

## INTERPRETING COMMUNITIES: LAWYERING ACROSS LANGUAGE DIFFERENCE

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As the rapid growth of immigrant communities in recent years transforms the demography of the United States, language diversity is emerging as a critical feature of this transformation. Poor and low-wage workers and their families in the aggressively globalized U.S. economy increasingly are Limited English Proficient, renewing longstanding debates about language diversity. And yet, despite a growing awareness of the challenges posed by limited English proficiency to the social, economic, political, and cultural well-being of poor immigrants today, relatively little attention has been paid to the role of language difference in poverty lawyering. This Article confronts the complexities of lawyering across language difference. Starting with the principal model for poverty lawyering—client-centeredness—it suggests the inadequacy of the model for meeting the challenges of language difference, particularly when an interpreter is interposed in the paradigmatic lawyer-client dyad. After exploring the nature of interpretation and the role of interpreters, the Article argues in favor of a more collaborative relationship among lawyers, clients, and interpreters than is often seen in poverty law practice. Specifically, it suggests that the disruption effected by the introduction of an interpreter may be more productive than is typically realized, and invites a normative reconceptualization of the traditional lawyer-client relationship. Ultimately, the Article urges the embrace of an emerging set of practices known as community interpreting, and argues that its increased attention to cultural context, third-party relationships, and community involvement is consistent with the methods and goals of community lawyering.

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## INTRODUCTION

In Merced, California, a twelve-year-old Laotian boy serves as an interpreter for his Hmong-speaking mother and her English-speaking doctor, and inadvertently mistranslates the doctor's instructions for her prescription medications; the mother overdoses.<sup>1</sup> In a jail in Prince William County, Virginia, a monolingual Spanish-speaking man is imprisoned for three months

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1. See *California Seeks to Stop the Use of Child Medical Interpreters*, N.Y. TIMES, Oct. 30, 2005, at A22.

after criminal charges against him are dismissed, because no one comes to release him and he is unable to communicate with anyone in the facility.<sup>2</sup> And a family court in Long Beach, California refuses to hear a divorce case because the indigent client failed to provide her own interpreter.<sup>3</sup> Cases like these, in the health care system, the criminal justice system, and the courts, have begun to draw public attention to the ways in which inadequate attention to the country's growing language diversity increasingly jeopardizes life and liberty interests, particularly of poor people. And yet, as growth in immigrant communities dramatically alters the challenges faced by poverty lawyers, one of the critical sites for the protection and advancement of the interests of poor people—the lawyer-client relationship—remains largely unexplored in the context of language difference.<sup>4</sup> This Article examines the phenomenon of lawyering across language difference, the radical disruption it effects on the traditional lawyer-client relationship, and the fundamental challenges it poses to the prevailing, client-centered model of representation for poverty lawyering. Troubling though they may be, I argue that these disruptions and challenges pose important opportunities for poverty lawyers to reimagine a more open, dynamic, and porous lawyer-client relationship than exists in traditional lawyering theory and practice.

Shifting immigration policy coupled with international and domestic macroeconomic trends over the past two decades have produced vast demographic changes, including a large and growing population of Limited English Proficient (LEP)<sup>5</sup> immigrants throughout the United States.

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2. See Theresa Vargas, *N. Va. Prisoner Lost in Translation*, WASH. POST, Aug. 4, 2006, at A1.

3. See Memorandum from Dick Rothschild, W. Ctr. on Law and Poverty, to People Interested in Access to Court Issues (Feb. 2001), available at <http://www.wclp.org/files/AccessUpdateXVIII.PDF>.

4. To the extent that language difference in the legal context has received scholarly and practitioner attention, it has been almost entirely in the context of courtroom interpretation. See *infra* notes 12–16 and accompanying text.

5. The term Limited English Proficient (LEP) is subject to various definitions. I adopt a modified version of the definition provided in prior guidance from the U.S. Department of Health and Human Services Office for Civil Rights, according to which LEP persons are those who “cannot speak, read, write or understand the English language at a level that permits them to interact effectively with” service providers. Policy Guidance on the Prohibition Against National Origin Discrimination as It Affects Persons With Limited English Proficiency, 67 Fed. Reg. 4968, 4969 (Feb. 1, 2002) (applying this definition in the context of health care and social services). But see Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47,311, 47,313–14 (Aug. 8, 2003) (revising the prior guidance and adopting a vaguer definition). Limited English proficiency is best understood along a spectrum rather than in binary terms of proficiency and nonproficiency, as individuals may possess varying degrees of proficiency in English without reaching the threshold necessary to interact effectively with service providers. Finally, although Limited English Proficiency embraces both spoken and written English, the focus of this Article is on spoken communication.

Limited English proficiency increasingly correlates with poverty, as well as with race and immigration status, thereby posing urgent demands upon poverty lawyers.<sup>6</sup> Indeed, the demographic pressures are so great that the present and future success of poverty lawyering requires increased attention to how to lawyer across language difference.<sup>7</sup> And yet, the principal model for poverty lawyering—client-centeredness—is inadequate to the challenges of language difference. As a result, core concerns of client-centeredness, such as the enhancement of client autonomy and client voice, are compromised, and many lawyers are left ill-equipped to address the needs of LEP individuals and communities in precisely the moment when lawyering for LEP clients is becoming a vital component of social change.

The core challenge to client-centeredness arises from the integral role of interpreters in the process of lawyering across language difference. Except in those limited circumstances where poverty lawyers are bilingual,<sup>8</sup> interpreters figure prominently in the representation of LEP clients. Their very presence disrupts the one-lawyer, one-client, dyadic norm on which the client-centered model (and traditional lawyering more generally) is premised, and their active engagement injects the subjectivity of a third person—her thoughts and feelings, attitudes and opinions, personality and perception—into what previously had been the exclusive province of the lawyer and client. The paradigmatic direct bond of communication between lawyer and client is now mediated, and therefore modified, by another individual. As a result of this perceived

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6. See *infra* Part I.A.

7. For a review of the historical development of the poverty law movement and its roots in the legal aid movement of the early twentieth century, see Philip L. Merkel, *At the Crossroads of Reform: The First Fifty Years of American Legal Aid, 1876–1926*, 27 Hous. L. Rev. 1 (1990). See also Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. Miami L. Rev. 999 (1994) (analyzing the evolution of the literature and the theories of practice of poverty lawyering).

8. Statistics regarding bilingual lawyers are difficult to come by, but it is readily apparent that their numbers are insufficient. This is particularly true with respect to less common languages; yet even with respect to Spanish, bilingual legal resources are inadequate. This reality is implicit in a guidance memorandum regarding language access issued by the Legal Services Corporation. See LEGAL SERVS. CORP., GUIDANCE TO LSC PROGRAMS FOR SERVING CLIENT ELIGIBLE INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY (2004) [hereinafter LSC GUIDANCE], available at <http://www.lri.lsc.gov/pdfs/05071801.pdf>. It is also implicit in a series of important articles written by Paul Uyehara regarding the imperative for legal services programs to improve language access for LEP clients. See Paul M. Uyehara, *Funding the Mandate for Language Access*, DIALOGUE, Winter 2004, at 16 [hereinafter Uyehara, *Funding the Mandate*]; Paul M. Uyehara, *Making Legal Services Accessible to Limited English Proficient Clients*, MGMT. INFO. EXCHANGE J., Spring 2003, at 33–37; Paul M. Uyehara, *Opening Our Doors to Language-Minority Clients*, 36 CLEARINGHOUSE REV. 544, 544–57 (2003). For a discussion of the shortage of bilingual legal aid lawyers in Canada, see PRA INC. INFORMATION INFO STRATEGY, DEPT OF JUSTICE CAN., A STUDY ON LEGAL AID AND OFFICIAL LANGUAGES IN CANADA § 5.0 (2002), available at <http://www.justice.gc.ca/en/ps/rs/rep/2003/r03lars-1/r03lars-1.pdf>.

intrusion and real disruption, many lawyers view interpreters with suspicion,<sup>9</sup> and may wish to confine the interpreter's role to that of a machine, not unlike a telephone, merely transmitting "exact" translations, free of subjectivity, from one side to the other. And yet, when properly understood, the linguistic complexity and cultural embeddedness of interpretation reveal the lie of verbatim translation and underscore the inescapable subjectivity of all interpretation.

Once we acknowledge the subjectivity that inheres in interpretation, we can move in one of two directions: either to squelch that subjectivity and attempt to force the interpreter back into the fictive box of technology; or to embrace the subjectivity, draw it out further, scrutinize it rigorously, and engage it dialogically. Most lawyers, and the legal system as a whole, attempt the former. I argue unambiguously for the latter. By accepting the interpreter as a partner rather than rejecting her as an interloper, by resolving the dynamic of dependence and distrust in favor of collaboration, lawyers can enhance LEP client voice and autonomy while increasing their engagement in the communities from which their clients hail.

Moreover, by opening ourselves up to the active engagement of interpreters in the lawyer-(interpreter-)client relationship, we also expand our understanding of the universe of actors, contexts, and discourses that any lawyer-client relationship involves. 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. A client's pastor, family considerations, involvement in a community group, or concern for her reputation in the community may inform her views. Similarly, the expectations of a lawyer's supervising attorney, her professional aspirations, or her political commitments may shape the lawyer's perspective. These third-party influences operate invisibly within the confines of the client interview room. An examination of lawyering across language difference, however, can render them visible and thereby generate a more

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9. See, e.g., Kathy Laster, *Legal Interpreters: Conduits to Social Justice?*, 11 J. INTERCULTURAL STUD. 15, 18 (1990) (noting lawyers' "suspicion of interpreters who cannot seemingly match, word for word, court-room dialogue").

nuanced understanding of the lawyer-client relationship, one that more fully accounts for the social contexts in which the lawyer and the client reside.

The challenges of lawyering across language difference, properly understood, can help us begin to reconceptualize the lawyer-client relationship not as a closed system, as it is traditionally understood, but as a more porous, though still privileged, relationship in which a range of mediating forces is recognized, negotiated, and embraced.

In Part I of this Article, I review five interrelated phenomena that compel greater attention to the project of lawyering across language difference: demography, legal obligation, ethical duty, dignitary concerns, and commitments to antisubordination. I argue that the astonishing growth of the LEP population, its diffusion across both urban and rural areas of the United States, and the correlations between limited English proficiency and poverty demand reconsideration of poverty lawyers' legal, ethical, and political commitments. In Part II, I provide a sociolinguistic overview of communication generally, and of interpretation in particular, drawing attention to the semantic complexity and inherent cultural embeddedness of all communication. This discussion foreshadows the fundamental challenges to the traditionally conceived lawyer-client relationship posed by the introduction of an interpreter into the lawyering process. I take up those challenges directly in Part III, where I argue that the involvement of an interpreter confounds traditional lawyer and client roles, transforms the very structure of the lawyer-client relationship, and threatens fundamental values of client-centeredness, such as client autonomy and client voice. I propose an admittedly troubling typology to describe and better understand the multiple and complex roles interpreters necessarily play in the lawyering process: interpreter as guardian, interpreter as advocate, and interpreter as linguistic and cultural authority.<sup>10</sup> I suggest that these correlate roughly to interpreter roles as co-client, co-counsel, and expert.

In Part IV, I explore the emergence, development, and professionalization of a form of interpretation known as community interpreting. I advocate the integration of properly trained community interpreters by lawyers as vital collaborators in the lawyering process because of the linguistic and cultural knowledge they bring, and suggest the interpreter-as-expert construct as a particularly useful framework for engaging interpreters in dialogue about their role, their expertise, and the limits of both. This constitutes a rejection of the cramped view of interpreters that is often advocated, and an embrace of the role disruption that the involvement of interpreters creates. Finally, in Part V, I argue that the robust involvement of community interpreters in the lawyering process

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10. See *infra* Part III.B.1–III.B.3.

invites a normative reconceptualization of the lawyer-client relationship, away from the closed, one-lawyer, one-client dyad and toward a more open architecture that embraces multiple actors and privileges social and cultural context. Thus, the embrace of community interpreting encourages community lawyering.

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The challenges of lawyering across language difference manifest in such diverse ways that no one scenario, real or imagined, can capture them all. With this caveat in mind, I nonetheless advance the following dialogue, based loosely on the experiences of students in the International Human Rights Clinic at American University Washington College of Law, as a means of introducing some of the key questions I seek to address in this Article.<sup>11</sup>

*Margaret and Grace are law students in an asylum clinic who have been assigned the case of Mae, a young Burmese woman. Ever since their first client meeting several weeks ago, Reverend Sen, a local Burmese pastor who serves as Mae's interpreter, has accompanied Mae. Reverend Sen's English is very good, and the students are grateful that he has agreed to help, as they had been unable to find any other volunteers. Although the students believe that Mae has a meritorious claim, they are concerned that she did not file for asylum within one year of her arrival in the United States, as the asylum statute requires. They meet with Mae and Reverend Sen to discuss the status of the case, and the following conversation ensues:*

*Margaret: Mae, you told us earlier that when you got to the U.S. you were very sick and that you stayed at a Burmese church in Texas. Is that right?*

*Reverend Sen: (interprets into Burmese)*

*Mae: Yes.*

*Margaret: Is there someone there that we could speak to?*

*Reverend Sen: (without interpreting into Burmese) Why is it necessary for you to speak with them?*

*Grace: Reverend, would it be possible for you to just translate what we said? If Mae has questions about why we would like to speak with them, we can answer her then.*

*Reverend Sen: I have helped many Burmese to apply for asylum, and I don't see why this information is important. Please explain it to me before I translate for Mae.*

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11. While there is an inherent artificiality to narrative reconstructions, the dialogue presented here largely tracks my understanding of the actual conversations that transpired between the student-lawyers, the client, and the interpreter in a single case in the clinic. Based on my experience as a practicing lawyer and a supervising clinical professor working with almost exclusively LEP client populations, I believe the issues that arise here are representative of those that frequently arise in the course of lawyering across language difference.

Margaret: In order to qualify for asylum, Mae must file her application within a year of entering the country, unless we can show that there were some exceptional circumstances justifying the delay. So, we would like to be able to talk to the people at the church in Texas to see if they can corroborate the fact that Mae was in poor health when she arrived. That might help us explain why she is applying late.

Reverend Sen: I understand. I will translate the question.

.....

The meeting continues, and a short while later, this exchange ensues:

Grace: Mae, I know this is very difficult for you, but we would like to ask you a few more questions about when the soldiers attacked you.

Reverend Sen: (interpreting into Burmese)

Mae: (suddenly looking away and starting to tremble) Okay.

Grace: The soldier who raped you, had you ever seen him before?

Reverend Sen (to the students): You already asked her about this incident.

Grace: We just need to get some more detail. The more detail we have, the more credible Mae's story will be and the better her chances of getting asylum.

Reverend Sen: I don't think you should be asking these questions again. It is very difficult for her to answer. Already you can see she is becoming upset.

Margaret: We don't mean to upset her, but this is a really important part of her story.

Reverend Sen: Margaret, let me explain to you about Burmese culture. Burmese women are not to talk about such things. She has been taught that what happened to her is shameful, not just for her but for her entire family. And it is shameful for her to talk about it now.

Grace: Reverend, as difficult as it is, Mae needs to learn how to answer these questions, because the judge and the government will probably ask them at trial even if we don't.

Reverend Sen: (speaking in Burmese to Mae)

Mae: (shaking her head side to side and speaking in Burmese)

Margaret: What did you ask her?

Reverend Sen: I told her that you had some sensitive questions to ask and asked if she would be willing to answer. She said she will answer your questions.

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Finally, toward the end of the meeting, the students ask Mae if she would be willing to undergo a medical exam in order to obtain corroborating evidence of the physical injuries she suffered in Burma. The students explain that it will include a pelvic exam. Mae agrees. Two weeks later, the students and Mae are in the doctor's office with another volunteer interpreter—this time, a woman—and Mae becomes distraught, as the students discover for the first time that Mae did not previously understand that a pelvic exam would be involved.

This brief exchange presents three sets of critical questions. First are questions concerning the semantic integrity of the interpretation: Why did



Mae not understand that a pelvic exam would be involved? Was it because of the manner in which Reverend Sen interpreted the information, or did the Reverend fail to interpret it at all? Second are questions of interpreter role: How does the role of the interpreter fit into the established structure of the lawyer-client relationship? Should Reverend Sen be serving as an advocate for Mae? Should he be her guardian, or a gatekeeper to information? For whom does the interpreter work, the lawyer or the client? Should he be serving as a cultural expert? How do gender, class, and social status affect the relationships between the student-lawyers, the interpreter, and the client? And third are questions regarding fundamental values of client-centeredness: Why is it that Mae speaks so little in this exchange? How can her voice be amplified? How does the involvement of the interpreter affect her sense of autonomy?

## I. FIVE IMPERATIVES FOR FOCUSING ON LANGUAGE DIFFERENCE

To date, scholars and practitioners addressing language difference in the legal context have focused almost exclusively on courtroom interpretation,<sup>12</sup>

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12. See, e.g., HERBERT S. ALTERMAN ET AL., EQUAL ACCESS TO THE COURTS FOR LINGUISTIC MINORITIES: FINAL REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON INTERPRETER AND TRANSLATION SERVICES (1985); SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS (1990); CAL. COMM'N ON ACCESS TO JUSTICE, LANGUAGE BARRIERS TO JUSTICE IN CALIFORNIA (2005); WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS (1995); JUSTICE ACTION GROUP, REPORT TO THE JUSTICE ACTION GROUP ON ACCESS TO MAINE COURTS FOR INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY (2005); Lynn W. Davis et. al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 HARV. LATINO L. REV. 1 (2004); Deborah M. Weissman, *Between Principles and Practice: The Need for Certified Court Interpreters in North Carolina*, 78 N.C. L. REV. 1899 (2000). An important exception is Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work With Language Interpreters*, 6 CLINICAL L. REV. 347 (2000). Relatedly, Sue Bryant and Jean Koh Peters have done groundbreaking work on cross-cultural lawyering, in which they include attention to language difference as one dimension of the cross-cultural lawyer's work. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001) (discussing a collaborative project with Peters). Similarly, Christine Zuni Cruz has observed that "law is cultured by the dominant societal view," and urges law schools to teach "the necessity of both cross-cultural communication skills and a vocabulary for understanding culture and community." Christine Zuni Cruz, *[On The] Road Back in: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557, 568 (1999). She continues:

[A] lawyer representing a client with a difference in language faces multiple issues. From the initial interview to trial or other resolution of the matter, each of the basic lawyering skills must be modified to accommodate the difference in language. From the competency of the interpreter, the interjection of a third party into an interview, the language skill of the attorney who does not make use of an interpreter, the questioning, the language itself, to the politics surrounding the use of a language other than english, language difference can greatly challenge the lawyering skills of the average attorney and raise issues of the competent representation of the client by the lawyer.

*Id.* This single paragraph identifies numerous important issues, many of which are explored at length in this Article.

while largely ignoring noncourtroom legal interpreting, such as that provided by Reverend Sen in the vignette above. Understandably, concern for interpretation in criminal courts has driven this focus, as growing numbers of LEP individuals have entered the criminal justice system.<sup>13</sup> The court, and criminal court in particular, is the paradigmatic site of legal contest; highly visible and unquestionably public, it directly implicates the state in issues of interpretation for LEP individuals, particularly since the state frequently seeks to deprive individuals of liberty through the courts. Thus, courtroom interpretation has emerged as a due process concern in criminal courts, and in other proceedings in which liberty interests are at stake. Many jurisdictions address courtroom interpretation in criminal matters as a matter of court administration, subject to court rules and regulations.<sup>14</sup> As a result, courtroom interpreting has been professionalized, as self-regulating associations of courtroom interpreters have been formed and have developed training programs, certification standards, and codes of ethics for their members.<sup>15</sup> Despite these promising developments, the quality of courtroom interpretation varies greatly, and demand for qualified interpreters vastly outstrips supply.<sup>16</sup>

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13. See, e.g., CARLOS A. ASTIZ, INTERPRETING SERVICES IN AMERICAN CRIMINAL COURTS: A VIOLATION OF THE DUE PROCESS CLAUSE? (2002), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/196661.pdf>; CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 12, at 22 (noting a significant increase in use of court interpreters in the 1990s for Spanish (19 percent), Korean (36 percent), Vietnamese (41 percent), Cantonese (57 percent), Mandarin (91 percent), and Punjabi (137 percent)).

14. Standards for interpreters in federal court, whether in criminal or civil proceedings, are governed by the Court Interpreters Act, 28 U.S.C. §§ 1827–1828 (2006), according to which the director of the Administrative Office of the United States Courts defines criteria for qualified interpreters. This led in 1980 to the creation of the Federal Court Interpreter Certification Examination (FCICE), a performance-based test considered one of the most rigorous in the country. See WILLIAM E. HEWITT ET AL., COURT INTERPRETING SERVICES IN STATE AND FEDERAL COURTS: REASONS AND OPTIONS FOR INTER-COURT COORDINATION, at v (1998), available at [http://www.ncsconline.org/WC/Publications/KIS\\_CtInteInterpServ.pdf](http://www.ncsconline.org/WC/Publications/KIS_CtInteInterpServ.pdf). The FCICE is only offered in three languages: Spanish, Navajo, and Haitian-Creole. See ADMIN. OFFICE OF THE U.S. COURTS FED. COURT INTERPRETER PROGRAM, FEDERAL COURT INTERPRETER INFORMATION SHEET, <http://www.uscourts.gov/interpretprog/infosheet.html> (last visited Mar. 4, 2007). The pass rate for the FCICE Spanish-English exam, for example, is only 4 percent. HEWITT ET AL., *supra*, at 25. Consequently, as of 1998, there were only approximately six hundred federally certified Spanish court interpreters in the entire country, nine Navajo interpreters, and thirteen Haitian-Creole. *Id.* at 25–26. Most state courts also have established qualification requirements for court interpreters, and a consortium of thirty-four state court systems has established its own standards and testing. See CONSORTIUM FOR STATE COURT INTERPRETER CERTIFICATION, FREQUENTLY ASKED QUESTIONS, available at [http://www.ncsconline.org/D\\_Research/CourtInterp/Res\\_CtInte\\_ConsortCertFAQ.pdf](http://www.ncsconline.org/D_Research/CourtInterp/Res_CtInte_ConsortCertFAQ.pdf) (last visited Apr. 5, 2007).

15. See, e.g., NAT'L ASS'N OF JUDICIARY INTERPRETERS AND TRANSLATORS, CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY, available at <http://www.najit.org/Documents/NAJITCodeofEthicsFINAL.pdf> (last visited Apr. 5, 2007).

16. See, e.g., CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 12, at 21–24. In California, for example, the number of certified court interpreters in Spanish declined from 1526 in 1995 to 1088

In sharp contrast to the courtroom, noncourtroom legal interpreting is largely invisible to the public and to the legal community, as is the larger project of lawyering across language difference. Moreover, because these noncourtroom settings do not directly implicate the court, they may be considered by most to be “private” activity, separate and apart from the state. Of course, this public/private distinction quickly disintegrates with the invocation of law, whether in the courtroom or not.<sup>17</sup> Nonetheless, because so much lawyering across language difference takes place in lawyers’ offices, its challenges remain largely hidden from public view and insulated from the kind of direct governmental or bar association involvement that might otherwise lead to systemic responses. Thus, while court systems across the country began addressing the challenges of language diversity decades ago,<sup>18</sup> the legal profession has only recently begun to appreciate the significance of lawyering across language difference.

Of course, interpretation in the courtroom is essential, and the challenges of language difference in the courtroom continue to be profound.<sup>19</sup> But the stakes for noncourtroom legal interpreting are often just as high, if not as visible. It is well-known that well over 90 percent of cases, both civil

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in 2005. *Id.* at 21. During the same time period, use of Spanish language interpreters in the courts increased by 19 percent. *Id.* at 23. The result has been increased reliance by courts on noncertified, untrained interpreters, not only in less common languages, but even in Spanish. *Id.* at 22–24.

17. The literature on the public/private distinction, particularly within feminist legal theory, is vast. For two examples, compare Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992) (examining the feminist challenge to the public/private distinction and how the distinction itself has shaped social trends), with Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT. L. REV. 847 (2000) (reevaluating the feminist critique of the public/private distinction and concluding that the distinction’s threat is generally overstated while its potential worth is understated).

18. The need for courtroom interpretation started to gain recognition as early as the 1970s. See Jindra Repa, *Training and Certification of Court Interpreters in a Multicultural Society*, 36 META 595 (1991). In 1978, California enacted landmark legislation to test and certify its courtroom interpreters. See Assem. B. 2400, 1977–78 Leg., Reg. Sess. (Cal. 1978). That same year, the federal Court Interpreters Act was enacted. See Pub. L. No. 95-539, 92 Stat. 2040 (codified at 28 U.S.C. §§ 1827–1828 (2006)).

19. Several state commissions on access to justice have examined limited English proficiency as a barrier to the courts, and all have concluded that the challenges are both serious and growing. See ALTERMAN ET AL., *supra* note 12; CAL. COMM’N ON ACCESS TO JUSTICE, *supra* note 12; JUSTICE ACTION GROUP, *supra* note 12. In California, for example, a shortage of qualified interpreters has led to the increased reliance on noncertified, often unqualified interpreters. CAL. COMM’N ON ACCESS TO JUSTICE, *supra* note 12, at 22–23. Despite having one of the largest Chinese immigrant populations in the country, counties in Southern California used registered interpreters in Mandarin in only 15 percent of the cases requiring a Mandarin interpreter. *Id.* at 23. Even in cases requiring Spanish interpreters, Northern California counties used certified Spanish interpreters in only 60 percent of the cases. *Id.*

and criminal, settle out of court.<sup>20</sup> While such cases might entail some court involvement prior to final settlement, a significant and growing amount of rights enforcement takes place in less formal lawyering settings. Moreover, even the minority of cases that reach a courtroom cannot get there without substantial noncourtroom lawyering. In Mae's case, for example, as in most asylum cases, whether she is granted legal relief is likely to turn on her lawyers' success in interviewing and preparing her for courtroom testimony. Indeed, the overwhelming majority of lawyering—and law—reside outside the courtroom. Yet, resources, methodologies, and theories for lawyering across language difference outside the courtroom remain scarce and underdeveloped.

Beyond this general need to attend to language difference outside the courtroom, for poverty lawyers today five interlocking imperatives demand a focus on limited English proficiency<sup>21</sup>: demography, legal obligation, ethical duty, dignitary concerns, and antisubordination. First, shifts in immigration and refugee patterns, coupled with economic displacement abroad and the growth of the low-wage service sector in the United States, have created a vast and growing population of poor LEP individuals. Second, federal antidiscrimination law provides partial, if inchoate, protection to language minorities and therefore warrants meaningful inquiry into the access to legal services available to LEP individuals. Third, while no rule of professional responsibility addresses the question of language difference explicitly, I argue that existing ethical obligations, taken together, require special attention to and consideration of language difference between lawyer and client. Fourth, legal and ethical obligations aside, basic respect for the autonomy and personhood of LEP clients necessitates special consideration of the challenges of lawyering across language difference. Finally, in light of these considerations, meaningful antisubordination commitments demand closer attention to language difference.

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20. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2497 (2004) (citing U.S. Department of Justice statistics that 94–95 percent of federal criminal defendants plead guilty); Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1 (1999) (citing both federal and state studies indicating that between 5 and 7 percent of civil cases do not end in settlement); James P. George, *Access to Justice, Costs, and Legal Aid*, 54 AM. J. COMP. L. 293, 299–300 (2006) (citing the National Center for State Courts study of ten states, in which only 7 percent of civil cases result in trials, with 93 percent of cases ending in settlement, involuntary dismissal, or summary judgment); Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717 (2006) (citing Department of Justice and Administrative Office of United States Courts reports that over 95 percent of criminal cases end with the defendant entering a guilty plea).

21. See *supra* note 5.

## A. Demography

The rapid growth of immigrant communities in the United States in recent decades is well-documented.<sup>22</sup> Far less recognized are the emerging correlations between limited English proficiency of recent immigrants and poverty. Recent data are astonishing: in Los Angeles, 69 percent of LEP individuals have incomes below 200 percent of the poverty level; in New York, 59 percent.<sup>23</sup> One study shows that in these two cities, economic hardship, food insecurity, and the need for public benefits are more closely associated with limited English proficiency than with either legal status or period of arrival to the United States.<sup>24</sup> One fourth of "working poor" families are immigrants, and working immigrant families are twice as likely as working native families to be poor.<sup>25</sup>

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22. From 1990 to 2000, the U.S. foreign-born population grew from 19.8 million to 28.4 million, a 44 percent increase. U.S. CENSUS BUREAU, *COMING TO AMERICA: A PROFILE OF THE NATION'S FOREIGN BORN* (2000 Update) (2002). In the previous decade, the foreign-born population increased 40 percent. *Id.* Recent census data demonstrate that immigrant communities continue their rapid growth. From 2000 to 2005, the foreign-born population grew 15 percent. See U.S. CENSUS BUREAU, 2005 AMERICAN COMMUNITY SURVEY, *SELECTED SOCIAL CHARACTERISTICS: UNITED STATES* (2006); Rick Lyman, *New Data Shows Immigrants' Growth and Reach*, N.Y. TIMES, Aug. 15, 2006, at A1. Despite the growth of the foreign-born population in the 1990s, the total U.S. population that was foreign-born in 2000 was only 11.1 percent, as compared to the historical high of 14.8 percent in 1890. Campbell Gibson & Kay Jung, U.S. Census Bureau, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850 to 2000*, at 103 (U.S. Census Bureau Population Div., Working Paper No. 81, 2006), available at <http://www.census.gov/population/www/documentation/twps0081/twps0081.pdf>. Nonetheless, the 2000 percentage is the highest since 1930, when 11.6 percent of the population was foreign-born. *Id.* See generally JEFFREY S. PASSEL, PEW HISPANIC CTR., *UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS* (2005); AUDREY SINGER, BROOKINGS INST., *THE RISE OF NEW IMMIGRANT GATEWAYS* (2004).

23. IMMIGRATION STUDIES PROGRAM, URBAN INST., *IMMIGRANT WELL-BEING IN NEW YORK AND LOS ANGELES* (2002).

24. *Id.*; see also SHAWN FREMSTAD, CTR. ON BUDGET AND POLICY PRIORITIES, *IMMIGRANTS, PERSONS WITH LIMITED PROFICIENCY IN ENGLISH, AND THE TANF PROGRAM: WHAT DO WE KNOW?* 7-8 (2003) (concluding that limited English proficiency (1) hinders awareness about Medicaid and available tax credits; and (2) limits wage levels and job advancement, citing a 46 percent wage disparity between English proficient and LEP individuals); Gilles Grenier, *The Effects of Language Characteristics on the Wages of Hispanic-American Males*, 19 J. HUM. RESOURCES 35, 51 (1984) (providing one of the first economic studies demonstrating that language, more than racial discrimination, is an important factor in explaining the significant wage differences between Latino and non-Latino men).

25. RANDY CAPPS ET AL., URBAN INST., *A PROFILE OF LOW-INCOME WORKING IMMIGRANT FAMILIES 2* (2005).

Not surprisingly, LEP children are concentrated in areas with higher incidences of student poverty.<sup>26</sup>

The population of poor LEP individuals in the United States has increased dramatically in recent years,<sup>27</sup> not only in absolute numbers,<sup>28</sup> but in geographic distribution throughout the country.<sup>29</sup> In states as disparate as Georgia and Nevada, the LEP population has grown more than 200 percent in the last decade alone.<sup>30</sup> This tracks exponential growth of foreign-born populations in cities like Atlanta (817 percent) and Las Vegas (637 percent) over the past two decades.<sup>31</sup> Once considered purely a phenomenon of the urban courtroom, the participation of LEP individuals in the legal system—or,

26. See CLEMENCIA COSENTINO DE COHEN ET AL., URBAN INST., WHO'S LEFT BEHIND? IMMIGRANT CHILDREN IN HIGH- AND LOW-LEP SCHOOLS (2005) (finding that 70 percent of LEP students in kindergarten through fifth grade are enrolled in 10 percent of the country's public schools, and that these "high-LEP" schools are located in urban areas with higher rates of poverty, higher overall enrollment, larger classes, and less experienced teachers and principals than "low-LEP" schools); see also RANDY CAPPS ET AL., URBAN INST., THE NEW DEMOGRAPHY OF AMERICA'S SCHOOLS: IMMIGRATION AND THE NO CHILD LEFT BEHIND ACT (2005).

27. While language diversity is a matter of great contemporary importance, it has been part of the American experience since the colonial period. Native Americans once spoke hundreds of languages. See Leila Sadat Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 WASH. L. REV. 285, 334 (1996) (citing William L. Leap, *American Indian Languages, in LANGUAGE IN THE USA* 116, 129 (Charles A. Ferguson & Shirley Brice Heath eds., 1981)). Moreover, colonial America was considerably multilingual, and several states have early histories of official bilingualism with German, French, and Spanish. *Id.* at 336, 339. But as Leila Sadat Wexler argues:

Although individual freedom was a concept deeply embedded in the American culture, and the Revolutionary period was clearly more linguistically tolerant than either the late nineteenth or twentieth centuries would prove to be, one must recall that the English adopted policies of anglicization towards all indigenous linguistic minorities of the British Isles. Gaelic, Welsh, Cornish, and Manx were all subjected to intense pressure from English and are now either extinct or endangered minority languages.

*Id.* at 336–37. The great wave of immigration in the late nineteenth to early twentieth centuries included many non-English speakers. However, by the mid-twentieth century, racially restrictive immigration policy, nativism arising around the world wars, and numerous "Americanization" campaigns had produced a fair degree of linguistic homogeneity. See *id.* at 339–51. This is what the linguist Einar Haugen called "Babel in reverse." EINAR HAUGEN, *THE ECOLOGY OF LANGUAGE* 1 (1972).

28. According to the 2000 Census, approximately forty-seven million people, or 18 percent of the population age five and over, speak a language other than English in the home, of whom nearly eleven million self-describe as speaking English "not well" or "not at all." U.S. CENSUS BUREAU, CENSUS 2000, SUMMARY FILE 3 tbl.P19 (2000). It is estimated that there are over three hundred languages spoken in the United States today. JANE PERKINS ET AL., *ENSURING LINGUISTIC ACCESS IN HEALTH CARE SETTINGS: LEGAL RIGHTS AND RESPONSIBILITIES* 1.5 (2d ed. 2003).

29. See SINGER, *supra* note 22, at 1–2 (describing emerging and "pre-emerging" gateways for immigrants and noting that "many of the areas with the highest growth [in immigration] during the 1990s have little 20th-century history of receiving immigrants").

30. PERKINS ET AL., *supra* note 28, at 1.6.

31. SINGER, *supra* note 22, at 21.

more likely, their exclusion from it—is a reality in virtually every part of the country,<sup>32</sup> urban and rural alike.<sup>33</sup> This creates a demographic imperative for legal institutions, including courts, bar associations, and law schools, to address these issues directly.<sup>34</sup> In the context of poverty lawyering, the Legal Services Corporation acknowledges exactly this demographic challenge as one of the most significant it now faces.<sup>35</sup>

The 1965 amendments to the Immigration and Nationality Act,<sup>36</sup> which liberalized immigration restrictions, provide only a partial explanation for the contemporary growth of the LEP population. The amendments unquestionably transformed the legal framework for immigration, resulting in dramatically higher immigration from the Eastern Hemisphere, and Asia

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32. *Id.* at 2; Lyman, *supra* note 22, at A1 (“What’s happening now is that immigrants are showing up in many more communities all across the country than they have ever been in . . . . So it’s easy for people to look around and not just see them, but feel the impact they’re having in their communities. And a lot of these are communities that are not accustomed to seeing immigrants in their schools, at the workplace, in their hospitals.” (quoting Audrey Singer)).

33. As Philip Martin, Michael Fix, and J. Edward Taylor write, “[t]he face of rural America is changing as a result of immigration.” PHILIP MARTIN, MICHAEL FIX & J. EDWARD TAYLOR, *AGRICULTURE & IMMIGRATION IN CALIFORNIA: THE NEW RURAL POVERTY* 3 (2006). The growth of rural, poor, LEP immigrants has resulted from the growth and diversification of the U.S. agriculture industry, the market demand for cheap labor, and the steady flow of immigrants, documented and undocumented, from rural Mexico and Central America. *Id.* at 3–7, 23–24. In addition to immigrant farmworkers, the 1990s witnessed significant growth in immigrant poultry processors in the mid-Atlantic and meatpacking workers in the Midwest. *Id.* at 61–63, 65–70.

34. In five states—California, Texas, New York, Hawaii and New Mexico—more than 10 percent of the population is LEP. The percentages of the population that are LEP are as follows: California (20 percent), Texas (13.9 percent), New York (13 percent), Hawaii (12.7 percent) and New Mexico (11.9 percent). PERKINS ET AL., *supra* note 28, at 1.5 (citing Census 2000 statistics). Four of the five states with the fastest growing LEP populations during the 1990s are in the South and the Midwest, regions not typically associated with immigrants, and their rates of growth are fast indeed—Georgia (243 percent), North Carolina (243 percent), Nevada (234 percent), Arkansas (170 percent), and Nebraska (160 percent). *Id.* at 1.6 (citing Census 2000 statistics).

35. See LSC GUIDANCE, *supra* note 8, at 1 (“Among the many vast changes that affect how and what services LSC programs provide to clients, none is more significant than the high number of immigrants that have come to the United States over the past few decades. Almost 47 million people in our nation speak a language other than English at home, and of these almost half (over 21 million) speak English ‘less than very well.’ Many of these individuals are US citizens or legal residents; many are quite poor; many are children.”).

36. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.); see Douglas S. Massey, *The New Immigration and Ethnicity in the United States*, 21 POPULATION & DEV. REV. 631, 638 (1995) (noting that “[i]t has become conventional to date the emergence of the new regime in US immigration from the passage of the 1965 amendments” but that scholars have overstated the significance of the legislation in bringing about increased immigration).

in particular.<sup>37</sup> However, they do not account for increased immigration from Latin America—which was for the first time *restricted* by the 1965 amendments<sup>38</sup>—nor do they explain the rapid increase in undocumented immigrants,<sup>39</sup> the vast majority of whom are poor and LEP.

International and domestic macroeconomic shifts have helped shape migration patterns, informing not only countries of origin, but the socioeconomic background of those who have immigrated to the United States in recent years.<sup>40</sup> Internationally, growing pressures of globalization and structural adjustment policies have created vast economic displacement in many developing countries, increasing the incentives for immigrants to seek work abroad.<sup>41</sup> Domestically, the transformation of the United States

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37. From 1921 to 1965, a national origins quota system established numerical restrictions on immigration. Introduced as a temporary measure in 1921, the quota system was made permanent in 1924, at which time the visa quota for a given nationality was based on the number of persons of their national origin who were in the United States in 1920. These restrictions did not apply to natives of Western Hemisphere countries, for whom no numerical restriction applied. The result was to sharply restrict immigration from southern and eastern Europe, and to preserve racial homogeneity. The Immigration and Nationality Act of 1965 eliminated the national origins quota system, categorically abolishing racially discriminatory immigration restrictions and established a fixed immigration quota for all nationals outside the Western Hemisphere. See CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, *IMMIGRATION LAW AND PROCEDURE* §§ 2.02–.04 (rev. ed. 2006); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 278–79 (1996) (arguing that the U.S. Congress passed the 1965 Act motivated by ideas of racial equality and nondiscrimination, fully understanding the future demographic consequences of the radical policy shift). As Douglas Massey notes, the dramatic increase in Asian immigration was aided by U.S. refugee policy in Southeast Asia following the end of the Vietnam War. Massey, *supra* note 36, at 639.

38. See Massey, *supra* note 36, at 638. As Douglas Massey explains, under the 1965 amendments, the Western Hemisphere was subject to a hemispheric cap of 120,000 immigrants (versus a hemispheric cap of 170,000 for the Eastern Hemisphere), but no per-country limits (versus a 20,000 per-country limit for the Eastern Hemisphere). Subsequent amendments placed further restrictions on Western Hemisphere immigration, establishing a uniform 20,000 per-country limit for Eastern and Western Hemispheres alike. Thus, “[r]ather than promoting the shift toward Latin American origins . . . the 1965 Act and its successor amendments actually inhibited the transformation. The shift in origins occurred in spite of the legislation, not because of it.” *Id.*

39. It is estimated that the undocumented population has grown from 3 million in 1980 to approximately 11.1 million in 2005. See JEFFREY S. PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 3* (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

40. See generally DEMETRIOS G. PAPADEMETRIOU, MIGRATION POLICY INST., *THE GLOBAL STRUGGLE WITH ILLEGAL MIGRATION: NO END IN SIGHT* (2005) (discussing the global phenomenon of unauthorized immigration, citing explanations for the flow of migrants such as economic need, family unification, and flight from unbearable circumstances).

41. See Timothy J. Hatton & Jeffrey G. Williamson, *What Fundamentals Drive World Migration?*, in *POVERTY, INTERNATIONAL MIGRATION AND ASYLUM* 15, 16–18 (George J. Borjas & Jeff Crisp eds., 2005) (analyzing the various motivations for global migration, including the



from an industrial to a service economy has created a huge demand for cheap labor, thereby providing further incentive for migration by poor individuals from around the world.<sup>42</sup> (Refugee populations, such as Mae's Burmese population, similarly have increased the LEP population.<sup>43</sup>)

Looking beyond the 1965 amendments reveals why so many low-wage immigrants are LEP: Economic policies in their countries of origin have rendered those with the lowest levels of formal education and the least economic opportunity most vulnerable, and have impelled them to immigrate to the United States<sup>44</sup> These LEP individuals constitute a new and growing population of poor, economically vulnerable immigrants once here.<sup>45</sup>

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impact of globalization, economic development, and demographic fundamentals); *see also* Alejandro Portes, *Economic Sociology and the Sociology of Immigration: A Conceptual Overview*, in *THE ECONOMIC SOCIOLOGY OF IMMIGRATION* 1, 19–22 (Alejandro Portes ed., 1995) (providing a sociological analysis of the migration process and discussing social and economic motivations for migration, as well as “spontaneous migration,” when people move without any coercion or inducement); ROBERTO SURO, PEW HISPANIC CTR., *REMITTANCE SENDERS AND RECEIVERS: TRACKING THE TRANSNATIONAL CHANNELS* 3 (2003) (stating that in 2003, six million immigrants will likely remit approximately \$30 billion to Latin America). Immigrants today remit large portions of their income to the families they leave behind.

42. *See* Saskia Sassen, *Transnational Economies and National Migration Policies*, in *FREE MARKETS, OPEN SOCIETIES, CLOSED BORDERS?* 7, 9 (Max J. Castro ed., 1999) (discussing how new economic developments have influenced the incorporation of new immigrants into receiving countries' labor markets and have increased the need for low-wage workers in order for receiving countries to remain competitive with cheap imports); *see also* PANEL ON THE DEMOGRAPHIC AND ECONOMIC IMPACTS OF IMMIGRATION, NAT'L RESEARCH COUNCIL, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* 135, 212–15 (James P. Smith et al. eds., 1997) (concluding that the concentration of immigrants is significantly higher in low-education occupations that are primarily in the service sector of the economy).

43. *See* OFFICE OF REFUGEE RESETTLEMENT, *ANNUAL REPORT TO CONGRESS*, tbl.II-7 (2003), available at <http://www.acf.hhs.gov/programs/orr/policy/03arc8.htm> (providing data on refugees' English proficiency levels for 1999–2003, showing that among refugees arriving in 2003, 42.4 percent spoke no English, 38.5 percent did not speak English well, and 18.5 percent spoke English fluently).

44. *See* GEORGE J. BORJAS, *HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY* 19–22 (1999) (emphasizing the strong link between immigrants' skills and their social and economic outcomes, and concluding that after 1960, the deterioration of immigrant economic performance was due almost entirely to a significant increase in the number of immigrants at “the very bottom rung of the U.S. economic ladder”).

45. California's Commission on Access to Justice has summarized the vulnerability of LEP individuals succinctly:

People with limited English proficiency are often also members of groups whose cultural traits or economic circumstances make them more likely to be subjected to discrimination in employment, housing, lending practices and other areas. Persons with limited English are often employed in entry-level, temporary, seasonal and low-wage jobs (particularly agriculture), where they are more likely to be denied minimum wages, workers' compensation, family leave, overtime pay and other employment benefits guaranteed by law. They also are more likely to encounter hazardous and illegal working conditions, including excessive hours, exposure to dangerous chemicals and pesticides and unsafe equipment. Workers who complain about safety violations or other conditions of employment are more likely to be terminated.

CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 12, at 33.

## B. Legal Obligation

The main legal framework governing representation of LEP individuals concerns access to legal services.<sup>46</sup> Based principally on the Civil Rights Act of 1964, the law in this area is unsettled and underenforced, and only recently has been brought to bear upon the issue of legal services. Nonetheless, it provides useful guidance on poverty lawyer obligations to LEP clients.

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funding from engaging in discrimination on the basis of race, religion, color, or national origin.<sup>47</sup> Because language frequently is a proxy for national origin, Title VI has been held to protect against discrimination on the basis of language.<sup>48</sup> The law requires recipients of federal funding—whether Legal Services Corporation funds, Department of Justice grants for Violence Against Women Act representation, or any other federal monies—to provide LEP individuals with meaningful access to their services.<sup>49</sup>

In the mid- to late 1990s, the Clinton Administration undertook a major initiative to ensure Title VI compliance with regard to LEP individuals, culminating with the issuance of an executive order on

46. A distinct but related body of law governs the provision and use of interpreters in the courtroom, and in criminal proceedings in particular. For a review of the relevant federal case law, see Weissman, *supra* note 12, at 1925–33. In addition, the Court Interpreters Act requires the use of interpreters in federal criminal and civil proceedings, when necessary for a party to comprehend the proceedings, or to communicate with counsel or the presiding judicial officer. See Court Interpreters Act, 28 U.S.C. §§ 1827–1828 (2006).

47. 42 U.S.C. §§ 2000d–2000d-7 (2006).

48. See *Lau v. Nichols*, 414 U.S. 563 (1974) (holding that the San Francisco Unified School District violated Title VI by failing to provide adequate instruction for LEP children of Chinese ancestry); *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947–48 (9th Cir. 1995) (“Since language is a close and meaningful proxy for national origin, restrictions on the use of languages may mask discrimination against specific national origin groups or, more generally, conceal nativist sentiment.”), *vacated on other grounds*, 520 U.S. 43 (1997). *But cf.* *Franklin v. District of Columbia*, 960 F. Supp. 394, 432 (D.D.C. 1997) (dismissing the Title VI claim of Hispanic inmates disqualified from certain prison programs because such disqualification was due to limited English proficiency and not race, color, or national origin), *rev’d on other grounds*, 1563 F.3d 625 (D.C. Cir. 1998). For a discussion of related case law, see PERKINS ET AL., *supra* note 28 at 2.6 n.19.

49. U.S. Department of Justice (DOJ) regulations provide:

Where a significant number or proportion of the population eligible to be served . . . needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient [of federal funding] shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons.

28 C.F.R. § 42.405(d)(1) (2006).

the subject.<sup>50</sup> This action paralleled and propelled growing attention to the issue, primarily in the context of access to health care, and secondarily with regard to social services.<sup>51</sup> In contrast, access to legal services continued to receive comparatively little attention. As a result, the legal services community remains in the early stages of addressing the matter.<sup>52</sup>

Federal law requires federally funded poverty lawyers to make their services accessible to LEP individuals.<sup>53</sup> That access must be

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50. In 1995, the Department of Health and Human Services (HHS) designated discrimination against LEP individuals as a "priority civil rights area," and the HHS Office for Civil Rights (OCR) played a leadership role in the development of Title VI policy with regard to LEP individuals. See PERKINS ET AL., *supra* note 28, at 2.16–17. On August 11, 2000, President Clinton issued Executive Order (EO) 13,166, entitled "Improving Access to Services for Persons With Limited English Proficiency." 65 Fed. Reg. 50,121 (Aug. 16, 2000). The EO requires each agency providing federal funding to draft Title VI guidance with regard to LEP individuals, and requires federal agencies to meet the same standards as federal fund recipients in providing program access to LEP individuals. *Id.* DOJ was designated as the lead agency for this initiative and charged with providing guidance to other federal agencies. *Id.* The Bush Administration has affirmed EO 13,166. PERKINS ET AL., *supra* note 28, at 2.8 (citing Memorandum from Ralph F. Boyd, Jr., Assistant Att'y Gen., to Heads of Federal Agencies, General Counsels, and Civil Rights Directors, Re: Executive Order 13,166 (July 8, 2002), available at <http://www.usdoj.gov/crt/cor/lep/BoydJul82002.htm>). Simultaneous with the issuance of EO 13,166, the DOJ issued a general policy guidance, incorporated by reference in the EO, which sets out four factors to be used by the other federal agencies in determining the nature and the scope of Title VI obligations with regard to LEP individuals. See Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency: Policy Guidance, 65 Fed. Reg. 50,123 (Aug. 16, 2000). These are: (1) the number or proportion of LEP individuals who are eligible to be served by the program; (2) the frequency of contact that LEP individuals have with the program; (3) the nature and importance of the program to LEP beneficiaries; and (4) the resources available and other cost considerations. See *id.* Following further revisions, final DOJ guidance was issued on June 18, 2002. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002) [hereinafter DOJ Final Guidance].

51. The National Health Law Program has been at the forefront of language access advocacy. Although its focus has been on language access in health care settings, its work has been of enormous value to advocates for LEP individuals in social service settings as well. See generally PERKINS ET AL., *supra* note 28.

52. The Legal Services Corporation appears to have issued its first guidance on the issue only in 2004. See LSC GUIDANCE, *supra* note 8. For a collection of other legal services–related LEP policies, program descriptions, and resources, see LRI: Diversity, Resources for Serving Clients With Limited English Proficiency (LEP), [http://www.lri.lsc.gov/sitepages/diversity/div\\_lep.htm](http://www.lri.lsc.gov/sitepages/diversity/div_lep.htm) (last visited Feb. 2, 2007).

53. See LSC GUIDANCE, *supra* note 8, at 1 ("LSC programs have an obligation to provide services to clients with limited English proficiency . . . that are equal to the services they provide to clients who speak English without difficulty."). It must be noted, however, that enforcement of Title VI requirements against legal services providers is highly unlikely, since the U.S. Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), eviscerated private enforcement of

“meaningful”<sup>54</sup>—a qualification defined in contextual rather than absolute terms.<sup>55</sup> However, the question of what constitutes meaningful access remains ill-defined. It cannot be understood in merely quantitative terms (that is, the number of LEP clients served), though that is important as well. Rather, the substantive dimension of the analysis renders mere provision of legal services insufficient. The manner of service delivery is a significant aspect of the statutory inquiry, and compliance with civil rights mandates provides further reason to examine the challenges of and potential strategies for lawyering across language difference.

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Title VI in much the same way that other civil rights protections have been eroded in recent years, leaving only the inadequate avenue of federal enforcement. *Sandoval* involved a Mexican immigrant who challenged the State of Alabama’s requirement that driver’s license exams be given only in English. *Id.* at 279. The Court held that there was no private right of action to enforce Title VI disparate impact regulations. *Id.* at 281–82. Although the Court did not rule on the validity of the regulations themselves, it did cast some doubt on them. *Id.* After *Sandoval*, a private right of action for Title VI violations only exists in the case of intentional discrimination. Of course, fear of enforcement should not be the motivating factor for Title VI compliance by legal services programs, particularly as legal service providers across the country have been ardent advocates of Title VI protections for LEP individuals in complaints brought against state and local governments as well as health care institutions. See, e.g., CalWORKs Title VI Language Access Complaint, Jane Doe v. Los Angeles County Dep’t of Pub. Soc. Servs., No. 09-00-3082 (U.S. Dep’t of Health and Human Servs. Dec. 16, 1999), available at <http://www.povertylaw.org/poverty-law-library/case/52800/52801/52801a.pdf> (complaint brought by Asian Pacific American Legal Center, Western Center on Law and Poverty, Legal Aid Foundation of Los Angeles, and San Fernando Valley Neighborhood Legal Services alleging that failures of Los Angeles County to make its welfare offices and welfare-to-work programs accessible to LEP individuals violated Title VI). The complaint was resolved in 2003. See Resolution Agreement Between the Office for Civil Rights Department of Health and Human Services Region IX and Los Angeles County Department of Public and Social Services, Complaint 09-00-3082 (Oct. 23, 2003), available at <http://www.apalc.org/pdf/files/dpsresagreesign.pdf> (The author was one of the lawyers involved in the filing of the complaint.). While resource disparities suggest that responsibilities for ensuring language access may be different for legal services providers than for state actors, see DOJ Final Guidance, *supra* note 50, scrutiny of language access directed at other service-providing entities should be turned inward as well.

54. See Exec. Order 13,166, 65 Fed. Reg. 50,121 (Aug. 16, 2000); DOJ Final Guidance, *supra* note 50; U.S. Dep’t of Health and Human Servs. Office for Civil Rights, Title VI of the Civil Rights Act of 1964, Policy Guidance on the Prohibition Against National Origin Discrimination as It Affects Persons With Limited English Proficiency, 65 Fed. Reg. 52,762 (Aug. 30, 2000) [hereinafter HHS Guidance].

55. Indeed, the four factors outlined in the DOJ guidance on Title VI obligations are designed precisely for a contextual analysis. See DOJ Final Guidance, *supra* note 50. In many respects, the meaningful access standard attempts to assimilate into Title VI the “reasonable accommodation” standard of the Americans with Disabilities Act (ADA). See 42 U.S.C. §§ 12101–12213 (2000). There is not a statutory basis for this substantive interpretation, and the contours of “meaningful access” have not been significantly tested. However, the standard’s similarity to the reasonable accommodation standard reflects the shift in civil rights discourse ushered in by the ADA—a shift away from absolute obligations and toward contextual ones. Such an approach recognizes substantive civil rights, but subjects the obligations to balancing tests designed to determine what is meaningful, or what is reasonable.

If we examine Mae's case through the lens of Title VI obligations,<sup>56</sup> the question of access must be posed at every point in the provision of service. First, if the clinic were to deny Mae representation solely because she is LEP, this would likely create a presumption of a Title VI violation.<sup>57</sup> But the mere provision of legal services, without further inquiry into how they are provided, is also insufficient. Once the clinic accepts Mae's case, inquiry must be made into the measures taken by the clinic to overcome the language difference. For example, the use of a minor as the interpreter, or a requirement that Mae provide her own interpreter, would be a presumptive violation.<sup>58</sup> So, too, would the use of an interpreter who lacks sufficient grasp of both English and Burmese—at least where, as in Mae's case, alternative interpreters are available. Moreover, as discussed in greater detail below,<sup>59</sup> Mae's meaningful access to legal services may be frustrated by Reverend Sen's seeming unwillingness or inability to provide complete interpretations of what Mae and the student-lawyers say. Thus, while the outer limits of Title VI obligations are difficult to discern, Title VI guidance at least suggests that the law demands a greater attention to the use of interpreters than exists in many legal services programs today.

### C. Ethical Duty

What ethical obligation do Mae's student-lawyers owe her with respect to language? On first inspection, the ethical rules provide no guidance on lawyering across language difference, failing to admit even the possibility of such a circumstance. However, when considered together, and in application to the representation of LEP clients such as Mae, core lawyer duties embodied in the ethical rules can and should be read as expressing a penumbral duty on lawyers who undertake such representation to take affirmative steps

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56. It is very likely that the law clinic serving Mae—and all law school clinics—bear Title VI obligations with respect to their clients by virtue of receipt of federal funding by the law school. This is true even if the clinic itself does not directly receive federal funding.

57. Because Title VI analysis takes account of factors such as demography and resources of the service provider, among other factors, there may be circumstances in which such denial of services would not constitute a violation. See DOJ Final Guidance, *supra* note 50.

58. Federal guidance stops short of characterizing the use of children or family members as a presumptive violation. Guidance from the HHS states: "A recipient/covered entity may expose itself to liability under Title VI if it requires, suggests, or encourages an LEP person to use friends, minor children, or family members as interpreters, as this could compromise the effectiveness of the service." HHS Guidance, *supra* note 54, at 52,769. However, the DOJ Final Guidance states only that, "[i]n many circumstances, family members (especially children) . . . are not competent to provide quality and accurate interpretations. Issues of confidentiality, privacy, or conflict of interest may also arise." DOJ Final Guidance, *supra* note 50, at 41,462.

59. See *infra* Part III.B.1.

to ensure that language difference is addressed meaningfully. Specifically, I argue here that the ethical rules require that lawyers who undertake representation of LEP individuals identify the client's need for an interpreter, provide an appropriate and qualified interpreter, and take steps to ensure the integrity of the interpretive process.

Moreover, while an ethical obligation with regard to language difference can be derived from the core duties owed by lawyers to their clients, language difference also implicates a broader professional responsibility for access to justice. The ethical rules are preoccupied with the lawyer-client relationship, but they also acknowledge lawyers' "special responsibility for the quality of justice," and their responsibility to expand access to the legal system.<sup>60</sup> The Model Rules of Professional Conduct (Model Rules) are woefully short on specific duties that lawyers bear with respect to access to justice, stating little more than an unenforced professional responsibility to perform pro bono work.<sup>61</sup> However, if the aspiration of the Model Rules is to be taken seriously, then it follows from the dramatic demographic transformation of recent years that the profession bears partial responsibility to ensure legal representation of LEP individuals.<sup>62</sup>

Remarkably, ethics opinions from only three jurisdictions in the country address the question of attorney representation across language difference.<sup>63</sup> All of them conclude that lawyers bear an ethical duty to ensure meaningful communication with LEP clients. While it may seem self-evident that such an ethical obligation exists, as distinct from the pragmatic need or legal requirement to address language difference, the ethical obligation is rarely

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60. MODEL RULES OF PROF'L CONDUCT Preamble, paras. 1, 6 (2006) [hereinafter MODEL RULES].

61. See *id.* at R. 6.1 (outlining a lawyer's professional responsibility to provide legal services to those unable to pay); see also Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2415-17 (1999) (discussing the gap between professional ideals of a lawyer's responsibility as articulated in the Model Rules of Professional Conduct (Model Rules) and the realities of practice, and emphasizing the need to build a "culture of commitment" to pro bono service).

62. See CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 12, at 40 (urging greater involvement by the California State Bar in addressing LEP access to justice); JUSTICE ACTION GROUP, *supra* note 12, at 27 (encouraging involvement of Maine State Bar Association).

63. See Cal. State Bar, Standing Comm. on Prof'l Responsibility, Formal Op. 1984-77 (1984) [hereinafter Cal. Opinion], available at <http://www.westlaw.com> (1984 WL 50101); Ass'n of the Bar of the City of New York, Comm. on Prof'l and Judicial Ethics, Formal Op. 1995-12 (1995) [hereinafter NYC Opinion], available at <http://www.westlaw.com> (1995 WL 607777); Utah State Bar, Ethics Advisory Op. Comm., Op. 96-06 (1996) [hereinafter Utah Opinion], available at <http://www.westlaw.com> (1996 WL 391434). A fourth opinion, from Pennsylvania, addresses the tangential question of what conduct performed by a licensed attorney who is also a certified translator constitutes the practice of law. See Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 93-122 (1993), available at <http://www.westlaw.com> (1993 WL 851226).

acknowledged among poverty lawyers. For example, a Legal Services Corporation draft program memorandum on provision of services to LEP clients makes only cursory mention of the ethical dimension of the enterprise, instead addressing the legal obligation to refrain from national origin discrimination pursuant to Title VI.<sup>64</sup>

Despite the superficial absence of language difference in the ethical rules, it is readily apparent that effective communication lies at the heart of the lawyer-client relationship, and that language difference between lawyer and client threatens that core concern. The ethical rules are replete with lawyer duties regarding communications with clients, which, when applied to LEP clients, demand special consideration to language difference. For example, Rule 1.4 of the Model Rules requires, among other things, that the lawyer keep her client timely and reasonably informed of developments in her case, consult with the client on the means by which the client's objectives are to be met, and comply with reasonable requests for information.<sup>65</sup> Of course, all of these requirements presume that the lawyer and client are *able* to communicate the relevant information to one another.

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64. The only mention of lawyers' ethical obligation regarding language difference with clients comes in a one-sentence admonition: "Programs may be putting their legal staff at risk of malpractice or ethical violations if they do not take every precaution to ensure that the communication between the attorney and client is accurate, free from bias, candid and confidential." Letter from Randi Youells, Vice President for Programs, Legal Servs. Corp., to All LSC Program Directors, Re: Services to Clients With Limited English Proficiency (Jan. 14, 2004), available at [http://www.lri.lsc.gov/pdf/other/011204\\_drftlepprogldr.pdf](http://www.lri.lsc.gov/pdf/other/011204_drftlepprogldr.pdf).

65. MODEL RULES, *supra* note 60, at R. 1.4. The overarching concern of Rule 1.4—and of the Model Rules in their entirety—is not a rudimentary or formalistic duty of information exchange, but rather an exhortation for robust lawyer-client communication. See J. Nick Badgerow, *Can We Talk?: The Lawyer's Ethical, Professional and Proper Duty to Communicate With Clients*, 7 KAN. J.L. & PUB. POL'Y 105 (1998) (describing lawyers' ethical and professional obligations to communicate frequently and effectively with their clients, as codified by Rule 1.4). This is particularly evident from the requirement that the lawyer obtain "informed consent" from the client on a wide range of enumerated issues relating to the representation, MODEL RULES, *supra* note 60, at R. 1.4(a)(1) (incorporating by reference all of the Rules' specific requirements of informed consent), including waiver of confidentiality, *id.* at R. 1.6, waiver of conflicts of interest, *id.* at Rs. 1.7(b), 1.8(a), 1.8(b), 1.9(a), and aggregate settlements of claims, *id.* at R. 1.8(g). But beyond these enumerated requirements is an overarching duty that the lawyer "explain a matter to the extent reasonably necessary to permit the client to make *informed* decisions regarding the representation." *Id.* at R. 1.4(b) (emphasis added). Moreover, by using "informed consent" as a term of art, the rules recognize that consent is always contextual. Thus, meaningful consent by the client is contingent upon the lawyer communicating to the client "adequate information and explanation about . . . reasonably available alternatives to the proposed course of conduct." *Id.* at R. 1.0(e) (defining "informed consent"). The adequacy requirement implicitly requires that the information be conveyed effectively as well. Thus, the Model Rules' requirement for informed consent cannot rest on the formal requirement of a shared language, but instead requires actual understanding.

The fact of language difference does not relieve the lawyer of her obligation to maintain these duties.<sup>66</sup>

Other core lawyer duties also suggest specific ethical obligations that are owed by lawyers to LEP clients. For example, the general requirement that a lawyer abide by a client's decisions regarding the objectives of the representation, and consult with the client regarding the means,<sup>67</sup> is an empty rule if the lawyer is unable to understand the client's goals or the client is unable to understand the range of available means.<sup>68</sup> Other rules, requiring written disclosures from lawyers to clients, similarly presume effective communication.<sup>69</sup>

The duty of diligence<sup>70</sup> and the duty of zealous representation<sup>71</sup> might also be understood to compel greater attention to language difference, but, at base, the failure to communicate effectively with one's client frustrates the ability of the lawyer to perform competently the core tasks of representation. As such, the duty of competence provides a particularly useful framework for analysis, as it suggests not only the existence of a duty to LEP clients, but also guidance on how that duty can be fulfilled.<sup>72</sup> As provided in the Model Rules, "competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Thus, we might consider what constitutes the knowledge, skill, thoroughness, and preparation reasonably necessary for the representation of an LEP individual.<sup>73</sup>

Taken together and applied to the representation of LEP clients, these rules constitute penumbral ethical obligation with regard to language difference. Specifically, I read the rules as requiring a lawyer representing an LEP client

66. See Weissman, *supra* note 12, at 1958 (arguing that "[a]ttorneys working with non-English-speaking clients outside the courtroom must be cognizant of their professional responsibility to communicate with their clients" (citing N.C. Rev. R. Prof. Conduct R. 1.4)).

67. See MODEL RULES, *supra* note 60, at R. 1.2(a).

68. Other core lawyer duties also suggest specific ethical obligations that are owed by lawyers to LEP clients.

69. See, e.g., *id.* at Rs. 1.5(c), 1.18(d)(ii).

70. See *id.* at R. 1.3.

71. See *id.* Preamble, paras. 2, 8.

72. Deborah Weissman has made a similar argument regarding attorneys' ethical responsibilities under North Carolina's rule regarding the duty of competency. See Weissman, *supra* note 12. She reads that rule, together with the North Carolina version of Rule 1.4, to require at least the following:

First, [attorneys] must assess a client's ability to communicate in English. Although some communication in English with a client may be possible, unless all that is communicated in English is fully understood, the attorney must communicate through an interpreter to assure that every word is understood. If an interpreter is needed, an attorney should locate a qualified interpreter who is fluent in both languages, familiar with the requisite dialect, competent, unbiased, and free of conflicts with the parties or the issues being litigated.

*Id.* at 1958–59.

73. MODEL RULES, *supra* note 60, at R. 1.1.



to, at a minimum, evaluate the client's need for an interpreter,<sup>74</sup> and to provide a qualified interpreter whenever necessary, so as to enable a level of client engagement comparable to that of non-LEP clients.<sup>75</sup> The provision of an interpreter might be accomplished in different ways—by associating bilingual counsel,<sup>76</sup> hiring a trained interpreter,<sup>77</sup> or, in appropriate circumstances, using a volunteer.<sup>78</sup> Ultimately, a third ethical obligation—to ensure the integrity of the interpretive process, which is to say, to ensure meaningful communication—should dictate how language difference is bridged. In order to ensure the integrity of the process, lawyers must first understand the complex linguistic, cultural,<sup>79</sup> and role dimensions of

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74. See NYC Opinion, *supra* note 63, at 3.

75. See *id.*; Cal. Opinion, *supra* note 63, at 2 (noting that “[o]n any matter which requires client understanding, the attorney must take all reasonable steps” to ensure client comprehension, which may include the use of an interpreter); Utah Opinion, *supra* note 63, at 1 (stating that an attorney “must take all reasonable steps” to ensure meaningful client communication).

76. See Utah Opinion, *supra* note 63, at 1 (suggesting association with a bilingual lawyer as one means to meet the ethical obligation of ensuring meaningful communication).

77. See NYC Opinion, *supra* note 63, at 3. The New York City opinion helpfully characterizes the issue of language difference as one in which the lawyer is confronted with “a legal matter requiring non-legal skills or knowledge outside the lawyer’s experience or ability, and these skills or knowledge are necessary for the proper preparation of the legal matter . . .” *Id.* (citing MODEL CODE OF PROF’L RESPONSIBILITY DR 6-101(A)(1)–(2) (1980)). It goes on to suggest that “[t]he interpreter appears to be the type of professional envisioned by [Model Code of Professional Responsibility Ethical Consideration (EC)] 6-3’s observation that “[p]roper preparation and representation may require the association by the lawyer of professionals in other disciplines.” *Id.* (Returning to the introductory vignette, we might question whether Reverend Sen would constitute a “professional” in another discipline.) Contrary to this opinion, there is nothing to suggest that EC 6-3 was intended to apply to the use of interpreters. See MODEL CODE OF PROF’L RESPONSIBILITY EC 6-3 (1980). Nonetheless, its invocation is useful in recognizing interpreters as one type of professional with relevant expertise with whom lawyers might be required to work to meet their ethical obligations. Similarly, the California opinion characterizes language as a form of knowledge essential to representation and which, if lacking on the part of the lawyer, must be obtained in order for the duty of competence to be satisfied. Cal. Opinion, *supra* note 63, at 1. Importantly, the New York City Opinion relies much more heavily upon the Model Code of Professional Responsibility (Model Code) than the Model Rules in its analysis of the duty of competence. As Linda Jean Davie has noted, the Model Rules provide little guidance on the meaning of competence, “particularly for conduct in a field not strictly ‘legal’ in nature.” Linda Jean Davie, Note, *Babes and Barristers: Legal Ethics and Lawyer-Facilitated Independent Adoptions*, 12 HOFSTRA L. REV. 933, 964 (1984). This reflects the Model Rules’ greater reliance upon, and faith in, legal expertise than that of the Model Code. *Id.*

78. See *infra* Part IV.

79. Of the three ethics opinions addressing language difference, the Utah opinion is the only one to recognize the centrality of culture in interpretation, noting that non-English-speaking clients “may interpret communications based on a different social and cultural foundation than that assumed by the attorney.” Utah Opinion, *supra* note 63, at 2. In light of such differences, the opinion concludes that, in addition to the ethical obligation to associate with a bilingual attorney or staff member, the lawyer should “take greater care in explaining complex legal communications to clients who are non-English speaking.” *Id.* This exhortation begins to comprehend the scope of the interpretive enterprise, but fails to provide sufficient guidance on how cultural differences might be bridged, and ignores the role dimensions of interpretation.

interpretation (each of which is discussed in greater detail below<sup>80</sup>), something few lawyers today fully comprehend.

#### D. Dignitary Concerns

For poverty lawyers committed to empowering subordinated clients through representation, language poses special challenges. Language difference not only complicates the ability of the lawyer to understand and effectuate the client's goals and wishes, but threatens the client's autonomy as well. This is because within the lawyer-client relationship and in society as a whole, language so frequently operates as a force of exclusion, marginality, and subordination. For example, one of the most troubling aspects of the introductory conversation is that the client, Mae, barely speaks. Rather, the two student-lawyers and the interpreter predominate, at times speaking only to one another and not to Mae, and at times purporting to speak for her. This suggests how, unless attended to by lawyers, language difference can degrade the client's ability to express herself. The resulting dilution of client voice diminishes the presence of the client, her ability to make decisions for herself, and ultimately, her very personhood.

We know intuitively that language enables communication at a purely instrumental level, but language is also a fundamental aspect of identity. Rather than merely a technical specification, the way we might think of a computer programming language, spoken language is simultaneously constitutive of and generative of identity.<sup>81</sup> It is bound up in our experience of the world, our understanding of it, and our ability to relate such understanding to others. The sociologist Patricia Steinhoff suggests a complex interdependency of language, narrative, and identity. Steinhoff, who has testified in numerous civil and criminal matters as an expert on Japanese culture, writes of a Japanese woman she interviewed who had been sexually assaulted. The woman "was able to discuss the incident with clinical detachment in English," but "when she spoke about it in Japanese, she cried . . . . She could narrate her experience calmly in English because she felt no emotion about

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80. See *infra* Part III.

81. See Cristina M. Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 140-41 (2001) ("Transmitting information . . . the speaker is using language to make statements about who she is, what her group loyalties are, how she perceives her relationship to her hearer, and what sort of speech event she considers herself to be engaged in." In other words, even when used solely as a communicative device, language assists in the process of self-definition and in the development of social relationships arising from that definition." (quoting RALPH FASOLD, *THE SOCIOLINGUISTICS OF SOCIETY*, at ix (1984))).

the English words she needed to use; in Japanese, the words immediately triggered deep shame and humiliation.<sup>82</sup> Without her language, the client was bereft not only of emotion, but of voice.

As one dimension of power,<sup>83</sup> language always informs the power dynamic between lawyer and client. This is true even when no language difference ostensibly exists between lawyer and client. Like any other discourse, lawyering, and the lawyer-client relationship, are constructed through various rules of exclusion, including specialized vocabulary, ritual, and social privilege, which govern who may speak and who may not, elevate certain forms of speech over others, and help to constitute privilege itself.<sup>84</sup> Lucie White provides a vivid description of how such rules operate within legal discourse, to the exclusion of poor people. She writes:

Poor people obviously do not speak in the same dialect that lawyers, judges, and elite businesspeople use. Furthermore, their courtroom speech is routinely interrupted by lawyers and judges who use threatening tones in ordering them when not to talk and what not to say. Their stories are interpreted by black-robed authorities on the basis of rules that are rarely explained and norms that they seldom share.<sup>85</sup>

White ostensibly is writing about poor people who are native speakers of English. And yet, even this population of clients is likely to encounter semantic differences with institutional players in the legal system. More profoundly,

82. Patricia G. Steinhoff, *When Murder May Be Suicide and "Yes" Means "I Heard You": The Sociologist as Cultural Interpreter*, in WITNESSING FOR SOCIOLOGY: SOCIOLOGISTS IN COURT 70, 84 (Pamela J. Jenkins & Steve Kroll-Smith eds., 1996). Juan Perea provides a related example of an individual's native (and only) language displaced not by English, but by silence. Perea writes:

In his recent book, *Latinos*, Earl Shorris poignantly describes Bienvenida Petion, a Jewish Latino immigrant, who clings to her language and culture "as if they were life itself." When Bienvenida dies, it is "not of illness, but of English." Bienvenida dies of English when she is confined to a nursing home where no one speaks Spanish, an environment in which she cannot communicate and in which no one cares about her language and culture.

"Death by English" is a death of the spirit, the slow death that occurs when one's own identity is replaced, reconfigured, overwhelmed, or rejected by a more powerful, dominant identity not one's own.

Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 965 (1995) (quoting EARL SHORRIS, *LATINOS: A BIOGRAPHY OF THE PEOPLE* 3 (1992)).

83. The intimate connection between language and power has been thoroughly explored. See, e.g., Michel Foucault, *The Discourse on Language*, in THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE, app. 215, 216 (A.M. Sheridan Smith trans., 1972); EDWARD W. SAID, *ORIENTALISM* (1978).

84. See Foucault, *supra* note 83, at app. 215, 216 (discussing the production of discourse through prohibiting speech about rituals, and through privileging the ability of certain individuals to speak on certain subjects).

85. Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 543 (1987-88).

the discourse of law—and frequently of lawyering—is structured so as to police and discipline poor client voices. In the face of such systems of power, many clients are rendered meek.<sup>86</sup> For LEP individuals, the exclusion is multiplied.

Both in and out of the courtroom, limited English proficiency and the exclusionary tendencies of legal discourse frequently conspire not only to frustrate lawyer-client communication, but to expel the client from her own case, or even her own life. Even as a client's life hangs in the balance, she is often cast out of it. This existential dispossession is on clear display in immigration court, where interpretation is typically provided only for the testimony of non-English-speaking witnesses.<sup>87</sup> While at first glance this

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86. The emphasis that Lucie White places on client voice has come under attack by Bill Simon and others for fetishizing the power dynamic of the lawyer-client relationship at the expense of the larger, structural causes of client subordination, and for paying insufficient attention to collective practice strategies. See William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994). More broadly, Simon has argued that this literature's focus on client autonomy, from which dignitary concerns ultimately spring, perpetuates a conservative view of the lawyer-client relationship in which lawyers have little space to advise clients or help determine client goals (because to do so could overwhelm client autonomy). *Id.* at 1105. While I agree with part of Simon's critique—in particular, the importance of balancing attention to the dynamics of professional domination against lawyerly commitments to broader social change—I believe he overstates his case. Indeed, his argument depends upon a disjuncture between individual client empowerment achieved through the lawyer-client relationship and collective empowerment strategies. The same poverty law theorists who focused attention on the microdynamics of power in the lawyer-client relationship subsequently sought to connect those insights to collective lawyering practices. See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths From Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994) [hereinafter White, *Collaborative Lawyering in the Field?*]; Lucie E. White, *To Learn and Teach: Lessons From Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 [hereinafter White, *To Learn and Teach*]; see also Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992).

87. The policy of providing only partial interpretation in immigration court proceedings, unless the immigration judge determines that full interpretation is necessary, has survived due process challenge. See *El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review*, 959 F.2d 742 (9th Cir. 1991) (holding that the policy of partial interpretation is facially constitutional under the Due Process Clause, but remanding for a determination of the plaintiffs' as-applied challenge). In at least one case, a court has implicitly found the practice of partial interpretation to violate due process, but refused to order any relief for the violation. See *Tejeda-Mata v. INS*, 626 F.2d 721 (9th Cir. 1980) (holding implicitly that the immigration judge's refusal to permit simultaneous interpretation of testimony against a noncitizen in deportation proceedings violated the Due Process Clause, but that the violation constituted harmless error).

The immigration court policy, as articulated by the Board of Immigration Appeals, reveals a purely pragmatic concern:

Although an alien in exclusion or deportation proceedings is entitled to a fair hearing, we do not find that due process requires translation of the entire hearing. In most cases,

might seem a pragmatic rule in light of the limited resources of immigration courts and the time and expense necessary for meaningful interpretation, closer inspection reveals its dehumanizing dimensions.

For example, in one recent case, two of my students represented a Francophone immigrant woman seeking asylum in the United States based on extreme persecution she had suffered in her country of origin due to her political activities there. The students were aware that the immigration court's official interpreter would only provide interpretation of questions put to the client in English, and of the client's responses in French, and therefore arranged for their own interpreter to provide simultaneous interpretation of the rest of the proceedings. However, the immigration judge prohibited the students' interpreter from doing so, stating that the student's interpreter would be distracting to the court's. As a result, vast portions of the client's case—at base, a referendum on whether she was worthy of U.S. protection or should be returned to a country where she believed she would be killed—transpired in the client's physical presence but mental absence.

It was not merely preliminary or administrative matters, such as a review of the exhibits, that went uninterpreted, but also the students' opening statement, and the lengthy direct examination of a psychologist regarding the client's mental health and her symptoms of post-traumatic stress disorder. The failure to provide, or even allow, interpretation of these elements of the client's trial may well compromise the client's ability to participate in her

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all that need be translated are the immigration judge's statements to the alien, the examination of the alien by his counsel, the attorney for the [Immigration and Naturalization Service], and the immigration judge, and the alien's responses to their questions. However, the immigration judge may determine, in the sound exercise of his discretion, that the alien's understanding of other dialogue is essential to his ability to assist in the presentation of his case. For example, where a witness testifies regarding factual matters which specifically relate to the alien's own testimony, effective cross-examination may necessitate translation of the witness's testimony. On the other hand, arguments presented by counsel and the rulings of the immigration judge are primarily legal matters, the translation of which generally would not be required where the alien is represented and the protection of his interests is ensured by counsel's presence.

Matter of Exilus, 18 I. & N. Dec. 276, 281 (B.I.A. 1982) (citations omitted); accord Matter of Tomas, 19 I. & N. Dec. 464, 465 (B.I.A. 1987) ("Although all of the hearing need not be translated for the hearing to be fair, the respondents must be able to participate meaningfully in certain phases of their own hearing."). For an insightful critique of the linguistic and cultural limitations of immigration courts to adjudicate fairly the claims of asylum applicants, see Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. 127, 128 (2000) (arguing that "[m]any negative determinations of credibility can be explained by the inability of the asylum applicant, or his attorney, to translate the persecution suffered into a narrative graspable by the adjudicator, and/or the adjudicator's inability to transcend the barriers created by the inherent otherness of trauma, culture, and language").

own case.<sup>88</sup> But beyond this important practical concern, the lack of complete interpretation perpetuates law's exclusionary tendencies in exactly the moment when the client seeks the law's assistance to gain inclusion. The students' opening statement, as well as her psychologist's testimony, are fundamentally stories about the client, stories replete with intimate and violent details of her life.<sup>89</sup> Yet such stories are told about her, in front of her, but without permitting (much less enabling) her comprehension. Particularly for those whom lawyers or the legal system frequently cast as victims,<sup>90</sup> the lack of interpretation forces clients into ever-smaller zones of autonomy. The client is effaced, reduced to a mute, dark figure, uncomprehending of all that transpires around her.<sup>91</sup>

Outside of the courtroom, too, language difference often becomes yet another source of social exclusion and psychic dispossession. Unable to express themselves in a language understood by the majority population, and forced to rely upon others to mediate their interactions with the world, LEP individuals are almost definitionally deprived of voice. For many, reliance

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88. For this reason, interpretation of the entirety of proceedings is typically provided in criminal cases, in which Sixth Amendment rights, among others, are implicated. See *U.S. ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970) (holding that the court's failure to provide interpretation into Spanish of witness testimony violated the criminal defendant's confrontation right and right to be present under the Sixth and Fourteenth Amendments). The Sixth Amendment, and all due process protections accorded to criminal defendants, have been held inapplicable to noncitizens in deportation proceedings because immigration proceedings are deemed civil rather than criminal. See, e.g., *Abel v. United States*, 362 U.S. 217, 236–37 (1960).

89. Binny Miller defends client stories as belonging to clients, therefore necessitating enhanced client participation and control in the development of case theories and the direction of the case as a whole. Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 563–70 (1994).

90. See Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 203–05, 243–45 (2001) (discussing the human rights movement's categorization of "victim" as a "helpless innocent" who has been abused by the state and concluding that this portrayal must be abolished in order to usher in a new, multicultural and reflective human rights corpus); Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. U. J. GENDER SOC. POL'Y & L. 117, 122 (2002) (noting that the use of stereotypical narratives such as the "helpless woman victim" may resonate with the values, beliefs, and assumptions of the audience, but that they expose a tension between the progressive lawyer's duty of zealous representation and her commitment to antisubordination).

91. The need for complete courtroom interpretation has been characterized in criminal proceedings as a matter of "linguistic presence," suggesting that the failure to provide interpretation is tantamount to a trial in absentia. ROSEANN DUEÑAS GONZÁLES ET AL., *FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY, AND PRACTICE* 49–50 (1991); see also *State v. Natividad*, 526 P.2d 730, 733 (Ariz. 1974) (It would be as though "a defendant was forced to observe the proceedings from a soundproof booth or seated out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy." . . . "[S]uch a trial comes close to being an invective against an insensible object, possibly infringing upon the accused's basic 'right to be present in the court room at the very stage of his trial.'" (citations omitted)).

upon their bilingual children as interpreters is an inescapable source of infantilization and shame,<sup>92</sup> and widespread hostility toward non-English speakers, whether embodied in the English-Only movement or expressed as microaggressions in the course of daily living,<sup>93</sup> further silences LEP individuals.

Indeed, limited English proficiency is not a discrete impairment, but instead has a pervasive effect on the lives of LEP individuals. Limited English proficiency frequently produces extreme forms of linguistic isolation both at home and in the workplace, which, when compounded by poverty, race, and gender, in turn may result in political, social, and

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92. See Joyce Frieden, *Practice of Using Minors as Interpreters Draws Criticism: Laws Considered in Calif.*, D.C., CLINICAL PSYCHIATRY NEWS, Sept. 1, 2003, at 82 (quoting language from a proposed bill that “[c]hildren should not be exposed to discussions and information that is often beyond their comprehension, or to discussions and information that are inappropriate for, or unseemly to, children. . . . The involvement of children as interpreters is difficult, both for the children and for the associated adults. . . .”); PERKINS ET AL., *supra* note 28, at 1.17 (noting that use of minors as interpreters may cause friction due to role reversal within the family structure). The use of minors as interpreters is troubling for many other reasons, such as lack of maturity, education, and judgment; therefore, it may jeopardize the integrity of the interpretation while placing significant and often overwhelming pressure and responsibility on the minor. See *id.*; see also Thomas Ginsberg, *Shouldering a Language Burden: In Immigrant Families, Children's Roles as Interpreters Full of Pressure*, PERIL, PHIL. INQUIRER, Mar. 9, 2003 at A1 (telling the story of a thirteen-year-old who had to interpret for his parents when his younger brother was admitted to the emergency room, suggesting that although interpreting by children can help parents survive and receive community services, it subverts family roles with pressure, edifies children but stalls adults from learning English and exacerbates various ills, from a child's absenteeism from school to medical errors); M.C. Sullivan, *Lost in Translation: How Latinos View End-of-Life Care*, PLASTIC SURGICAL NURSING, Summer 2001, at 90 (discussing how a fifteen-year-old Mexican American girl had to interpret for her mother during a hospital visit and was asked to inform her mother that she had cancer); Barry Newman, *Language Gap: For Ill Immigrants, Doctors' Orders Get Lost in Translation*, WALL ST. J., Jan. 9, 2003, at A1 (discussing incidents involving family members and children interpreting for LEP patients).

93. See Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989). Davis describes microaggressions toward African Americans as “subtle, stunning, often automatic, and non-verbal exchanges which are “put downs” of blacks by offenders,” and “incessant and cumulative” assaults on black self-esteem.” *Id.* at 1565 (citations omitted). She explains:

“Microaggressions simultaneously sustain[ ] defensive-deferential thinking and erode[ ] self confidence in Blacks. . . . [B]y monopolizing . . . perception and action through regularly irregular disruptions, they contribut[e] to relative paralysis of action, planning and self-esteem. They seem to be the principal foundation for the verification of Black inferiority for both whites and Blacks.” The management of these assaults is a preoccupying activity, simultaneously necessary to and disruptive of black adaptation. . . . Vigilance and psychic energy are required not only to marshall [sic] adaptational techniques, but also to distinguish microaggressions from differently motivated actions and to determine “which of many daily microaggressions one must undercut.”

*Id.* at 1565–66 (citations omitted). I suggest that a similar, though historically distinct, set of practices are directed toward LEP individuals.

economic marginalization.<sup>94</sup> The lack of access experienced by LEP individuals is both quotidian and profound. It may include the inability to answer the phone, read the mail (utility bills, immigration notices, welfare appointment letters), or communicate with someone knocking on the door.<sup>95</sup> Asking for directions, calling the police, speaking with a child's teacher, or explaining one's symptoms to a doctor can be impossible tasks.

Lawyers all too frequently replicate within the lawyer-client relationship the forms of subordination that afflict clients outside of it,<sup>96</sup> and language difference provides ripe opportunity to do so. For those lawyers committed to making the lawyer-client relationship a site for enhancing client autonomy, then, language difference poses new and special challenges.

#### E. Antisubordination

Lawyers committed not only to representing individual poor and marginalized people but also to combating poverty and subordination cannot achieve their goals of progressive, structural change without attending to language difference. This is to say that language difference is not merely a procedural matter in lawyering, but a substantive dimension of systems of inequality and marginalization. As discussed above, demographic shifts have produced a growing population of poor people who are LEP. Because of the marginalizing force of language, being LEP is, in many instances, one reason that they remain not only poor but exploited.<sup>97</sup> Moreover, the

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94. David Shipler provides a vivid description of linguistic isolation in the life of Nara, an immigrant from Korea:

For twelve hours a day six days a week, she worked as assistant cook in a Korean restaurant, where customers' tips were not shared with the staff in the hot kitchen . . .

. . . She was a dress designer [in Korea] but without English she couldn't get such work here, so she felt confined to the subculture of Korean restaurants in the 'Koreatown' section of Los Angeles. 'I went to a language institute for three months,' Nara said through an interpreter, 'but I forget very easily. I'm too old.' She was forty-five. 'I live in Koreatown; I can get along without English.' She could get along, but she couldn't get out . . .

. . . Moreover, a psychological confinement imposed a mood of defeat. Marginalized, cloistered, and stagnant, Nara simply wanted to go back to South Korea; her husband wanted to stay.

DAVID K. SHIPLER, *THE WORKING POOR* 92-93 (2004).

95. See generally ANNE FADIMAN, *THE SPIRIT CATCHES YOU AND YOU FALL DOWN* (1997) (describing experiences of one Hmong family in Northern California).

96. See, e.g., White, *Mobilization on the Margins*, *supra* note 85, at 540.

97. See generally CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 12, at 33 ("Immigrant populations are often preyed upon specifically because perpetrators recognize their victims' limited ability to access judicial protection. The numerous federal and state legal protections against



intersections of limited English proficiency, immigration status, and race necessitate attention to language as one dimension of the broader systems of subordination that exist today.<sup>98</sup> Thus, both the demands of individualized lawyering and political commitments to social change require that lawyers grapple with the challenges posed by language difference.

## II. A PRIMER ON COMMUNICATION: LINGUISTIC COMPLEXITY AND THE CENTRALITY OF CULTURE

Lawyers cannot meaningfully understand, much less address, the challenges of lawyering across language difference without first understanding the nature of language itself. As suggested previously, the conventional understanding is that language operates mathematically, with each word in one language having an exact, corresponding word in another. This view presupposes that, even within a single language, each word, phrase, or sentence has a unitary meaning. By this account, interpretation is merely a process of decoding, or transliteration.<sup>99</sup>

In reality, language difference so deeply complicates the lawyering process because language and communication are contextual and often ambiguous processes not susceptible of mathematical solution. A brief

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discrimination in housing, education, employment, and lending are of little benefit if victims lack meaningful access to the courts to enforce them.”).

98. Immigration status often exerts a profound subordinating effect on the substantive rights of LEP immigrants. From family law to employment law to criminal law, a client's immigration status can have profound consequences for the availability of legal protection. See Deborah A. Morgan, Comment, *Access Denied: Barriers to Remedies Under the Violence Against Women Act for Limited English Proficient Battered Immigrant Women*, 54 AM. U. L. REV. 485, 490–92 (2004) (discussing how battered immigrant women dependent upon their batterers for their immigration status were often forced to remain in abusive marriages in order to remain in the country lawfully prior to the Violence Against Women Act, but noting that language access issues remain a barrier to obtaining legal remedies); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (holding the National Labor Relations Board lacked the discretion to award backpay to an undocumented employee who was not legally authorized to work in the United States); Lory Diana Rosenberg, *Indigent Defense*, CHAMPION, March 2003, at 43 (discussing severe immigration consequences of even minor criminal convictions); John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 36 U. MICH. J.L. REFORM 691 (2003) (same); see also Uyehara, *Funding the Mandate*, *supra* note 8, at 16, 19–20 (discussing how the legal needs of LEP immigrants differ from those of non-LEP native-born clients). But even where formal protection is available, the push and pull factors driving many immigrants to the United States engender fear of all organs of the state, including the courts.

99. See JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 253 (1990) (describing the classical view of translation—“that ‘what is said’ in one language can be ‘said’ in another”—as “the result of the defective view of language more generally . . . namely, that language is a ‘code’ into which ‘messages’ are encoded”).

linguistic inquiry into lawyer-client communication (and communication more generally), even where the lawyer and the client ostensibly speak the same language, illuminates two critical dimensions of language—semantic complexity and the centrality of culture. When viewed in the context of language difference, each of these becomes ever more complicated.

It is a truism of linguistics that language is inherently ambiguous. This ambiguity exists at the level of individual words, sentences, and discourse.<sup>100</sup> For example, the word “charge” could mean to demand a fee or to accuse someone of wrongdoing; the sentence “I’ll talk to you later” could express an intention to resume a dialogue at a later date or simply to say goodbye; and the same conversation could constitute the resolution of a dispute between two parties or a form of apology.<sup>101</sup>

Linguists distinguish between the semantic and pragmatic meaning of language. Semantic meaning is the “fixed context-free meaning” of words,<sup>102</sup> largely determined by the listener’s understanding of the lexical and syntactic conventions of the language. In contrast, pragmatic meaning refers to the meaning that words assume in a particular context, as understood between particular individuals.<sup>103</sup> It is the pragmatic meaning that matters in lawyer-client communications, and in all social interactions. Only through interaction between two or more individuals are otherwise indeterminate meanings fixed and does meaningful communication occur.<sup>104</sup> By this account, words, sentences, and discourse carry with them no inherent meaning.

100. See RON SCOLLON & SUZANNE WONG SCOLLON, *INTERCULTURAL COMMUNICATION* 6–10 (2d ed. 2001) (describing word-level, sentence-level, and discourse-level ambiguity of language).

101. Of course, the ambiguity of language is no stranger within legal discourse. The inescapable centrality of statutory analysis in any legal system is itself an implicit recognition of the inherent ambiguity of language, and the various tools of statutory interpretation—“plain meaning” approaches, inquiries into congressional intent, and canons of construction—are all attempts to resolve this ambiguity, to determine a single pragmatic meaning from a range of available meanings, and to fix that meaning as authoritative. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). Similarly, basic contract theory is committed to the principle of achieving a “meeting of the minds,” and memorializing this shared understanding as best as possible; contract disputes are testimony to the imperfect nature of this enterprise.

102. GUY COOK, *DISCOURSE* 29 (1989).

103. *Id.*

104. The linguist John Gumperz describes this phenomenon in terms of the “dialogic properties” of conversational exchange, noting

(a) . . . interpretations are jointly negotiated by speaker and hearer and judgments either confirmed or changed by the reactions they evoke—they need not be inferred from a single utterance; and (b) . . . conversations in themselves often contain internal evidence of what the outcome is, i.e. of whether or not participants share interpretive conventions or succeed in achieving their communicative ends.

JOHN J. GUMPERZ, *DISCOURSE STRATEGIES* 5 (1982).

Rather, they are merely signs, cues,<sup>105</sup> or hints as to what a speaker intends the listener to understand. While the speaker presumably knows exactly what she means by specific utterances, her listener can only approximate that meaning, for the simple reason that the speaker's intention and the listener's comprehension are both circumscribed by the subjective experience of each individual.<sup>106</sup> Language is therefore best understood as a social process or a semiotic system rather than a static code.<sup>107</sup>

An epistemological question lurks just beneath the surface here: Can we ever fully understand the intended ("true") meaning of another person's speech? Daily life experience demonstrates that we can and do frequently achieve sufficient agreement upon speakers' intended, pragmatic meaning; the basic functioning of society relies upon it. But miscommunication is a prominent feature of daily life experience as well, suggesting how significant a barrier the subjectivity inherent to personhood is to the process of effective communication, even when the speaker and the listener speak the same language.

The goal and the challenge of communication is what Sue Bryant refers to as "isomorphic attribution": attributing to particular communication the meaning intended by the speaker.<sup>108</sup> Such attribution—the making of pragmatic meaning—depends upon an understanding of the literal meaning of the words used, and a shared cultural context between speaker and listener.

105. See Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273, 318 (1989) (describing the view that spoken words are only a "cue to the meaning entertained by the speaker" (quoting David R. Olson, *From Utterance to Text: The Bias of Language in Speech and Writing*, 47 HARV. EDUC. REV. 257, 277 (1977))).

106. In his discussion of justice as translation, James Boyd White describes translation as

an attempt to be oneself in relation to an always imperfectly known and imperfectly knowable other who is entitled to a respect equal to our own . . . it means the perceptual acknowledgment of the limits of our minds and languages, the sense that they are bounded by the minds and bodies of others.

WHITE, *supra* note 99, at 258. The poet Adrienne Rich expresses these inherent limitations of subjectivity: "A language is a map of our failures." ADRIENNE RICH, *The Burning of Paper Instead of Children*, in *THE WILL TO CHANGE: POEMS 1968–1970*, at 15, 18 (1971).

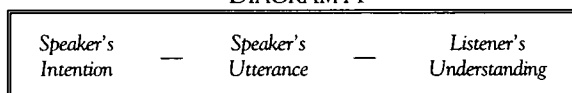
107. M.A.K. Halliday has described language as a "social semiotic," by which he means that language is a social process within a particular sociocultural context, and that language partially constitutes, encodes, and reflects that context. M.A.K. HALLIDAY, *LANGUAGE AS SOCIAL SEMIOTIC: THE SOCIAL INTERPRETATION OF LANGUAGE AND MEANING* 1–2 (1978). There is not total unanimity on this linguistic view. Noam Chomsky, among others, argues that the meaning of language is determined by the semantic structure of the sentence, and that language is autonomous and self-executing. By this account, a single correct meaning of a sentence can be derived from analysis of its grammatical structure, without recourse to the subjective or contextual knowledge of the listener. See NOAM CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX* (1965); NOAM CHOMSKY, *SYNTACTIC STRUCTURES* (1957).

108. Bryant, *supra* note 12, at 43.

This is because any given utterance is comprised of the literal, semantic meaning of the words used, and the force or intention that the speaker intends these words to have.<sup>109</sup> For example, the words “I’m sorry” have the literal meaning of a sentiment of regret, but the intended meaning may vary: If said by the speaker upon showing up late for a meeting, it could constitute an apology, whereas if said at a funeral, it could be an expression of empathy. Thus, even when there is no language difference and no interpreter is involved, the process of constructing meaning from language requires the listener to know the semantic meaning of the speaker’s utterance, and to discern its intended meaning in the specific cultural context of use.<sup>110</sup>

As illustrated below in Diagram A, miscommunication can occur when there is a gap either between the speaker’s intention and her utterance, or between the speaker’s utterance and the listener’s understanding of it. The first gap is internal to the speaker and reflects the imperfection of language in capturing human intention. The second might arise when the listener hears different words from those uttered by the speaker; when the listener is unfamiliar with or misunderstands the semantic meaning of the words; or when the listener makes a mistake in attributing meaning to the speaker’s utterance. Such mistaken attribution might owe to a cultural unfamiliarity with the concepts or ideas being expressed by the speaker.

DIAGRAM A

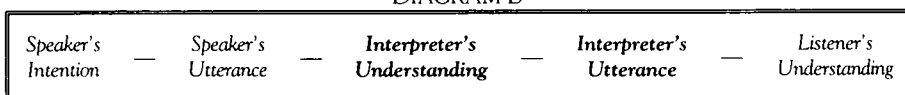


109. These two communicative dimensions of language—the literal or semantic meaning, and the force or intention behind the utterance—are described within Speech Act theory, a framework for analysis within the linguistic field of pragmatics, as the locutionary and illocutionary acts, respectively. A third dimension, the effect that an utterance has on the listener, is referred to as the perlocutionary act. See J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 94–107 (1962); JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 23–25 (1970). Speech Act theory exposes the richness and multidimensionality of even basic communications, thereby helping to explicate the multiple, complex roles that interpreters must play to be effective. I borrow this application of Speech Act theory to interpretation from Sandra Hale, *The Interpreter on Trial: Pragmatics in Court Interpreting*, in THE CRITICAL LINK: INTERPRETERS IN THE COMMUNITY 201–11 (Silvana E. Carr et al., eds., 1995).

110. Elaborating on his description of language as a social semiotic, Halliday writes: [W]e have to proceed from the outside inwards, interpreting language by reference to its place in the social process. This is not the same thing as taking an isolated sentence and planting it out in some hothouse that we call a social context. It involves the difficult task of focusing attention simultaneously on the actual and the potential, interpreting both discourse and the linguistic system that lies behind it in terms of the infinitely complex network of meaning potential that is what we call the culture. HALLIDAY, *supra* note 107, at 4–5.

Language difference between lawyer and client multiplies the possibility for both semantic and cultural errors because, where there is an interpreter, the speaker's intention is now mediated by an additional person. Thus, in addition to the gaps illustrated in Diagram A, two additional gaps between the interpreter's understanding and the listener's understanding may compound the problem. These gaps are illustrated in Diagram B.

DIAGRAM B



Moreover, language difference complicates enormously the semantic and cultural dimensions of communication because of the need to work between two languages and two (or more) cultural contexts; it is not merely that there are two more links in the chain of communication, but also that the communication now demands additional dimensions of work and analysis. At the semantic level, the interpreter must possess a mastery of vocabulary, diction, and the grammar that governs the use of words and the relationships among them, in both the transmitting and the receiving languages. Angela McCaffrey identifies several related difficulties, including differences in dialect between interpreter and lawyer or between interpreter and client, an unfamiliarity with colloquial expressions, and difficulty rendering legal jargon or other technical terminology.<sup>111</sup> All of these operate to frustrate the interpretation of semantic meaning.

Difficulties in semantic meaning may arise not only from deficiencies in the knowledge or skill of the interpreter, but also from structural differences across different languages. For example, the Eskimo-Aleut language of Inuktitut has "different phonology, methods of terminology, development, syntax, and ways of organizing and expressing thoughts," and features a lack of technical terminology.<sup>112</sup> Thus, the Inuktitut term for cancer—*aaqiktaujuunnangituaq*—back-translates into English as "something

111. McCaffrey, *supra* note 12, at 351–55; see also Holly Mikkelsen, *The Art of Working With Interpreters: A Manual for Health Care Professionals*, <http://acebo.com/papers/artintpr.htm> (last visited Mar. 4, 2007) (enumerating common linguistic problems in health interpretation, including the use of technical terms and idioms, inarticulate patients, and dialectical or regional differences).

112. Christine Penney & Susan Sammons, *Training the Community Interpreter: The Nunavut Arctic College Experience*, in *THE CRITICAL LINK: INTERPRETERS IN THE COMMUNITY*, *supra* note 109, at 66, 71.

which cannot be cured.”<sup>113</sup> More famously, the disease known in English as epilepsy is referred to in Hmong as *qaug dab peg*, which translates as “the spirit catches you and you fall down.”<sup>114</sup>

In the vignette set forth in the Introduction, we could imagine Reverend Sen attempting to translate “pelvic exam,” but not understanding the meaning of the term in English, or not knowing the corresponding terminology in Burmese. Alternatively, Mae and Reverend Sen might speak different dialects of Burmese, or may speak Burmese imperfectly, as a second or even third language.

The difficulty here, and in all instances of interpretive failure, is that the existence of the failure is not directly knowable by either the lawyer or the client, as neither possesses the linguistic abilities to verify the integrity of the interpretation. As a result of this black box problem, errors in interpretation can only be inferred circumstantially, and even then, only their existence and not their cause can be readily appreciated. The work of the interpreter to render semantic meaning accurately is therefore doubly important, as the structure of the relationship (lawyer-interpreter-client) lacks any meaningful corrective for interpreter errors.<sup>115</sup> Thus, not only is language inherently ambiguous, so, too, is interpretation.

As daunting as these challenges may be, the task of interpreting the intended meaning of a particular utterance—that is, providing the contextual, pragmatic meaning of specific language—is even more profound. While words and grammatical structure may signal the speaker’s intended meaning, they do not represent it exactly. Rather, the listener must rely upon a number of additional, external sources of information to resolve the otherwise ambiguous pragmatic meaning. These include nonlinguistic cues and prior knowledge or life experience, from which the listener draws inferences as to the speaker’s intended meaning.<sup>116</sup> Thus, much of the information required to determine the speaker’s meaning is not contained in the words of the speaker, but instead is supplied by the listener. Comprehension therefore depends upon a shared perceptual context such that the inferences the listener draws are the ones the speaker intends.<sup>117</sup>

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113. *Id.*

114. See FADIMAN, *supra* note 95, at 20.

115. One partial solution to this problem would be to use different interpreters throughout the course of the representation. This poses its own difficulties, as it necessarily disrupts the rapport-building process among lawyer, client, and interpreter.

116. See SCOLLON & SCOLLON, *supra* note 100, at 10–11 (noting that inferences are necessarily drawn because of the inherent ambiguity of language, and that they are based upon the language used and our knowledge of the world).

117. See Olson, *supra* note 105, at 272.

Nonlinguistic cues are fundamental to the process of making meaning. These include paralinguistic features such as intonation, volume, and speech rate, as well as nonverbal communication like physical gestures.<sup>118</sup> The intended meaning of an utterance—the action it is meant to perform, and the force with which it is intended—depends upon the attribution of meaning to these aspects of communication. Based on past experience, we tend to identify certain tones of voice as angry, apologetic, or enthusiastic.<sup>119</sup> Often times, the inferences we draw relating to paralinguistic features are reinforced by inferences based on physical gestures, such as the wagging of a finger, the pressing together of one's hands, or a widening of the eyes. Because the listener's inferences are based upon past experience, their strength, and therefore the isomorphic attribution of meaning, depends upon the extent to which these past experiences are shared by the speaker.<sup>120</sup>

Returning to the introductory vignette, when asked toward the end of the meeting if she were willing to answer the students' questions about her rape, Mae shook her head from side to side. Even with the semantic translation provided by Reverend Sen indicating her willingness (or perhaps because of it), the students might be confused since they may have assimilated Mae's behavior into a perceptual framework in which the gesture is coded as disagreement rather than assent.<sup>121</sup>

With the introduction of an interpreter, the complexities involved in inferring intended meaning are multiplied. First, effective interpretation requires that the interpreter share the perceptual frame of both the lawyer and the client.<sup>122</sup> Second, the interpreter must actually interpret the paralinguistic cues.<sup>123</sup> This requires a level of culturally specific performance by the interpreter—simulating anger by raising her voice, or delivering emphasis by pounding one's fist—that interpreters rarely provide.<sup>124</sup> Indeed, such theatrics might be uncomfortable for the interpreter to perform, and may be unwelcome by the lawyer or the client.<sup>125</sup> At the very least, this method of interpretation enlarges the presence of the

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118. *Id.*

119. *See generally id.*

120. *See generally id.*

121. *See* Bryant, *supra* note 12, at 56 (noting the importance of intercultural skills of reading both verbal and nonverbal behavior).

122. *See* McCaffrey, *supra* note 12, at 354 (noting the "rarity of perfect bilingualism on the part of interpreters").

123. *See* Holly Mikkelsen, Verbatim Interpretation: An Oxymoron, <http://www.acebo.com/papers/verbatim.htm> (last visited Mar. 4, 2007).

124. *See* BERK-SELIGSON, *supra* note 12, at 40; McCaffrey, *supra* note 12, at 381.

125. *See* BERK-SELIGSON, *supra* note 12, at 153–54 (discussing the interpreter's awareness of own role as court employee causing the interpreter to use more polite address).

interpreter in the lawyer-client relationship. And yet without it, the interpretation may be incomplete.<sup>126</sup>

Of course, shared experiences are important not only for interpreting gestures and intonation, but for understanding the intended meaning of speech acts<sup>127</sup> in their entirety. Because communication is a socially mediated phenomenon, the success of the enterprise depends upon a common perceptual frame between speaker and listener, or more simply, a common culture.<sup>128</sup>

It is a mistake to view language and culture as coextensive. Rather, language and culture are partially constitutive of one another. I define culture as a perceptual frame for viewing and understanding the world, one that is shaped by a set of "socially transmitted values, beliefs and symbols that are more or less shared by members of a social group."<sup>129</sup>

Sue Bryant provides a helpful elaboration of this view of culture, and, in so doing, emphasizes both its centrality and its breadth:

Culture is like the air we breathe—it is largely invisible and yet we are dependent on it for our very being. Culture is the logic by which we give order to the world. Culture gives us our values, attitudes and norms of behavior. We are constantly attaching culturally-based meaning to what we see and hear, often without being aware that we are doing so. Through our invisible cultural lens, we judge people to be truthful, rude, intelligent or superstitious based on the attributions we make about the meaning of their behavior.<sup>130</sup>

Similarly, Kevin Avruch and Peter Black suggest how culture constitutes our sense of normalcy, noting that "our culture provides ways of seeing, thinking, and feeling about the world which in essence define normality for us—the way things are and the way things ought to be."<sup>131</sup>

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126. Susan Berk-Seligson has demonstrated how interpreters who alter the pace of the witness's speech, elide hesitations or pauses, or otherwise "clean up" the witness's testimony may inadvertently affect the perceived credibility of the witness. BERK-SELIGSON, *supra* note 12, at 179–83.

127. See *supra* note 109 and accompanying text.

128. See Bryant, *supra* note 12, at 42 (describing the communication challenges faced by lawyers and clients who do not share a common culture, which can result in lawyers incorrectly judging clients as "holding back," "lying," and "being unhelpful").

129. Kevin Avruch, *Culture as Context, Culture as Communication: Considerations for Humanitarian Negotiators*, 9 HARV. NEGOT. L. REV. 391, 393 (2004).

130. Bryant, *supra* note 12, at 40.

131. Kevin Avruch & Peter W. Black, *Conflict Resolution in Intercultural Settings: Problems and Prospects*, in CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION 131, 133 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993).



Culture is constituted at both the macro- and the micro-level, the gross and the specific. For example, the macroeconomic context in which recent immigration has occurred<sup>132</sup> forms an important part of the cultural context of poor LEP clients' lives in the United States and therefore informs client choices on a range of legal and nonlegal issues. While economic marginality always influences a poor client's decision on whether to accept a settlement offer or proceed to trial, for many LEP clients the decision obtains transnational dimension, implicating the cost incurred in migrating to the United States,<sup>133</sup> and the economic condition of family in the immigrant's country of origin as well. This is to say that immigrant culture encompasses not only the daily lived experiences of immigrants in the United States, but the very experience of migration as well.

The degree to which values, beliefs, and symbols are shared by a social group, or the degree to which two individuals are part of the same social group, is not always readily apparent.<sup>134</sup> For example, some years ago, I represented three Latina and Latino garment workers in Los Angeles, who were suing a large garment manufacturer because of the sweatshop conditions in which they worked. The manufacturer deposed one of the workers, and because the workers were monolingual Spanish speakers, the entire proceeding was interpreted by a court-certified interpreter. A central issue in the case was whether we could establish that the workers had in fact sewn garments for the defendant manufacturer. During the course of the deposition, the defendant's counsel attempted to ask the worker what labels were in the garments on which she worked. The interpreter translated "labels" as "las etiquetas," but the response received from the worker was seemingly nonsensical. This prompted the defendant's lawyer to rephrase the question several times, each time using the word "labels," which the interpreter consistently translated as "las etiquetas," and which continued to produce confusing responses from the worker.

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132. See *supra* notes 40–42 and accompanying text.

133. See Douglas S. Massey, CATO INST. CTR. FOR TRADE POLICY STUDIES, BACKFIRE AT THE BORDER: WHY ENFORCEMENT WITHOUT LEGALIZATION CANNOT STOP ILLEGAL IMMIGRATION (2005), available at <http://www.freetrade.org/pubs/pas/tpa-029.pdf> (arguing that increased immigration enforcement along the U.S.-Mexico border has increased the cost of passage for undocumented immigrants, thereby requiring immigrants to remain in the United States longer to recoup that cost).

134. See Avruch, *supra* note 129, at 393 (noting that "culture is rarely, if ever, perfectly shared by all members of a group or community"); Bryant, *supra* note 12, at 41 (noting that "[c]ulture is enough of an abstraction that people can be part of the same culture, yet make different decisions in the particular" and that "[p]eople can also reject norms and values from their culture").

Eventually, I suggested that the confusion might be stemming from the translation of the word “labels.” The interpreter insisted that the proper translation was “las etiquetas,” and any English-Spanish dictionary would confirm him on this point. However, though I spoke very little Spanish myself, I knew from my work with my clients and many other garment workers in Los Angeles that among the approximately 100,000 Latina and Latino workers in the garment factories of Los Angeles, the word used for labels was the anglicized “los labels.” In contrast, “las etiquetas” was used by the workers to denote the price tags that are attached to finished garments. Thus, while “las etiquetas” may well be the appropriate term in the design houses of Madrid, its meaning in the local culture of the sweatshops of Los Angeles was quite different. Here, then, was an example not only of the cultural embeddedness of all language, but of the discontinuities between language and culture as well: an interpreter with semantic mastery of English and Spanish was unable to render an appropriate interpretation, while a lawyer with cultural familiarity of the speakers but not semantic mastery of their language was able to do so.<sup>135</sup>

Culture is an inescapable yet problematic explanatory framework for understanding the challenges of language difference. On the one hand, the social nature of language necessarily renders effective communication contingent. On the other, culture tends to explain both too little and too much. It explains too little because it fails to account for the semantic dimensions of language difference—unfamiliarity with technical vocabulary, differences in dialect, or differences in source and target language structure. It explains too much because of a tendency to fall back on culture as a catchall for anything that does not comport with our expectations or our sense of normalcy. In so doing, this totalizing form of culture threatens to elide other, transcultural social forces that may be at play.

For example, students in the international human rights clinic in which I teach told me about a meeting they had with their Spanish-speaking client, in which they had used an interpreter. The students and the client were all young women in their twenties, and the interpreter was a man in his forties. After their meeting, the students complained that the interpreter

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135. Sue Bryant has suggested that the confusion between “las etiquetas” and “los labels” in this example might be best understood as a difference in dialect. The question of what constitutes a dialect is itself contested, and the line between language and dialect is often indistinct. Dialect is used to describe variances in diction or other speech patterns according to factors such as geography, social class, and degree of conformity with the standard or literary form. See HAUGEN, *supra* note 27, at 237–53 (identifying structural and functional features that distinguish dialect from language). See generally HAROLD BYRON ALLEN & MICHAEL D. LINN, *DIALECT AND LANGUAGE VARIATION* (1986).

had been condescending to them and to their client. As we began to discuss why this might have been, one student volunteered, "Maybe it's a cultural thing." I asked her to expand on this and she said, "Well, we're all young women and he's an older Latino man." Asked to expand further, the student cited machismo as the cultural source of the interpreter's condescension. And yet, the students' experience was remarkably similar to the condescension which many of my female students have reported after their first interaction with an older, male, white opposing counsel. Thus, while there might be something specific about the interpreter's perceptual frame that informed his conduct, his behavior is equally intelligible within a different perceptual frame with which the students had greater familiarity, namely, one of patriarchy and sexism in the U.S. legal profession. Despite the availability of an explanation that did not depend upon cultural difference, it was the cultural explanation, and, in particular, a racialized form of a transcultural phenomenon, to which first resort was made.

The point here is not that there were no cultural forces animating the conduct of the interpreter, but that to merely label them as "cultural" is too blunt an analysis to be meaningful. On further inspection, we might disaggregate age and class assumptions from issues of gender, even as we recognize the relationships among them. Alternatively, we might consider a set of assumptions not based on identity—for example, the interpreter's skepticism that inexperienced students, regardless of their age or sex, could provide meaningful client representation. Finally, to identify patriarchy as one possible explanation is not to disclaim culture; even as patriarchy occurs transculturally, it has culturally specific forms that might demand special attention.

The students' experience is consistent with Leti Volpp's argument that there is a tendency to describe certain behaviors in cultural terms when immigrants of color are involved, but to characterize the same behavior as individual aberrance when it relates to white Americans.<sup>136</sup> Such differential ascription of cultural explanation, Volpp argues, derives from an equation of culture with nonwhite race and ethnicity, coupled with an invisibility of majority practices as cultural.<sup>137</sup> Thus, culture is viewed as constitutively foreign—something that others have but that "we" do not—and often falsely serves as an explanation for behavior that would otherwise be understood in noncultural terms.

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136. See Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89 (2000).

137. See *id.* at 94.

My working definition of culture, already tentative, is subject to several additional qualifications. First, there is a strong tendency to think of culture in monolithic and totalizing terms, and to equate culture with behavior. This belies the reality that most people are members of multiple social groups, and that within any one community, there likely exists significant intercultural variation.<sup>138</sup> As Avruch has noted, “[i]ntracultural variation is likely to be present, perhaps considerable, and this should caution us against ascribing value, belief, or behavioral uniformity to members of a group—against stereotyping.”<sup>139</sup> The link between culture and behavior is therefore best understood as contextual rather than causal. To say that something is determined by “Burmese culture,” or “Asian values,” or “African tradition” is tempting in its simplicity, but ultimately is unacceptably reductive.

For the lawyer representing an LEP client, culture therefore is both essential and treacherous to the lawyer-client relationship. Because culture often operates silently in its shaping of meaning,<sup>140</sup> it may not be evident to the lawyer when the interpreter is drawing on a purportedly shared perceptual frame in the course of interpretation. Moreover, even when the cultural frame is openly acknowledged, the lawyer may lack the analytic tools to evaluate the cultural claims of the interpreter. In these instances, the lawyer relies solely on the interpreter for cultural analysis, uncritically accepting as fact what might best be understood as opinion.<sup>141</sup> Once again, a black box problem occurs, because neither the client nor the lawyer can readily appreciate when a cultural gap exists. Moreover, both parties are limited in their ability to evaluate the integrity or appropriateness of the interpreter’s cultural gap-filling.

In the introductory vignette, Reverend Sen invokes his knowledge (and implicitly, the students’ ignorance) of Burmese culture to explain Mae’s reaction to the students’ questions about her rape. In effect, the reverend is interpreting Mae’s nonverbal behavior (looking away and trembling) in the context of the students’ question, and attributing meaning to it—namely, feelings of shame. This attribution is based upon the reverend’s purported

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138. See Bryant, *supra* note 12, at 41.

139. Avruch, *supra* note 129, at 393.

140. Michael Cooke refers to this phenomenon as “the problem of hidden or disappearing steps,” by which he means the purportedly shared contextual knowledge between the speaker and listener that “allows some of the steps in a sequence of statements to be left as implicit.” Michael Cooke, *Understood by All Concerned? Anglo/Aboriginal Legal Translation*, in 8 *TRANSLATION AND THE LAW* 37, 42 (Marshall Morris ed., 1995).

141. See generally Bryant, *supra* note 12, at 41, 52–53; Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 *CLINICAL L. REV.* 373 (2002).

cultural knowledge of how rape is viewed within Burmese society and how Mae is likely to have been socialized to experience it.

Reverend Sen may well be right that Mae's experience of the students' questioning is framed by culturally specific concepts of shame, family, and honor. If this is the case, then the information he provides the students is integral to the interpretive process, and, therefore, to effective lawyer-client communication. The common request that the interpreter translate exactly what the client says, and nothing more, may therefore be detrimental to effective communication. However, this form of cultural information is likely to encourage essentialism of clients and cultures,<sup>142</sup> as well as an overreliance on the interpreter as a cultural informant. It may be possible, for example, that Mae does feel shame, but not because of anything culturally Burmese. Rather, it may be owing to the cultural meaning produced by patriarchy. If this were the case, then the appropriate cultural frame might be one of transnational male dominance, to which the reverend might have no claim of expertise. As long as the interpreter is the primary and untested source of cultural information, however, as is frequently the case, such distortions are likely to occur.<sup>143</sup>

### III. ROLE TRANSFORMATION AND CHALLENGES TO CLIENT-CENTEREDNESS

While the semantic complexity and cultural embeddedness of language can complicate effective communication, the involvement of interpreters challenges the very nature and structure of the traditionally conceived lawyer-client relationship, as well as the core values of the client-centered model of lawyering. The indispensability of interpreters when lawyering across language difference disrupts the roles of lawyers and clients and ultimately transforms the relationship. If left unaddressed, this transformation may jeopardize client autonomy and client voice. The rote application of client-centered methodologies is insufficient to meet these challenges, pointing up the inadequacies of the model, both when language difference is involved and when it is not. Thus, I argue that the role disruptions involved

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142. Angela Harris defines gender essentialism as "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990). Essentialism's false promise of universalism recurs with regard to other identity characteristics as well.

143. See Bryant, *supra* note 12, at 86–87 (suggesting conversations with clients as a means of testing "culture-specific information" and thereby avoiding the essentialist trap).

when lawyering across language difference call for a recasting of the traditional, closed-system lawyer-client relationship as a more porous relationship that embraces the active role of third parties in the lawyering process.

Many of the challenges I discuss here are posed by the involvement of virtually any interpreter, paid or volunteer, trained or untrained. However, they are particularly acute when the interpreters are volunteers. I focus my attention on volunteer, nonprofessional interpreters for several reasons. First, even assuming that poverty lawyers were to have unlimited resources to pay for professional interpreters,<sup>144</sup> most professional interpreters, with only rare exceptions, lack any training on working with lawyers and clients in the context of the lawyer-client relationship. To the extent that training regimes exist for legal interpreting (as opposed to the far more robust field of health interpreting<sup>145</sup>), they are almost entirely committed to interpretation in the courtroom.<sup>146</sup> Second, the pool of such interpreters is vastly

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144. I use the term "professional interpreter" to designate individuals who have been specifically trained in the techniques and ethics of interpretation, and who rely upon interpretation as a significant source of livelihood. The term "professional" connotes membership in an organization, subscription to particular rules of practice, and self-governance by other members of the same profession. See Holly Mikkelsen, *The Professionalization of Community Interpreting*, available at <http://acebo.com/papers/profslzn.htm> (defining "profession" as a specialized occupation that is well established and retains substantial control over the substance of its work, and discussing the challenges community interpreters face in professionalizing); see also *id.* at 2.3 (citing Joseph Tseng, *Interpreting as an Emerging Profession in Taiwan—A Sociological Model* (1992) (unpublished Master's thesis, Fu Jen Catholic University, Taiwan)) (observing that there are four different phases before an occupation can achieve professional status, and that market disorder, a phenomenon that is present in the field of interpreting today, is the first phase before credentialing takes place). While numerous interpreter associations do exist in the United States, there is a wide range of practice among them, and further professionalization is a stated goal for many. See, e.g., National Association for Interpretation, *Mission, Vision, and Core Values*, [http://www.interpnet.com/about\\_nai/mission.shtml](http://www.interpnet.com/about_nai/mission.shtml) (last visited Jan. 21, 2007) (stating that one of the organization's many goals is to "[s]trengthen and support academic programs" and "[p]rovide opportunities for professional development of individual members"); American Translators Association, *About the American Translators Association (ATA)*, <http://www.atanet.org/aboutus/index.php> (last visited Jan. 17, 2007) (listing its primary goal as to "advance the translation and interpreting professions"); National Association of Judiciary Interpreters and Translators, *About NAJIT*, [http://www.najit.org/about\\_najit.html](http://www.najit.org/about_najit.html) (last visited Jan. 17, 2007) (describing itself as a professional association and listing that one of its main objectives is "[t]o promote professional standards of performance and integrity").

145. Several organizations and initiatives across the country have contributed to the development of sophisticated training materials in the field of health interpreting, among them: the National Health Law Project, see [www.healthlaw.org](http://www.healthlaw.org) (last visited Feb. 5, 2007), DiversityRx.com, a joint project of the National Conference of State Legislatures, Resources for Cross Cultural Health Care, and the Henry J. Kaiser Family Foundation, see <http://www.diversityrx.com> (last visited Feb. 5, 2007), and Cross Cultural Communications, see <http://www.cultureandlanguage.net> (last visited Feb. 5, 2007).

146. Noncourtroom legal interpreting often falls into the category of "community interpreting," discussed at length in Part IV. However, community interpreter training programs

inadequate to meet current needs, as evident from the shortage of qualified courtroom interpreters throughout the country.<sup>147</sup> Of course, poverty lawyers lack even the resources of courts (which are themselves underresourced), and therefore frequently draw upon a range of informal interpreting resources, including bilingual staff members,<sup>148</sup> volunteers from community-based organizations, and friends, acquaintances, or family members of clients. However, I focus on such volunteer interpreters not merely because of the frequency with which they are used in poverty law settings, but because I wish to argue that the involvement of certain volunteers, known as “community interpreters,” presents an important opportunity for expanding our normative vision of lawyering. As discussed in greater detail in Part IV, I see the potential for robust collaboration among lawyers, clients, and community interpreters as the most effective way of providing client-centered representation to LEP clients. Before taking up that topic, in this Part, I explore the impact of interpreters on the attorney-client relationship and on traditional notions of client-centeredness.

#### A. The Traditional Lawyer-Client Dyad and the Refinements of Client-Centeredness

The traditional model of lawyering presumes a single lawyer and a single client. The Model Rules, as well as the Model Code of Professional Responsibility, are both premised upon this conception of a lawyer-client dyad. Basic lawyer duties, such as the duty of zealous representation,<sup>149</sup> the duty of confidentiality,<sup>150</sup> the duty to keep a client informed of developments in the case,<sup>151</sup> and the duty of loyalty,<sup>152</sup> are paradigmatically held by one lawyer and owed to one client. There is an inherent logic to this elemental conception, as lawyer duties are most readily satisfied within a

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typically focus on health, and, to a lesser extent social services, touching only tangentially on legal interpreting outside the courtroom. See, e.g., Cross-Cultural Communications, The Community Interpreter: Professional Training for Bilingual Staff and Community Interpreters, available at <http://www.cultureandlanguage.net/CIC.doc> (last visited Feb. 5, 2007). For discussion of an exceptional program created by the Asian Pacific American Legal Resource Center, see *infra* note 231.

147. See, e.g., CAL. COMM'N ON ACCESS TO JUSTICE, *supra* note 12, at 19–22 (describing the growing need for and declining availability of qualified courtroom interpreters).

148. I distinguish bilingual staff members—whose work responsibilities may include but are not primarily devoted to interpretation—from staff interpreters. In either case, the pool of bilingual staff in most poverty law settings is also inadequate.

149. See MODEL RULES, *supra* note 60, Preamble, para. 2.

150. *Id.* at R. 1.6.

151. *Id.* at R. 1.4.

152. See *id.* at Rs. 1.6–1.9 (establishing lawyer duty to avoid conflicts of interest).

one-lawyer, one-client model. This should come as no surprise, given that many of the lawyer's basic duties are intended to construct the lawyer-client relationship as a trust relationship,<sup>153</sup> and indeed, one of the most sanctified trust relationships we have.<sup>154</sup> That trust is more easily established between two people than between three or more is intuitive.<sup>155</sup> The traditionally conceived relationship, then, consists of a line segment in which the lawyer and client form each of the terminal points, with a series of duties spanning between them.

This is not to say that the traditional conception of the lawyer-client relationship cannot accommodate more than one client or more than one lawyer. In fact, the ethical rules contemplate each of these scenarios, in the form of multiple client representation<sup>156</sup> and co-counseling arrangements.<sup>157</sup> Even these, however, are extrapolations from a set of norms that essentially contemplate application to a one-lawyer, one-client relationship. The complications that multiple client representation and co-counseling arrangements introduce into the lawyer-client relationship<sup>158</sup> are useful to an analysis of the involvement of interpreters. At base, however, the process of building trust with a client is altered by the interjection of a third person. Moreover, unlike group representation, in which the rules of ethics necessitate that all of the clients share at least some set of interests, or co-counseling, in which all of the lawyers are required to share the same set of duties, interpreters enter the lawyer-client context free of any such constraints. While an ethics of interpretation exists within the profession of interpretation,<sup>159</sup> no rule of legal ethics governs the duties of the interpreter.<sup>160</sup>

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153. See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 127-52 (2d ed. 2002).

154. *Id.* at 127 ("Trust between lawyer and client is . . . the 'cornerstone of the adversary system and effective assistance of counsel,' and fidelity to that trust is 'the glory of our profession.'") (citations omitted).

155. This is particularly true insofar as trust is established through assurances of confidentiality. See *id.* at 128-32 (discussing the tradition of client confidentiality and its relation to lawyer-client trust).

156. See MODEL RULES, *supra* note 60, at R. 1.7.

157. *Id.* at R. 1.5(e) (governing the division of fees between lawyers who are not in the same firm).

158. See Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992).

159. See McCaffrey, *supra* note 12, at 377.

160. Indeed, because the rules of ethics, as adopted by the bar associations of various jurisdictions, only govern the conduct of lawyers, no ethical rule *could* address the duties of the interpreter. The rules could establish duties relating to lawyers' relationships with interpreters, but no such rule currently exists.



Indeed, it seems safe to conclude that the rules of ethics never contemplated the presence of an interpreter in the lawyering process.<sup>161</sup>

Client-centeredness developed as an intellectual and ethical intervention in the discourse on lawyering, and presents an enriched normative vision of the lawyer-client relationship.<sup>162</sup> Client-centeredness first offers a critique of traditional lawyering practice, focusing in particular on the location and role of power in the lawyer-client relationship. Specifically, client-centeredness recognizes the tendency of lawyers to undervalue or disregard the decisionmaking abilities of their clients, to substitute their judgment for that of their clients, and to construe clients' cases in overly narrow, legal terms, without regard to the nonlegal dimensions of clients' cases and lives.<sup>163</sup> More broadly, the client-centered critique exposes the dangers

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161. As discussed earlier, see *supra* Part I.C, one can derive from the ethical rules some guidance for how to lawyer responsibly across language difference, but it does not appear that the drafters of the rules ever contemplated this situation.

162. As Kate Kruse has recently demonstrated, the client-centered approach to lawyering is in fact a plural set of practices and underlying, sometimes competing values that have developed over the past three decades. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 371 (2006); see also Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 504 (1990) ("Advocates for the client-centered model have made a number of arguments, based variously on philosophical, political, psychological, ethical and utilitarian grounds, for their model's superiority over the traditional approach."); DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 51 (2002) (noting the evolution of the concept of client-centeredness and that "the meaning of the term . . . has changed over time"). While its rationales, meanings, and values remain deeply contested, client-centeredness is the predominant model for lawyering as taught in clinical programs throughout the country. Kruse, *supra*, at 370-72; see also Dinerstein, *supra*, at 504 (noting "the extraordinary influence of the [client-centered] model within clinical education circles"). Conceived by David Binder and Susan Price in their groundbreaking text, *Legal Interviewing and Counseling: A Client-Centered Approach*, client-centeredness emerged as an alternative theory of practice to the dominant approach to lawyering. DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977). In contrast to the traditional approach, client-centeredness sought to redefine both the role of the lawyer and the scope of representation. See CHAVKIN, *supra*, at 51-52 (defining client-centeredness in terms of its effect on the focus and process of legal representation). As Kruse describes, client-centeredness established four principles for lawyering:

(1) [I]t draws attention to the critical importance of non-legal aspects of a client's situation; (2) it cabins the lawyer's role in the representation within limitations set by a sharply circumscribed view of the lawyer's professional expertise; (3) it insists on the primacy of client decision-making; and (4) it places a high value on lawyers' understanding their clients' perspectives, emotions and values.

Kruse, *supra*, at 377.

163. See, e.g., DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 4 (2d ed. 2004) ("One traditional image of lawyers portrays them as professionals who control the choices that clients make by convincing clients as to what is in their best interests . . . . [T]he starting point of client-centeredness is that respect for clients' autonomy means that decisions about solutions to clients' legal problems are for clients to make."); STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 16 (2d ed. 2003); CHAVKIN, *supra* note 162, at 51.

of lawyerly overbearing<sup>164</sup> and the damage that it does to client autonomy.<sup>165</sup> This critique identifies the traditional lawyer-client relationship as an unequal one in which the lawyer's role is central and the client's is marginal. The lawyer's role consists of a series of well-defined professional duties, powers, and abilities for general application to a population of fungible clients. In short, the lawyer holds and exercises disproportionate power.

Informed by this critique, client-centeredness sets out an alternative model of lawyering that seeks to level the relationship. The model has both political and practical dimensions, as it attempts to correct for lawyerly overbearing through the use of various techniques that respect and enhance client autonomy.<sup>166</sup> These include close listening strategies, such as the deliberate use of open-ended questions,<sup>167</sup> active listening,<sup>168</sup> expressing empathy,<sup>169</sup> attention to the use of legal jargon,<sup>170</sup> and the structuring of client interviews and counseling sessions so as to privilege client goal identification.<sup>171</sup> These techniques help to make explicit a previously unmarked set of assumptions about lawyers and clients: that lawyers know better than clients what the nature of their problem is; that client problems should be understood in legal terms alone; and that lawyers alone possess relevant expertise. Thus, the client-centered model supplants an invisible, unexamined, and frequently subordinating code of constructing client meaning with a framework for representation that acknowledges and attempts to rectify the power disparities of the traditional lawyer-client relationship.<sup>172</sup>

164. See Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 108 (1977) (describing lawyer dominance in the lawyer-client relationship).

165. See Dinerstein, *supra* note 162, at 584 (noting that client-centeredness "is supported most clearly by the importance we place on individual autonomy"); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 759 (1987) ("Let me begin with the proposition that lawyers should seek to foster the autonomy of their clients within the law."); Kruse, *supra* note 162, at 399-414 (critiquing client-centeredness for failing to define clearly what is meant by client autonomy).

166. See, e.g., BINDER, ET AL., *supra* note 163, at 27-31.

167. See *id.* at 47 (noting that open-ended questions allow clients space to freely communicate their feelings in their own words).

168. See *id.* at 48 (describing "active listening," whereby the lawyer's response to a client's statement conveys her grasp of the statement, as a way of demonstrating to clients that their message is understood).

169. See *id.* at 27, 55 (defining empathic understanding).

170. See CHAVKIN, *supra* note 162, at 118 (highlighting the importance of making information accessible to clients through careful choice of language that clients will understand).

171. See BINDER ET AL., *supra* note 163, at 108-09, 302-03 (identifying the importance of goal identification in client interviews and counseling sessions); KRIEGER & NEUMANN, *supra* note 163, at 85, 231-32 (same).

172. See Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1739 (1993) (noting that traditional legal education perpetuates the invisibility of clients, and discussing the role of clinical legal education in combating this tendency).

In this way, client-centered lawyering techniques are tools of construction of client meaning, not unlike the tools of construction applied to substantive law.<sup>173</sup> This reflects an implicit understanding that, like law itself, the lawyering process is inherently interpretive. Understanding a client's problems, identifying the client's goals, and framing legal claims are all deeply textured and contingent processes governed by the competing grammars of clients, lawyers, and adjudicators.

While client-centeredness has broad applicability across a range of lawyering contexts, and was conceived with such breadth in mind,<sup>174</sup> it has special application in the context of poverty lawyering. Client-centeredness necessitates careful consideration of the differences in race, gender, class, age, sexual orientation, immigration status, educational background, professional privilege, and language, among other characteristics, that inform the power dynamic between an individual lawyer and client.<sup>175</sup> Because these differences are often more pronounced between poverty lawyers and their clients, the attentiveness to them that client-centeredness demands is especially important.

By necessity, the close attention paid by the lawyer to the client requires of the lawyer a close self-scrutiny as well, so as to ensure proper forbearance and strategic engagement that further the values of client autonomy. Thus, the ultimate goal of client-centeredness—a “co-eminent” relationship<sup>176</sup>—is pursued through a methodology of critical attention to both lawyer and client roles. The client-centered approach therefore helps to endow lawyers and clients with individualized qualities, rather than the generic, categorical ones ascribed by the traditional model of lawyering. Such appreciation of the respective subject positions of the lawyer and

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173. See *supra* note 101.

174. See, e.g., BINDER & PRICE, *supra* note 162, at 147 (“Before turning to the technical matter of how the lawyer conducts the counseling process, one further issue must be addressed. The issue, in our judgment, is critical to all of counseling. It concerns who, between the lawyer and the client, should make the final decision.”); DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS*, at xxi (1991) (“[I]n an effort to write a book that will be useful in nearly all attorney-client relationships, we examine counseling principles and techniques in both litigation and transactional contexts.”).

175. See BINDER ET AL., *supra* note 163, at 36 (noting how the language and educational background of a client may inform a lawyer's conduct); KRIEGER & NEUMANN, *supra* note 163, at 49 (counseling attention to lawyer and client ethnicity, race, gender, age, locality or geography, religion, nationality or immigrant status, disability, sexual orientation, income, education, and occupation). Curiously, despite the extensive list of identity characteristics mentioned by Stefan Krieger and Richard Neumann in their textbook, language is not among them.

176. LÓPEZ, *supra* note 86, at 53–54; see also Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 *BUFF. L. REV.* 71, 76–79 (1996) (articulating a vision of “equality and collaboration” between lawyers and clients).

the client significantly enriches the traditional model by recognizing each lawyering context as unique, contingent, and demanding of individualized attention. As such, one of the great virtues of the client-centered approach is its flexibility. The individual evaluation that client-centeredness demands of each lawyer-client relationship in light of the characteristics of the specific lawyer and client enables a broader range of lawyer-client relationships than contemplated by the traditional lawyering model.

Client-centeredness therefore represents a major advancement in the project of achieving lawyer-client understanding, in ways that benefit LEP and non-LEP clients alike, and many of its insights are directly relevant to the project of lawyering across language difference. But the introduction of an interpreter forces a fundamental restructuring of the lawyer-client relationship, and, in so doing, threatens the efficacy of client-centered techniques.

B. The Introduction of the Interpreter, Role Confusion,  
and Transformation of the Lawyer-Client Relationship

The interpreter does not fit comfortably within the structure of even a client-centered lawyer-client relationship. Like the traditional model, the client-centered relationship is still linear, albeit more level. The lawyer's appreciation of her own subject position and that of the client are enhanced, but the fundamental structure of one lawyer, one client remains the same. The strength of the dyadic model as a cultural feature of lawyering encourages lawyers to imagine the role of the interpreter as merely a conduit of information—a piece of technology, such as a telephone—that transmits data from one point to another,<sup>177</sup> achieving “perfect identity” between one language and the other.<sup>178</sup> But the culturally informed, deeply textured nature of language, combined with the interpersonal consequences of the interpreter's presence, belie such a mechanical understanding of how

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177. BERK-SELIGSON, *supra* note 12, at 2 (noting the conventional view of courtroom interpreters as “nothing short of a machine” converting one language into another, but arguing that “the output of that machine is by no means perfect, nor can it ever be, because of the problems inherent in the interpreting process”).

178. See Ruth Morris, *The Moral Dilemmas of Court Interpreting*, in 1 THE TRANSLATOR: STUDIES IN INTERCULTURAL COMMUNICATION 25, 26, 29 (1995) (noting that lawyers and judges expect interpreters to “achiev[e] perfect identity . . . between the source and target texts or utterances,” and “not to interpret—this being an activity which only lawyers are to perform, but to *translate*—a term which is defined, sometimes expressly and sometimes by implication, as rendering the speaker's words verbatim”); Laster, *supra* note 9, at 18 (noting “a lingering preference for literalism”).

interpreters operate, and expose the fiction of verbatim interpretation.<sup>179</sup> Because interpreters do not merely transmit information, but mediate it as well, the personhood of the interpreter—her own subject position and associated biases and interests—cannot be removed from the process.

Because the interpreter brings her own subjectivity to the enterprise, the singular relationship between lawyer and client is transformed into three distinct relationships: lawyer and interpreter, interpreter and client, and lawyer and client. We might envision these relationships in a triangular formation—a lawyer-interpreter-client triad—that both multiplies and refracts the client-centered concern for power as between lawyer and client. It multiplies this concern in that we must now attend to power not only between lawyer and client, but also between lawyer and interpreter and between client and interpreter. It refracts the concern because nearly all communication between the lawyer and client is necessarily mediated by the interpreter. In this regard, client-centeredness is a useful point of departure for an analysis of the complex nature of the relationships between and among lawyer, client, and interpreter.

For example, the principles of client-centeredness prove useful in selecting an appropriate interpreter. Just as client-centeredness encourages attention to gender as one potential dimension of power disparity in the lawyer-client relationship, a similar attentiveness to the gender dynamic as between client and interpreter may also be appropriate. In our clinic, many female clients who have been victims of sexual violence express a strong preference for a female interpreter, and that preference is generally honored. This is not merely a matter of subjective client preference, but a recognition of how gender subordination has figured into the client's life and may continue to animate and inhibit the lawyer-client relationship.

While such attention to power disparities is highly productive, the conventional tools of client-centeredness do not address the full complexity of lawyering across language difference. In particular, they are inadequate to the task of managing the role complications that result when an interpreter is involved. Unlike in the traditional lawyer-client relationship, in which the regulatory structure of the ethical rules renders lawyer and client roles relatively well-defined and static, the role of the interpreter is

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179. See Holly Mikkelsen, Toward a Redefinition of the Role of the Court Interpreter, <http://acebo.com/papers/rolintrp.htm> ("Anyone who is at all familiar with translation theory knows . . . that 'a truly verbatim interpretation is literally impossible. It is, therefore, the interpreter's task to mediate between . . . two extremes: the verbatim requirement of the legal record and the need to convey a meaningful message in the [target language].'" (quoting ROSEANN DUEÑAS GONZÁLEZ ET AL., *supra* note 91, at 17)); Mikkelsen, *supra* note 123.

often diffuse and dynamic. Interposed between the client and the lawyer, interpreters often assume characteristics of each. Thus, the interpreter may end up answering the lawyer's question, thereby displacing the client and compromising her autonomy, or asking the client questions of his own, thereby displacing the lawyer and diminishing her control. Even if the interpreter's conduct does not fully displace the lawyer or the client, it may situate the interpreter closer to one or the other, either in function or in perception. Moreover, the interpreter's position with respect to the lawyer and the client may vary across time and according to context. Such role confusion is unsurprising in light of the lack of clear guidance on the use of interpreters in the lawyering context, and is especially likely to occur with untrained interpreters.

Just as client-centeredness seeks to mitigate the effects of power disparities between lawyers and clients, as applied to the multiple relationships of LEP representation, it counsels corrections for interpreter distortions as well. Angela McCaffrey has detailed a series of corrective measures that lawyers can take, including how to identify an appropriate interpreter, prepare the interpreter for a client interview, and frame appropriate questions for the client.<sup>180</sup> However, approaches such as these leave unanswered the fundamental question of what role the interpreter should play. Specifically, the question of how a lawyer may construct a perceptual frame that is shared by the client when their relationship is mediated through the subjective experience of another remains unresolved.

Any interpreter role other than a technological one is bound to agitate many lawyers, precisely because the dyadic one-lawyer, one-client norm is so strongly established within the profession. By the traditional account, the lawyer-client relationship does not accommodate the personhood of the interpreter, thus fueling the lawyerly impulse to confine and control the interpreter. The inevitable expression of the interpreter's personhood is likely to be viewed as an unwelcome intrusion, and the lawyer may feel like she is engaged in a power struggle with an unruly subordinate.<sup>181</sup> While the lawyer's desire for control is, in the abstract, understandable, it is unrealistic in light of the linguistic demands of interpretation. Rather than attempt to repudiate the presence of the interpreter, it would be

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180. McCaffrey, *supra* note 12, at 373–86.

181. In my own practice and in the law clinic setting, in legal and nonlegal environments, I have witnessed countless instances in which a seemingly wayward interpreter has been admonished to “just translate exactly what I say.” On more than one occasion, I was the one making the admonition. More often than not, the admonition is repeated, with steadily increasing exasperation at the interpreter's noncompliance.

more productive to the ultimate goals of representation—including the client-centered goal of enhancing client autonomy—to embrace the complexity that the involvement of interpreters necessarily brings.

In everyday practice, interpreters play multiple and conflicting roles. Given what interpreters are expected to deliver, this is understandable, and potentially productive. At base, we expect interpreters to translate what the lawyer says to the client, and what the client says to the lawyer. But even a cursory examination of common synonyms for “translate” reveals the impossibility of the task. On the one hand, the interpreter is expected to engage in objective and determinate activities: to translate is to “ascertain,” “determine,” “find,” or “find out.”<sup>182</sup> On the other, the interpreter’s project is avowedly subjective and indeterminate. Thus, she is to “reword,” “rephrase,” or “paraphrase.”<sup>183</sup> These latter activities necessarily implicate the specific life experiences, biases, and assumptions of the interpreter. In this regard, the work of the interpreter in rendering the words of the lawyer and of the client is not unlike the work of the lawyer in rendering the stories of clients in the vernacular of legally cognizable claims.<sup>184</sup>

Once we accept the humanity of the interpreter, her agency, and her subjectivity, we can identify several roles that interpreters frequently play. I suggest here a typology of three common roles that may be played to varying degrees, at various times, and in varying combinations. These are the interpreter as guardian, the interpreter as advocate, and the interpreter as linguistic and cultural authority.<sup>185</sup> Each of these constructs is inexact and problematic, but I suggest them for both their descriptive qualities and their normative potential to meet the client-centered goals of enhancing client autonomy and client voice. While at first glance unrecognizable in the vernacular of the lawyer-client relationship, these roles can be

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182. Thinkmap Visual Thesaurus, <http://www.visualthesaurus.com> (last visited Feb. 3, 2007) (searching for “translate”).

183. *Id.*

184. The metaphor of lawyers as translators is a popular one, perhaps best developed by Clark Cunningham. See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1299 (1992) (using the metaphor to suggest “the ways lawyers change the meanings of their clients’ stories”); see also WHITE, *supra* note 99; Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1, 9–14 (1984) (arguing that translation is an essential aspect of any effort to help another solve a problem).

185. The typology I introduce here resembles the self-conception that many interpreters hold. For example, a survey of student-interpreters and interpreters seeking national accreditation in Australia revealed four roles the interpreters identified as important to their profession: language expert, aid to community professionals, advocate for the non-English speaker, and cultural bridge. Laster, *supra* note 9, at 20 (citing to GUTHRIE, P. (1986) “Interpreting and Translating: A Profile of NAATI Candidates,” A Report Presented to the State Assessment Panel for Translators and Interpreters, Victoria, Melbourne).

assimilated, tentatively and perhaps uncomfortably, into the more legible categories of co-client, co-counsel, and expert, respectively. This "translation" into the traditional vocabulary of lawyering helps to render the role of the interpreter more intelligible, and to provide lawyers with an analytic framework to engage with interpreters in meaningful and productive ways.

1. Interpreter as Guardian/Interpreter as Co-client

Consider the following scenario: In his limited English, an Arabic-speaking inmate has demanded to see the prison superintendent. The prison has no interpreter available. However, an Arabic interpreter working with a lawyer representing another inmate happens to be at the prison, and agrees to assist. Standing outside the inmate's cell, the interpreter listens as the inmate hurls invective at the superintendent, swearing repeatedly at him. Rather than translating, the interpreter remains silent. When the inmate demands that the interpreter translate what he is saying, the interpreter refuses, saying to the inmate in Arabic that it will only get the inmate in trouble.

Here, the interpreter's refusal to translate extinguishes the inmate's agency and replaces it with his own. This substitution of silence for the inmate's words is a variation on the far more common phenomenon of interpreters answering questions that are posed to a client without translating the question for the client or affording her the opportunity to answer the question herself. In both instances, the interpreter presumes to speak (or not speak) for the client, and may do so out of a sense of what is best for the client. In this regard, the interpreter acts as a kind of guardian for the client, protecting her interests, on the assumption that the client is either partially or fully incapacitated and therefore unable to do so herself. Like a guardian, the interpreter is a constant presence in the lawyer-client relationship.

A similar phenomenon can be seen in the introductory vignette, when the reverend seeks to block the student-lawyers' questions regarding sexual violence, stating that "[i]t is very difficult for her to answer." In the case on which this scenario is based, the students were understandably dismayed by this behavior. They viewed the proper role of the interpreter as an enabler rather than a gatekeeper. In contrast, the reverend saw himself not merely as an instrument for the students' use, but as an independent actor, with his own agency and his own relationship with Mae. In fact, the reverend's relationship with Mae preceded the students' first client meeting, and extended beyond her legal issues to encompass her



spiritual life as well as her immediate material needs. Older, male, and in a position of authority within the local community, the reverend's intervention was undoubtedly nettlesome to the student-lawyers, but was also avowedly protective.

Of course, the interpreter-as-guardian construct deserves vigorous critique for its infantilization and paternalism. Moreover, not only does such a role subordinate the client, but the interpreter may have his own agenda for the client's case: As a leader in the local Burmese community, the reverend may have a concern for the reputation of the community, or of Burmese "culture," which is in tension with full disclosure of the sexual violence experienced by Mae. At the same time, the tendency of some interpreters to embrace the role of self-appointed guardian may reflect as much about the interpreters' perceptions of the lawyers as it does about their views toward the client. For example, the reverend's intervention reflects a skepticism, if not outright mistrust, of the abilities of the students. It also may reflect a rejection of the special status traditionally conferred on lawyer-client relationships, and a concomitant elevation of the reverend's own relationship—as pastor, as provider, and as elder—with Mae.

I intend the interpreter-as-guardian construct as descriptive rather than normative, for it ultimately entails too great a displacement of the client's autonomy. However, it may be productive to consider tentatively the interpreter as a co-client. I do not mean to suggest that lawyers owe duties to the interpreter. But in a less doctrinal sense, the trust relationship that lawyers strive for with their clients is not unlike that which may be necessary with an interpreter. This is especially true of community interpreters who, by virtue of their relationships with clients outside of the interview room, may enter the lawyer-client relationship with greater credibility than the lawyers themselves.<sup>186</sup> At times, a client may, as an exercise of agency, choose for the interpreter to speak for her. Rather than assume that the interpreter's and the client's interests are aligned, we might recognize that the client may choose to align with the interpreter, either because of a preexisting relationship, or because of some real or perceived basis for interpreter-client trust. Thus, the

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186. It is also frequently the case that clients come to depend upon interpreters they meet through their lawyers for the first time. In our International Human Rights Law Clinic, for example, clients often develop relationships with the clinic's volunteer interpreters that endure beyond the life of the client's legal case.

lawyer-interpreter relationship is a trust relationship on which the lawyer-client relationship frequently depends.<sup>187</sup>

## 2. Interpreter as Advocate/Interpreter as Co-counsel

Rather than merely speaking for clients, interpreters often advocate for them. With interpreters such as Reverend Sen, much of this advocacy takes place outside the presence of the lawyer—for example, when the interpreter helps the client obtain housing or intervenes with a client's social worker. Because the reverend is a community leader first, and an interpreter only incidentally, his role within the lawyer-client relationship is not easily contained. It is therefore not surprising that his advocacy on behalf of Mae extends to the student-lawyers. For instance, when the students ask certain questions of Mae, the reverend refuses to translate them until they first provide a rationale for the inquiries. While on the one hand consistent with the guardian role discussed previously, it can also be viewed as a form of information bargaining in which negotiating lawyers frequently engage.<sup>188</sup> The reverend's inquiries are designed not merely to protect, but to gain access to legal knowledge (for himself and not for the client) that is the typical province of lawyers. This reflects a larger ambition on the part of the reverend to involve himself in the substantive decisionmaking of how to advance Mae's asylum claim, and is informed by his past experience assisting others in his community in successfully obtaining asylum. Indeed, the reverend's experience with the asylum process far exceeds that of the student-lawyers.

It is a small step from interpreter as advocate to interpreter as co-counsel, and thus, a hugely disconcerting one for many lawyers. Certainly, this formulation is the most threatening to the lawyer's traditional sense

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187. Alternatively, we might think of the interpreter as a "next friend." Next friends serve as plaintiffs, and purport to represent their interests, when the plaintiff is physically or mentally unable to do so herself. See *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) (outlining the requirements of the next friend doctrine). Ultimately, however, I believe that the co-client analogy is more apt, as it suggests a contemporaneous relationship based on ongoing communication between the interpreter and the client, whereas next friend status typically presumes that such communication is impossible. My thanks to Vanessa Lavelly for suggesting this insight.

188. See, e.g., JOSEPH D. HARBAUGH & BARBARA J. BRITZKE, *A PRIMER ON NEGOTIATION: CONTROLLING INFORMATION AND MAKING AND MEETING OFFERS* (1997), reprinted in *BRIDGE THE GAP PROGRAM MATERIALS*, at 261, 274 (PLI's MCLE, New York Practice Skills, Course Handbook Series No. F-31, 1998) ("The assessment phase of negotiation involves the information bargaining that marks every legal or business negotiation. It is here that the parties get, give and guard the information that is important to an understanding of the objects of the negotiation and interests of the parties involved.").

of professional identity, as it challenges the lawyer's claim to substantive expertise as well as her ability to control the dynamic of the lawyer-client relationship. While this may seem consistent with the project of client-centeredness, which seeks to disrupt lawyer claims to exclusivity of expertise and tendencies toward overbearing,<sup>189</sup> it threatens to dissolve the lawyer's role entirely.

And yet, in the face of this blurring of roles, the co-counsel formulation provides an opportunity for conscious and deliberate restructuring of the lawyer's relationship with the interpreter. Once we accept the insight of client-centeredness that lawyers must explore both legal and nonlegal dimensions of clients' problems,<sup>190</sup> the active involvement of the interpreter in facilitating trust, providing information, and perhaps even strategizing with the lawyer and the client, may seem more palatable, and even desirable. Lawyers may wish to define primary areas of responsibility and reassert claims to specific areas of expertise. However, the collaborative, co-counsel model suggests that the lawyer, client, and interpreter relationships maintain a level of fluidity, permit debate and contestation, and recognize that all three parties may bring expertise to the table.

Even if one is not comfortable with an expansive co-counsel model, there is a degree of collaboration between lawyers and interpreters that is often essential, even if unrecognized. This is particularly true with regard to the establishment of client trust. In the traditional lawyer-client relationship, the establishment and the building of trust are fundamental, and underwrite much of the conduct of the relationship. This formation of trust is also traditionally within the sole province of the lawyer. Core ethical obligations, such as the duty of confidentiality, are designed expressly to facilitate the establishment of client trust. However, where an interpreter is involved, trust must be established with everyone in the room. This implicates the interpreter in two respects. First, the interpreter is one party with whom trust must be established, with respect to the client and with respect to the lawyer. Second, just as the interpreter mediates verbal communication between the lawyer and the client, the interpreter also mediates the trust relationship between the lawyer and the client. In both enterprises, the personhood of the interpreter figures prominently.

If we consider the earlier example of a client who expresses a preference for a female interpreter, we can understand the honoring of such a preference in the first instance as a matter of trust as between

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189. See *supra* notes 162–164 and accompanying text.

190. See *supra* notes 162–164 and accompanying text.

client and interpreter. But trust as between the lawyer and client is derivative of client trust with the interpreter. Thus, to a large degree, trust building, which is a central lawyer concern in the traditional lawyer-client relationship, is implicitly contracted out to the interpreter.<sup>191</sup>

Where client trust depends upon trust between the client and the interpreter, the interpreter is endowed with considerable power, which necessarily detracts from that of the lawyer. There is, then, a sharing with the interpreter of what in a traditional lawyer-client relationship would be viewed as quintessentially lawyerly duties. Put more simply, the interpreter—like co-counsel—does part of the lawyer's job.

### 3. Interpreter as Linguistic and Cultural Authority/Interpreter as Expert

Once the linguistic complexity of interpretation is acknowledged, culture—a perceptual and experiential frame within which language derives meaning—becomes an essential element of the interpretive process. Interpreters are frequently described as cultural brokers who, in addition to rendering semantic meaning, provide information about the norms, practices, and beliefs the client is likely to espouse, so as to determine the meaning of the client's words.<sup>192</sup> But cultural brokering is fundamentally a process of ascription, based not on specific knowledge of the lived experience of the client, but instead upon the interpreter's understandings and assumptions of what that lived experience must be. As such, cultural brokering is fraught with the dangers of essentialism, as captured by Reverend Sen's admonition, "[l]et me explain to you about Burmese culture," the implication being that Burmese culture is unitary, static, and universal. And yet, while the integrity of the interpreter's cultural assumptions may be questionable, the social nature of language necessitates cultural information in order for communication to be meaningful, and forms an inescapable, often unmarked element of interpretation, even when an interpreter professes to be interpreting "only what the client says."<sup>193</sup>

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191. My thanks to my colleague Elliott Milstein for suggesting this formulation.

192. See, e.g., LARISSA CAIRNCROSS, CULTURAL INTERPRETER TRAINING MANUAL 7 (1989) (defining a "cultural interpreter" as "an active participant in a cross cultural/lingual interaction, assisting the social service personnel's understanding of the beliefs and practices of the client's culture, and assisting the client's understanding of the dominant culture, by providing cultural as well as linguistic links").

193. This recalls the earlier example regarding the competing interpretations of the terms "las etiquetas" and "los labels" in the Los Angeles garment industry. See *supra* note 135 and accompanying text.

In light of this central role of culture in the interpretive process, we can understand interpreters as enacting the role of experts in two respects: They possess (or purport to possess, or are assumed to possess) expertise both in the semantics, grammar, and diction of the languages involved, and with regard to culture.<sup>194</sup> Despite this putative expertise, lawyers rarely subject interpreters to the level of scrutiny regarding qualifications and reliability to which they would subject other types of experts.<sup>195</sup> Indeed, it is nearly inconceivable that untrained, untested, unpaid volunteers would be used as expert witnesses with the frequency with which such volunteers are used for legal interpretation.

Subjecting interpreters to more formal expert witness scrutiny can be productive in two regards. First, it forces lawyers to identify the specific expertise that the interpreter putatively possesses. Second, it demands a substantive evaluation of the bases for this putative expertise. The former consideration recognizes the multiple practices and knowledge forms that constitute interpretation, while the latter provides a mechanism for guarding against the dangers of essentialism.

Finally, the interpreter-as-expert model rejects the technological view of interpretation, and instead embraces its unavoidably testimonial dimension. As an expert, the interpreter is not only rendering information to and from the lawyer and the client, but also bringing independent knowledge, opinion, and judgment to the enterprise. To varying degrees, then, the interpreter provides opinion testimony, even in the confines of the client interview room.

### C. Disruption of Client-Centered Values and Methods

As the typology set out above suggests, lawyering across language difference poses fundamental challenges to both the values and the methodological dimensions of client-centeredness, because the methods for enacting these values assume an unmediated communication between the lawyer and the client. The intercession of an interpreter inescapably distorts the ability of the lawyer to control both what she hears and what she says, thereby frustrating many of the various techniques of client-centeredness, such as active listening or strategic deployment of open-ended versus closed questions. Listening more attentively is of little

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194. See Laster, *supra* note 9, at 20 (noting interpreter self-conception as both a language expert and a cultural bridge).

195. See generally THOMAS A. MAUET, TRIAL TECHNIQUES 309–13 (6th ed. 2002) (reviewing general considerations for selecting experts).

use if the voice heard is the interpreter's and not the client's, and the lawyer's use of open-ended questions is irrelevant if the interpreter substitutes closed questions instead. When the lawyer's chosen techniques are frustrated, so, too, are the underlying values of enhancing client autonomy and voice.

A few years ago, two students in our clinic were working to prepare an affidavit for their client, a monolingual Mandarin-speaking woman, in support of her application for asylum. In the course of a supervision meeting with them, the students told me they were concerned about capturing the client's voice, as they felt it important for the client to be able to tell her story in her own words. The students and I then engaged in a robust conversation<sup>196</sup> about the significance of client voice, its relation to autonomy, and its dignitary aspects.<sup>197</sup>

When the students submitted a draft of the affidavit for my review, I stared at it in confusion. Despite the supremely conscientious efforts the students had made to amplify their client's voice, the affidavit was written

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196. This included a discussion of the purpose and the legal requirements of an affidavit and principles of persuasive writing. It was a wide-ranging discussion that drew explicitly on the literatures of client-centeredness, feminist theory, and critical race theory, as well as the rules of evidence, the rules of the court, and general principles of civil procedure. It was, in my mind, the quintessential, if elusive, clinical experience in which students appreciated the value of legal theory, learned its relevance to practice, and came to understand the meaning of praxis. And yet, as the students' work product would ultimately demonstrate, our failure to address the role of the interpreter in this process proved fatal to the enterprise.

197. At base, creating space for client voice enables expression of the client's personhood—her self-conception, her aspirations, her life story as she wishes it to be told. Of course, life stories are often told in multiple and contradictory ways, depending upon the context and the audience, among other factors. The multiplicity of such accounts does not invalidate the authenticity of the experience, but instead affirms the autonomous act of self-description. For a striking example of this, see Lucie E. White, *Seeking " . . . The Faces of Otherness . . . ": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499, 1509–11 (1992) (recounting the contrasting narratives elicited from an African American woman during a formal, tape-recorded interview on experiences in the Head Start program and afterward, in informal, unrecorded conversation with White). As Lucie White has observed, "[w]ithout the opportunity to articulate a narrative of one's own life, 'there is a loss of identity and self-understanding that diminishes and victimizes us. Our feelings are never collected and ordered, and our sense of self contracts in the measure that we forget or avoid our stories.'" White, *supra* note 85, at 552 n.70 (quoting PAUL J. KING & DAVID O. WOODYARD, *THE JOURNEY TOWARDS FREEDOM* 22 (1982)). White thus embraces a sociolinguistic theory of narrative as constitutive of social identity. Leslie Dery elaborates:

Narratives are ontological. They inform our essence—how we represent ourselves to ourselves and to each other and how we know, understand, and make sense of the world around us. Narrativity is cyclical and regenerative. Our stories "are used to define who we are; this in turn is a precondition for knowing what to do . . . ."

Leslie V. Dery, *Hear My Voice: Reconfiguring the Right to Testify to Encompass the Defendant's Choice of Language*, 16 GEO. IMMIGR. L.J. 545, 549 (2002) (quoting MARGARET R. SOMERS & GLORIA D. GIBSON, *SOCIAL THEORY AND THE POLITICS OF IDENTITY* 61 (1994)). For additional discussion of the dignitary dimensions of voice, see *supra* Part I.D.

in a terse and disjointed style, using only basic vocabulary and featuring what appeared to be deliberate grammatical mistakes. It was difficult to square this rendering with what I knew of the client—namely, that she was a university professor who came from a family actively engaged in political opposition in China. Through conversation with the students, I learned that, despite their best efforts, the voice replicated in the affidavit was not the client's, but the interpreter's. The short sentences, simplified vocabulary, and grammatical lapses mirrored the translation the students had heard from their interpreter for hours on end over the course of their many client meetings. Thus, the students had unconsciously equated the diction, cadence, and grammar spoken by the interpreter with the inner voice—the “true” self—of the client. The client-centered goal of amplifying the client's voice was utterly defeated.

Confronted with this reality, the students raised a series of profound questions: How can we give our client voice when we can't truly hear what she's saying? How do we distinguish the words of the client from the words of the interpreter? Without understanding the language, how do we know who our client really is? These questions recall the integral link between language and personhood,<sup>198</sup> but also call into question the efficacy of traditional methods of client-centeredness when language difference is involved. No matter how closely the students listened, the only intelligible voice would be that of the interpreter. No matter how carefully they crafted their questions, those questions would be recrafted by the interpreter.

Once again, the traditionally conceived lawyer-client relationship relies upon the faulty assumption that uninterpreted lawyer-client communications are also unmediated. The background presumption to the set of questions articulated above is that none of those concerns would be present if the students and their client all spoke English. But as sociolinguistic study, as well as the daily practice of poverty lawyering tell us, dialect, diction, and cultural meaning separate even lawyers and clients who speak the same language, just as they do when lawyering across language difference.

Through perseverance and creativity, the students devised a better means of amplifying their client's voice. They provided her with a list of questions, translated into Chinese, and asked her to write narrative responses to them, which were then translated into English. The resulting affidavit was vastly improved from the first one. Of course, this technique assumes that the client is literate—an assumption that does not hold for many poor immigrants in the United States today. Nonetheless, it suggests

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198. See *supra* notes 81–82 and accompanying text.

once more the limitations of the interview room, and the opportunity that may exist when lawyers pursue alternative means to understanding their clients' goals, their selves, and their lives.

#### IV. RECONCEPTUALIZING THE ROLE OF THE INTERPRETER: COMMUNITY INTERPRETING

While the legal profession has been slow to recognize the complex and sometimes contradictory roles that interpreters are called upon to play, interpreters themselves have not. In recent years, a distinctive form of interpreting, known as "community interpreting," has emerged in practice as well as in the academic realm of interpreter studies.<sup>199</sup> As described here, community interpreters will be familiar to many poverty lawyers, even if they are not known by this name. While not without its problems, community interpreting suggests important opportunities for more effective lawyering across language difference, and, more broadly, argues in favor of a reconceptualized lawyer-client relationship.

The category of community interpreters is a broad and flexible one, and, while it defies precise definition,<sup>200</sup> the following examples illustrate many of the features that characterize community interpretation:

*Cheryl Yip is a community interpreter.* A first-generation, 26-year-old Chinese-American woman, Yip worked as a labor organizer with the Garment Worker Center,<sup>201</sup> a nonunion organizing center for exploited immigrant garment workers in Los Angeles. The Center is committed to multiethnic, multilingual organizing of Latina/o and Asian garment workers, and Yip, who speaks Spanish and Mandarin, was the Center's Asian Outreach Organizer. Her job was to organize workers around labor issues, and therefore required her to have the skills and knowledge of a union organizer, such as methodologies for community outreach, popular education, leadership development, and campaign strategy. Inevitably, she also served as an interpreter in a variety of different circumstances: between Mandarin- and Spanish-speaking workers; between Spanish-speaking workers and non-Spanish-speaking staff of the Center; between workers and college

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199. See generally FRANZ PÖCHHACKER, *INTRODUCING INTERPRETER STUDIES* (2004) (discussing the history and evolution of the field of interpreter studies).

200. See *infra* note 209 and accompanying text.

201. For more information on the Garment Worker Center, see JANICE FINE, *WORKER CENTERS: ORGANIZING WORKERS AT THE EDGE OF THE DREAM* 17, 49–50 (2006); Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 471–81 (2005–2006); Katie Quan, *Strategies for Garment Worker Empowerment in the Global Economy*, 10 U.C. DAVIS J. INT'L L. & POL'Y 27, 35–36 (2003); Garment Worker Center, <http://www.garmentworkercenter.org> (last visited Feb. 3, 2007).



students when the Center's workers spoke at on-campus events; between workers and government agencies; and between workers and lawyers. Thus, although her job existed within an English-speaking economy, by virtue of working within immigrant communities, she became an interpreter as well, despite her lack of formal training in interpretation. Because her job required her to be an advocate for the Center's members, she retained an advocate's perspective when interpreting. She was committed to the empowerment of the Center's workers, and saw it as her role to promote that empowerment, even when she was called upon to be an interpreter.<sup>202</sup>

*Indira Chakravorty is a community interpreter.* Formerly a case worker for Maitri, a nonprofit domestic violence agency serving the San Francisco Bay Area's South Asian community,<sup>203</sup> Chakravorty continues to volunteer as a Hindi and Bengali interpreter for former clients. As a case worker, she was responsible for facilitating her clients' appointments with social service agencies, immigration officials, and lawyers, and for advocating for her clients in those often difficult settings. Recently, Chakravorty assisted a former client for whom she had secured transitional housing. The client, a monolingual South Asian woman named Sonia,<sup>204</sup> was experiencing persistent conflict with her roommates, both African American women, and all parties involved were expressing the conflict in racially troubling ways. Indira served as an interpreter at a meeting convened by the transitional home's director, a meeting at which her former client was reticent. Formally trained in social work and without formal training in interpretation, Chakravorty brought to her interpreting work a social worker's ethos: to serve the needs of the client, to advance social justice, to respect and enhance the client's dignity, and to promote understanding.<sup>205</sup> Thus, in the face of her former client's silence, Chakravorty took it upon herself to explain Sonia's perspective as best she could, and to provide a cultural context for Sonia's experiences. At the same time, as a longtime resident of the United States whose life's work has been committed to racial justice, Chakravorty engaged in side

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202. This description of the Garment Worker Center is based on work I did from 1997 to 2001, while a staff attorney at the Asian Pacific American Legal Center in Los Angeles, to help launch the Center, as well as several months of ethnographic research of the Center conducted in 2004–05. The description of Cheryl Yip is based on observation of her work in 2004–05, as well as interviews with her. (A transcript of one such interview is on file with the author.)

203. For more information on Maitri, see <http://www.maitri.org> (last visited Feb. 3, 2007).

204. While the events described here are real, I have used a pseudonym for the client to protect her anonymity.

205. See generally CODE OF ETHICS OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS (1996), available at <http://www.naswdc.org/pubs/code/code.asp>.

conversations with Sonia about the history and contemporary practices of racism toward African Americans in the United States.<sup>206</sup>

*Amchok Thubten is a community interpreter.* Thubten, a Tibetan monk who was tortured by the Chinese government for advocating Tibetan independence, obtained political asylum in the United States and subsequently volunteered as an interpreter for the Lawyers Committee for Human Rights.<sup>207</sup> Later, he founded Song Tsen, a Tibetan refugee assistance program in New York. It was as an interpreter that Thubten initiated his work in refugee assistance:

The first person Amchok translated for, Lodoe Jinpa, was like himself, a pro-independence monk and torture victim. "It was very hard," Amchok recalls. "Very interesting. But too technical. My English I don't think is good enough. But when we finish, his lawyer (Jinpa, like Amchok, like virtually all asylum-seeking Tibetans, had a pro-bono lawyer) says to me, 'I think you are okay.'"

Just like that, the yoke of language shape-shifted into the clay of vocation. The Lawyers Committee had him inform Tibetans of the new immigration law that had taken effect on April 1, 1996. Refugees arriving after that date had a year in which to file for political asylum. (Previously, there was no deadline for filing.) His outreach brought to the Committee a dozen asylum seekers.<sup>208</sup>

Thubten's own experiences motivated him to assist other Tibetan asylum seekers, and his knowledge of Tibetan equipped him to do outreach in the Tibetan community that organizations like the Lawyers Committee otherwise would have been unable to do on their own. It was through his community activism, and not through degree programs or certification exams, that Thubten became an interpreter, and it is in the capacity of community activist that he engages in interpretation.

206. This description of Indira Charavorty's work is based upon numerous conversations I had with her in 2005–06. I had previously represented Sonia.

207. The Lawyers Committee for Human Rights is now known as Human Rights First. See Human Rights First, <http://www.humanrightsfirst.org> (last visited Apr. 9, 2007).

208. Robert Hirschfield, *A Tibetan Monk Escapes . . . to Brooklyn*, THE WITNESS, <http://thewitness.org/agw/hirschfield112503.html> (last visited Apr. 6, 2007); see also *An Overview of Asylum Policy: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 107th Cong. 72–74 (2001) (statement of Amchok Thubten Gyamtso) (testifying about his experience of persecution in Chinese-occupied Tibet and his opposition to expedited removal and detention of asylum seekers); Edward Lewine, *Tibetans in Limbo: Language, Fear, and Illegal Status Bars to Asylum*, DAILY NEWS (N.Y.), Feb. 15, 2001, at 2 (reporting on the difficulties faced by Tibetan immigrants in New York and Amchok Thubten's organization, Song Tsen, New York's first Tibetan community association).

Community interpreters such as these are nontraditional both in their background and in the multiple roles they play. They are engaged in broader projects in the community—labor organizing, domestic violence advocacy, and community education and outreach—for which interpreting is a necessary but insufficient job requirement. Moreover, many of these individuals come to interpretation from the vantage point of some other vocation, and while interpreting figures prominently in their work, it is only one aspect of it, and often is merely instrumental to the achievement of some other goal in the immigrant community in which they work. Thus, this orientation posits interpretation as a means to work in particular immigrant communities rather than as an end in itself. Reverend Sen, too, might be counted as a community interpreter.

Although initially defined merely in opposition to traditional and more formal forms of interpreting, community interpreting increasingly is understood on its own terms as a coherent set of practices that are distinct in location, purpose, and interpreter identity from traditional interpretation.<sup>209</sup> Historically, interpretation has been a creature of

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209. The term “community interpreting” was originally developed by the Institute of Linguistics in London in the early 1980s to signify interpretation in settings such as police stations, courts, and social service contexts, as distinct from interpretation in more traditional and more formal settings such as international conferences. See Virginia Benmaman, *Legal Interpreting by Any Other Name Is Still Legal Interpreting*, in *THE CRITICAL LINK: INTERPRETERS IN THE COMMUNITY*, *supra* note 109, at 179, 179; Adolfo Gentile, *Community Interpreting or Not? Practices, Standards, and Accreditation*, in *THE CRITICAL LINK: INTERPRETERS IN THE COMMUNITY*, *supra* note 109, at 109, 111–12 (discussing multiple factors, including location, that characterize community interpreting). Within the field of interpreter studies, the term has come to describe not only the settings in which interpreter services are provided, but also the relationship between the interpreter and the individuals for whom she is interpreting. Thus, one salient characteristic of community interpreting is that the interpreter generally provides services to people who “live and work in the same political social system.” *Id.* at 112. Moreover, the majority of these interpreters belong to the same ethnic, national, or linguistic minority group as the individuals for whom they are interpreting. *Id.*

Roda Roberts has identified six key distinctions between community interpreting and traditional conference, diplomatic, or business interpreting:

- 1) Community interpreters primarily serve to ensure access to public services, and are therefore likely to work in institutional settings; 2) they are more apt to be interpreting in dialogue-like settings than speeches; 3) they routinely interpret in and out of both or all of their working languages; 4) the presence of the community interpreter is much more noticeable in the communication process than is that of the conference interpreter; 5) a great many languages, many of them minority languages that are not the language of government in any country, are interpreted at the community level, unlike the limited number of languages of international diplomacy and commerce handled by conference and escort interpreters; and 6) community interpreters are often viewed as advocates or “cultural brokers” who go beyond the traditional neutral role of the interpreter.

Mikkelsen, *supra* note 144, at 1.1 (citing Roda P. Roberts, *Community Interpreting Today and Tomorrow*, in *PROCEEDINGS OF THE 35TH ANNUAL CONFERENCE OF THE AMERICAN TRANSLATORS ASSOCIATION* 127, 128–29 (Peter Krawutschke ed., 1994)).

formality—in international conferences, the halls of diplomacy, and the criminal courts.<sup>210</sup> Moreover, the traditional interpreter has occupied a tightly circumscribed role, and often a tightly circumscribed space. For example, conference interpreters, such as those at the United Nations or in proceedings of other international bodies, speak only when a recognized conference participant speaks, and often occupy booths—sometimes, literally black boxes—that physically segregate and conceal the interpreter from the recognized participants. In contrast, community interpreting is 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. Thus, community interpreting explicitly contemplates an active role for interpreters in ensuring equal access to legal, health, and social services for LEP individuals.<sup>211</sup> In this regard, community interpreters bear some resemblance to social workers.<sup>212</sup>

In practice, and as a normative approach advocated by a small but growing literature on the subject, community interpreting blurs the boundaries of traditional interpreters, frequently embracing cultural brokering, advocacy, and conciliation as a part of the interpreters' project.<sup>213</sup>

Community interpreters often come from the same geographic, national, or ethnic communities as the individuals for whom they interpret,<sup>214</sup> particularly when less common languages are involved.<sup>215</sup> These interpreters typically interpret for poor, recent immigrants lacking both the financial and the social resources to access health services, speak with their children's school teachers, file a complaint with a government agency, or contact a lawyer. It is too reductive to say that they are "of" the community, and yet, at the same time, like Yip, Chakravorty, Thubten,

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210. See Holly Mikkelsen, *Interpreting Is Interpreting—Or Is It?*, <http://www.acebo.com/papers/interp1.htm> (last visited Mar. 15, 2007) (summarizing the traditional forms of interpreting and discussing their development and increased use in a variety of fora).

211. As one definition provides, "community interpreting has been described as a type of interpreting done to assist those who are not fluent speakers of the official language of the country, to gain full and equal access to public services (legal, health, education, local government and social services)." Roda P. Roberts, *Community Interpreting Today and Tomorrow*, in *THE CRITICAL LINK: INTERPRETERS IN THE COMMUNITY*, *supra* note 109, at 7, 11.

212. See Roberts, *supra* note 209, at 129.

213. Roberts describes five categories of activity, apart from rendering one language into another, in which community interpreters frequently engage: cultural brokering, advocacy, general assistance to the service recipient, general assistance to the service provider, and conciliation. *Id.* at 130. Roberts cites to a training manual published by the Ministry of Citizenship in Ontario, Canada, as a leading exponent of this multidimensional vision of community interpreting. *Id.*; see CAIRNCROSS, *supra* note 192.

214. See Gentile, *supra* note 209, at 112.

215. See Mikkelsen, *supra* note 144, at 8.

and Reverend Sen, these interpreters frequently have both material and affective ties to the populations in which they work far surpassing those of most traditional interpreters.

One might be tempted to view community interpreting as a kind of informal labor<sup>216</sup>: Whereas more formal interpretation is subject to regulation (by interpreter associations, international institutions, and courts) and is structured much like traditional employer-employee relations (static employer, regular hours, fixed terms of employment), community interpreting is far more contingent, casual, and irregular, typically governed neither by professional associations nor by state regulation.<sup>217</sup> It is as much a volunteer enterprise as a paid vocation, and benefits from the flexibility while suffering from the instability that flow from informality.<sup>218</sup> Operating outside the strictures of traditional professional regulation, the community interpreter challenges conventional boundaries of interpreter role. Even as she interprets from one language to another, a community interpreter might simultaneously serve as an advocate, a counselor, or a service provider, recalling the typology of multiple interpreter roles discussed previously.<sup>219</sup> And yet, without the benefit of clear guidance on her proper role, the porous boundaries between the community interpreter, the LEP individual, and third parties threaten to disintegrate altogether.

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216. Informal labor consists of income-generating activity that takes place outside formal regulatory frameworks. Although previously conceived of as a phenomenon of the developing world, in recent years informal labor has expanded rapidly as globalization has transformed the economies of industrialized and developing countries alike. For a review of the history and heterogeneity of the informal economy, see generally Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289 (1994); Martha Alter Chen et al., *Supporting Workers in the Informal Economy: A Policy Framework* (International Labour Organization Working Paper 2002), available at [http://wiego.org/papers/2005/unifem/11\\_ILO\\_WP\\_Chen\\_Jhabvala\\_Lund.pdf](http://wiego.org/papers/2005/unifem/11_ILO_WP_Chen_Jhabvala_Lund.pdf). For a discussion of informality and the growth of the contingent labor force in the United States, see KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 68–70 (2004).

217. As discussed in greater detail below, see *infra* notes 227–230 and accompanying text, there is a trend toward professionalization of community interpreting. However, the existence of this trend itself reflects that community interpreting is, in its origins, a more casual form of interpreting practice.

218. The comparison here is a rough one. While some professional interpreters, such as conference interpreters at the United Nations or in other large, multinational organizations, are likely to be full-time staff in traditional employment relationships, segments of the nonconference interpreting profession have become casualized as well. This parallels the rapid increase in contingent labor in the United States and other industrialized economies generally.

219. See *supra* Part III.B.1–III.B.3.

### A. The Advantages of Community Interpreters in the Lawyering Process

Because these individuals are already involved in assisting members of specific immigrant communities to access services or exercise rights—the very work of lawyers—they are frequent and logical sources for noncourtroom legal interpreters, particularly in the resource-starved environment of poverty lawyering. As the examples above illustrate, the provision of interpretation in lawyer-client relationships often becomes a critical aspect of the work of nonlegal advocates in immigrant communities. Because many of these individuals come to interpretation with other goals in mind, and with other bodies of expertise, it is not surprising that when they provide interpretation in the context of a lawyer-client meeting, they may conceive of and exercise their role in ways that exceed the bounded role of the traditional conference or courtroom interpreter.

Indeed, the interpreter-as-guardian and interpreter-as-advocate roles discussed previously<sup>220</sup> can be understood as the logical outgrowth of the political and professional commitments that community interpreters often bring to their work as interpreters. Since client protection and client advocacy are essential to their work in immigrant communities, those roles are not readily relinquished when these individuals engage in the work of noncourtroom legal interpreting.

While the client protection and client advocacy roles may be redundant of the lawyer's, the community interpreter brings something further that many poverty lawyers lack: a familiarity with the communities from which their clients hail. Individuals like Yip, Chakravorty, Thubten, and Reverend Sen are immersed daily in specific immigrant communities. Their work puts them in regular dialogue with immigrants, gives them exposure to issues, concerns, beliefs, and ideologies within multiple cultural frames, and demands of them a constant process of interpretation, not only of language, but of culture. In this way, they develop expertise in the multiple political, social, cultural, and economic contexts in which their clients reside. As Gerald López has described with regard to interpretation more broadly, "[w]hen we interpret, we are communitarians. We share stock stories reflecting conventions and beliefs that, in turn, may be said to 'see' themselves in the circumstances we are always in."<sup>221</sup> Community interpreters function much like ethnographers, bringing to

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220. See *supra* Part III.B.1–III.B.2.

221. López, *supra* note 184, at 9.

the lawyering process an expertise in the cultural contexts of clients' lives.<sup>222</sup> In light of the cultural embeddedness of language, such expertise can prove invaluable to the project of lawyering across language difference.

#### B. Limitations of Community Interpreters in the Lawyering Process

Community interpreting brings with it a host of complications, many of which are evident from the problematic conduct of Reverend Sen in the opening vignette. Because they come to interpretation only incidentally, community interpreters may lack formal training in interpretation techniques, have imperfect knowledge of the languages they are interpreting, or be unfamiliar with the relevant dialects, idiomatic expressions, and specialized vocabularies called for when lawyering across language difference.

A second set of problems arises from the ethnographic dimension of interpretation, and the claims to cultural expertise, whether implicit or explicit, often made by community interpreters. While community interpreters may have greater familiarity with particular immigrant communities, claims of cultural expertise are fraught with dangers of essentialism. Cultural expertise is always premised upon cultural analysis, a practice that is both knowledge-based and experiential. As such, any claim to cultural expertise includes an inescapably subjective component which, if left unnamed and untested, may carry with it a pretense to universality. Moreover, it is not only the interpreter who may make seemingly universal cultural claims, but the lawyer may want to believe in such cultural reductivism, so as to simplify the process of lawyering across language difference.

The community interpreter's claims to cultural expertise are complicated by interpreter and client identity. Because many community interpreters are from the same ethnic or national background as the clients for whom they interpret,<sup>223</sup> the claim to cultural expertise may be enhanced by personal experience, as opposed to merely that of the ethnographic participant-observer.<sup>224</sup> For Reverend Sen, the statement "let me explain to you about Burmese culture" arises not only from extensive work with people from Burma, but from his own life experience as a Burmese immigrant.

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222. For a cogent discussion of ethnography and its roots in cultural anthropology, see Cunningham, *supra* note 184, at 1339–44.

223. See Gentile, *supra* note 209, at 112.

224. See generally CLIFFORD GEERTZ, *WORKS AND LIVES: THE ANTHROPOLOGIST AS AUTHOR* 4–5 (1988).

While such personal experience is often a fundamental source of cultural understanding, it can also constrain the relationships among the lawyer, the client, and the interpreter, for three reasons. First, to the extent that the interpreter is speaking for a culture with which she herself identifies, she may have a personal interest in portraying the culture in a particular light. Thus, as a cultural expert, she has a potential conflict of interest. Second, a shared cultural or national identity between the interpreter and the client may, in the eyes of the lawyer, endow the interpreter with undue cultural authority. Alternatively, a lawyer might suspect the interpreter of a cultural or national chauvinism, even if it does not exist, and therefore may distrust the integrity of the interpretation. Without the tools to identify and evaluate the cultural claims of the interpreter, the lawyer may too readily accept them.

A shared identity between the interpreter and the client can pose one further problem: While in many instances a shared background, whether real or perceived, can facilitate the development of trust with the client, in some circumstances, intracommunity dynamics can render community interpreting undesirable. This is especially true when an individual client seeks legal assistance to gain distance from, rather than closeness to, her community. Indeed, much of the strength of the community interpreting model as I have presented it here derives from an assumption that the interpreter and the client are not only from the same community, but that they desire to remain so. Yet this assumption is at odds with the lived experience of many poor immigrant clients whose legal problems arise from some form of conflict or subordination within the community.<sup>225</sup> For example, many battered immigrant women seeking to

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225. Any analysis of community conflict is complicated by the fact that communities, like cultures, are neither static nor monolithic, and individuals frequently are members of multiple communities simultaneously. Out of recognition of this reality, many immigrant-oriented service organizations seek not only to serve the community, but to help constitute new communities through their work. Progressive South Asian organizations provide a particularly vibrant example of this phenomenon. Organizations, such as Maitri, see *supra* note 203 and accompanying text, and the South Asian Network in Artesia, California, work with recent immigrants from India, Pakistan, Bangladesh, and Sri Lanka. In so doing, they are both responsive to and constitutive of the South Asian community, as their work recognizes lines of ethnic identity while fostering affective bonds across them. See generally Tayyab Mahmud, *Genealogy of a State-Engineered "Model Minority": "Not Quite/Not White" South Asian Americans*, 78 DENV. U. L. REV. 657 (2001) (reviewing VIJAY PRASHAD, *THE KARMA OF BROWN FOLK* (2000)). Similar approaches of multiplying community membership are practiced by immigrant-based organizations across the country. Their approach to immigrant-based work can help to expand options for assistance for individuals who might otherwise feel constrained by community membership. In this way, a narrow form of intraethnic conflict might be addressed through recourse to an alternative community to which the individual might claim membership.



leave their abusers may also be seeking exit from their particular community, and, due to concerns about safety or shame, may not trust an interpreter from their community.<sup>226</sup> Similar concerns may arise in the case of trafficked individuals, or clients who bring civil wage claims against the business class or other “pillars” of the community. Clearly, then, a community interpreter may not be appropriate in all circumstances.

### C. An Enriched Vision of Community Interpreters: Recalling Interpreters as Experts

The three categories of limitations to community interpreting described here—linguistic qualifications, cultural competence, and enforced community—are significant but not insoluble. Rather, an understanding of the complex and heterogeneous role of interpreters in the process of lawyering across language difference enables a set of strategies that can mitigate, if not eliminate outright, many of these challenges. In particular, the interpreter-as-expert construct may prove especially useful in harnessing the strengths of community interpreting while checking its weaknesses. More broadly, a dialogical relationship between the lawyer and the interpreter that is open to the multiplicity of roles community interpreters frequently play can help determine what roles are appropriate in specific lawyering contexts.

The question of qualifications is one that community interpreters themselves have already begun to address, but that poverty lawyers can help to advance as well. While community interpreting began as a set of interstitial practices, filling those gaps left by conference, courtroom, and other formal setting interpreters, it is increasingly becoming professionalized.<sup>227</sup> Individual community interpreters are being contracted by nonprofit agencies, particularly in health care settings, which require the interpreters to complete rigorous training and certification programs.<sup>228</sup> Many of those agencies then provide their own continuing education,

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226. See generally Karin Wang, *Battered Asian American Women: Community Responses From the Battered Women's Movement and the Asian American Community*, 3 *ASIAN L.J.* 151 (1996).

227. See Mikkelsen, *supra* note 144; Roda P. Roberts, *Community Interpreting: A Profession in Search of Its Identity*, in 4 *TEACHING TRANSLATION AND INTERPRETING* 157–75 (Eva Hung ed., 2002).

228. Community interpreting curricula, distinct from traditional interpretation programs, have also begun to emerge. See George Gage, *Community Interpretation in Spanish: An Entry Level Training Opportunity*, *PROTEUS*, Fall 2000, available at [http://www.najit.org/proteus/v10n2/gage\\_v10n2.htm](http://www.najit.org/proteus/v10n2/gage_v10n2.htm) (describing community interpreting curriculum at Riverside Community College in Riverside, California).

develop and promulgate ethical guidelines for practice, and establish quality assurance protocols.<sup>229</sup> Importantly, many of these programs acknowledge directly the cultural brokering role that interpreters are often called upon to play, and provide specific training on such practices.<sup>230</sup>

While the trend toward professionalization of community interpreting is promising, it is currently insufficient to meet the needs of poverty lawyers. Almost all of the community interpreting programs in the country that provide trained interpreters do so primarily in the context of health care, and, to a lesser degree, in social service settings. Virtually none provide any specific training on noncourtroom legal interpreting.<sup>231</sup> Moreover, to the extent that interpreters have been trained in noncourtroom legal interpreting, demand vastly outstrips supply. Thus, most poverty lawyers cannot expect or rely upon certification as a means of ensuring interpreter qualifications, with regard to either linguistic abilities or cultural competence.

This gap may be filled effectively by recalling the earlier conceptualization of interpreters as experts possessing two dimensions of expertise—one linguistic, the other cultural.<sup>232</sup> Thinking of interpreters as experts, not unlike other experts employed by lawyers, suggests a framework for screening, evaluating, and working with interpreters as team members in the process of lawyering across language difference. For example, we might consider the application of Federal Rule of Evidence (FRE) 702 in evaluating the expertise of interpreters. That rule provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of

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229. For examples of such programs, see PERKINS ET AL., *supra* note 28, at 6.24–28.

230. See, e.g., CAIRNCROSS, *supra* note 192.

231. One notable exception is the Language Interpreter Program developed by the Asian Pacific American Legal Resource Center in Washington, D.C. The program recruits and trains members of the Asian and Pacific Islander (API) communities in the Washington metropolitan area, and, then, for a modest fee, matches them with attorneys representing poor API clients. See ASIAN PAC. AM. LEGAL RES. CTR., ENSURING MEANINGFUL ACCESS TO LANGUAGE SERVICES: A MODEL FOR A LEGAL INTERPRETER PROGRAM (2004) (copy on file with author); see also Gage, *supra* note 228 (describing community interpreting curriculum that includes field observation with public defenders in Riverside County, California, and with the Inland Empire Latino Lawyers Association).

232. See *supra* notes 192–194 and accompanying text.

reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>233</sup>

As an evidentiary rule, FRE 702 concerns the propriety of courtroom opinion testimony on matters requiring specialized knowledge, and therefore is not technically applicable to the use of interpreters in lawyer-client communications. Nonetheless, the rule's analytic framework is particularly apt once one acknowledges the indeterminate nature of interpretation and the central role of culture in shaping meaning. These necessitate that the interpreter render some amount of her own opinion as to the intended meaning of client and lawyer utterances in order for the process of interpretation to be effective. Interpreter opinion is therefore an inescapable, and indispensable, element of language interpretation, based upon specialized knowledge.<sup>234</sup>

Thus, the expert framework is useful in requiring lawyers to identify what specialized knowledge the interpreter possesses, to inquire into the sufficiency of the facts or data on which the interpreter relies, to examine the principles and methods she employs, and to test the application of those principles and methods. Thinking of interpreters as experts therefore encourages a deliberateness in examining both the linguistic qualifications of the interpreter and the factual bases of the cultural knowledge she purports to possess. This, in turn, may encourage lawyers to inquire into the cultural ascriptions the interpreter makes about a client, and to test those ascriptions against the specificity of the client's lived experience. Thinking of the interpreter as an expert further subjects the interpreter to

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233. FED. R. EVID. 702.

234. Although U.S. courts typically do not admit any explicit role for cultural interpretation by interpreters, countries where community interpreting practices are better developed tend to recognize that interpreters may possess cultural expertise and create opportunities for that expertise to be expressed in formal proceedings. For example, in the United Kingdom, "[o]n those occasions where the interpreters' advice or opinions are sought [by the court] on linguistic matters which are outside the remit of interpreting, they may be asked to step out of their interpreters' role and become expert witnesses." Mikkelsen, *supra* note 179 (quoting personal communication from Ann Corsellis). Similarly, in Australia, the code of conduct for the Australian Institute for Interpreters and Translators requires that interpreters "must interpret not only the words but also, where appropriate and within the bounds of court procedure, explain cross-cultural differences and difficulties." *Id.* (quoting Helga Niska, *Just Interpreting: Role Conflicts and Discourse Types in Court Interpreting*, in 8 *TRANSLATION AND THE LAW* 293, 295 (Marshall Morris ed., 1995)). In New Zealand, a government training program for community interpreters instructs interpreters to interrupt an interview if cultural misunderstandings arise, implicitly acknowledging the interpreters' presumed cultural expertise. *Id.* (citing LALITA KASANJI, *ETHNIC AFFAIRS SERV., LET'S TALK: GUIDELINES FOR GOVERNMENT AGENCIES HIRING INTERPRETERS* 20 (1995)).

the kinds of scrutiny appropriate for all witnesses, and in particular, to scrutiny into potential biases, whether real or perceived.<sup>235</sup>

Thinking of interpreters as experts also liberates the interpreter from the strict bounds of the lawyer-client dyad, and acknowledges an independent, consultative role for the interpreter, one that is derivative of neither the lawyer nor the client. Lawyers routinely consult with expert witnesses not merely in preparing their testimony but also in helping the lawyer to understand unfamiliar or specialized facts, concepts, and phenomena, to aid the lawyer in fact development, and ultimately to shape the theory of the case. Lawyers can—and perhaps should—make similar use of interpreters.<sup>236</sup> Thus, a medical expert may be expected to decipher hospital records, and also to help the lawyer understand psychological or physiological phenomena, to identify key areas for factual inquiry, and to advise on the factual viability of a particular legal theory. If an interpreter is screened with the same rigor as a medical expert, one can then imagine a similarly conceived consultative role for her. At the semantic level, the interpreter might suggest to the lawyer alternative formulations of questions that are more easily rendered into the target language. As a cultural advisor, the interpreter might educate the lawyer about appropriate forms of greeting. More substantively, the interpreter could advise the lawyer about what she understands to be the prevailing racial, religious, or gender norms in the client's home country. (As discussed previously, it would then be incumbent upon the lawyer to explore with the interpreter and the client the degree to which the client views those norms as prevailing, and the degree to which she subscribes to them.) The interpreter could also be asked to suggest areas of inquiry for the lawyer to discuss with the client, and to suggest how, in light of various cultural considerations, a client's testimony is best understood.

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235. Admittedly, the lawyer's ability to analyze the interpreter's linguistic and cultural expertise will be limited for precisely the same reason that the interpreter is required in the first place—namely, the lawyer lacks this expertise herself. And yet, this is not significantly different from the challenge faced by lawyers in assessing the qualifications of other types of experts. In those instances, lawyers rely upon a set of techniques to assess expertise in a field in which the lawyer is not herself expert, including extensive interviewing, seeking recommendations from other lawyers or other experts in the field, third-party assessments of the expert's work product, and other forms of peer review. Similar methodologies could be employed with interpreters. Moreover, the lawyer might employ additional techniques to help identify the specific subjectivities of the expert. For example, the lawyer might use different interpreters with the same client, as the students did in the introductory vignette. While this may come at the expense of a stable and continuous relationship between the client and the interpreter, it can also indicate whether the interpreter has the appropriate expertise for the client and the case involved.

236. My thanks to my colleague Bob Dinerstein for suggesting this insight.

The goal here is to make transparent what typically are hidden but pervasive practices when lawyers employ interpreters, and to make explicitly known the factual bases for an interpreter's linguistic or cultural opinions. By inquiring into the factual basis for interpreter opinion as a threshold matter (qualifying the expert) and throughout the lawyer's relationship with the interpreter (ensuring the interpreter remains within the scope of her expertise), the lawyer can obtain the benefit of the interpreter's expertise while reducing the risks of inaccurate, biased, or essentialized cultural testimony.<sup>237</sup> Interpreter opinion is not rejected, because our understanding of the interpretive process establishes its necessity. Nor is it accepted unquestioningly. Once conceived of as an expert, the interpreter can then be incorporated into a dialogical process with the lawyer, akin to the dialogical character of other lawyer-expert relationships.

Of course, the expert framework does not provide a perfect fit for interpreters, nor does it solve all of the potential problems posed by the use of community interpreters. Where community interpreters are involved, the expert framework may address the problems of linguistic qualification and cultural competence, but it does not resolve the issue of intracommunity conflict. With the typical expert, what matters is her relationship to the issues involved in the case, and her ability to explain and contextualize those issues. With interpreters, however, interpersonal dynamics with the lawyer and the client are also important. This critical difference points to the need to involve LEP clients in the process of selecting and working with interpreters, something rarely done when other types of experts are involved. At least as important, however, is that the lawyer be attentive to such intracommunity dynamics. As argued in the next Part, such attentiveness can come only from greater lawyerly engagement with immigrant communities.

## V. RECONCEPTUALIZING THE LAWYER-CLIENT RELATIONSHIP: TOWARD COMMUNITY LAWYERING

As I have argued thus far, the involvement of an interpreter is inherently disruptive of the traditional lawyer-client relationship, but that disruption should be embraced as potentially productive rather than presumptively destructive. In the previous Part, I argued that the involvement of community interpreters offers particular promise, especially

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237. Such inquiry would also disqualify family members and minors from serving as interpreters.

as the field of community interpreting continues to professionalize, because of the enhanced linguistic and cultural expertise that often derives from community immersion. But effective lawyering across language difference does not turn on development within the interpreting field alone. Rather, it requires a professional reorientation of lawyers as well.

Recognizing the integral role of the interpreter when lawyering across language difference allows us to break open the architecture of the lawyer-client relationship and to consider how a range of third parties figure in the lives of clients, and poor clients in particular. In so doing, we begin to recognize the broader set of social relationships, outside the strict confines of the lawyer-client dyad, that constitute clients' lives, and to accept that some of these relationships may be more important to the client than the client's relationship with her lawyer. We might then reconstitute a more porous form of the lawyer-client relationship, one in which the lawyer retains a central role, but is far more open to multidimensional collaboration.

#### A. The Fetishized Lawyer-Client Relationship

As discussed previously,<sup>238</sup> the intellectual project of client-centeredness brought much-needed attention to the lawyer-client relationship and to the operation of power within it. But while this focus has proved enormously productive, at times it has threatened to fetishize the lawyer-client relationship by elevating it above all other relationships in the client's life. As Michael Diamond has lamented, the search for more effective strategies to combat poverty and oppression "often leads into the cul-de-sac of the lawyer-client relationship."<sup>239</sup>

It is ironic that, even as client-centeredness has attempted to dismantle professional privilege as a barrier to productive client representation, it has privileged the lawyer-client relationship (if not the lawyer) even further. Much traditional lawyering rests upon the faulty assumption that people seeking legal representation are, first and foremost, clients, or that in

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238. See *supra* notes 162–164 and accompanying text.

239. Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 67 (2000). Diamond continues: "Progressive lawyers spend so much time and energy focusing on the nature of their relationship with clients, that clients' purposes in obtaining the representation may be neglected, trapped in the relational maze." *Id.*; see also William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 489 (1980) (identifying a psychological orientation to client-centeredness and criticizing its practices for shifting focus away from cases and statutes while failing to resolve the inadequacies of the traditional lawyering style that client-centeredness purports to address).

becoming clients, they cease to be anything else. This tendency to view the lawyer-client relationship as determinative rather than incidental in the life of the client, and of the poor client in particular, may be reinforced by the preoccupation of client-centeredness with the lawyer-client relationship. It is important to remember that, while “lawyer” is a professional role that often informs the lifelong identity of those who inhabit it, “client” is not. Rather, the client role is ephemeral. While becoming a lawyer requires many years of study and training, becoming a client, particularly a poor client, is typically incidental—if not accidental—and unfortunate. Whereas becoming a lawyer brings a host of professional and social privileges,<sup>240</sup> becoming a client brings none, and instead is frequently born from subordination, injustice, exploitation, or tragedy.

Lawyers hold an existential stake in the lawyer-client relationship (it is what lawyers do), but it would be a mistake to assume that clients do as well. A lawyer without a client is bereft of professional identity. A client without a lawyer is the same person she has always been. Indeed, it is a frequent complaint of subordinated individuals that having a lawyer, or filing a lawsuit, does not make a difference. Put another way, unlike lawyers, clients do not exist primarily in the lawyer-client relationship. It therefore follows that the sanctity of the relationship may be more important for the lawyer than for the client, whose personhood encompasses the fleeting role of client, but importantly, is embedded within a web of numerous other, more lasting relationships. It 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.

This asymmetry is not always well understood. It is a common phenomenon in our law clinic for students embarking on poverty law representation for the first time to complain about clients who do not return phone calls or who show up late for meetings. For many students, the intensity of the clinical experience and the centrality of representation to the students’ professional development ensure that their relationship with their first client becomes one of the most important in their lives. But there is no reason to believe that the same would be true for the client. Even for experienced lawyers, the seeming inattention by clients to the relationship can be confounding. However, so long as the client’s life is read in the cramped and artificial context of the lawyer-client relationship, the expectation of client devotion equal to that of the lawyer is likely to persist.

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240. See LÓPEZ, *supra* note 86, at 46 (discussing privileges accorded to lawyers).

We might think of the traditional lawyer-client relationship as represented spatially, if somewhat reductively, by the client interview room. In many poverty law settings, the client interview room is as impersonal as a laboratory, free of clutter or decor, numbered liked an operatory. It is also modular, a space into which any lawyer and any client can be slotted. For many lawyers, the confines of the interview room are the primary site in which they interact with their clients, and in which their client and her goals are defined. Thus, the interview room tends to construct the individual in unitary terms as "client."<sup>241</sup>

The interview room represents a domesticated lawyer-client relationship. While there are good and practical considerations for such configurations, such as confidentiality and convenience, the sterility of this environment, its orderliness and its four walls are at physical and metaphysical odds with the unruliness of individual lives, and of lawyering. A lawyer is not a phlebotomist extracting data with routinized, pinpoint accuracy. Rather, as the process of lawyering across language difference makes clear, lawyering methodologies must extend beyond the confines of the interview room in order for lawyer-client communication to be meaningful. Breaching the client interview room and liberating the lawyer-client relationship from it frees us to imagine new configurations of lawyers, clients, and communities. Such a crowd could never fit in the traditional interview room.

#### B. From Community Interpreting to Community Lawyering

The introduction of an interpreter as an indispensable third party disrupts the fiction of the discretely contained, inviolable, and dyadic lawyer-client relationship. Even when seated within the confines of the client interview room, the interpreter represents a breach of it. Because meaningful interpretation requires the interpreter to draw upon a broad range of information and understandings that constitute the client's perceptual frame—in essence, to engage in some degree of cultural analysis—the interpreter necessarily insinuates a stream of external

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241. See, e.g., Shalleck, *supra* note 172 (exploring the ways traditional legal education constructs clients); Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019 (1997) (discussing reductive constructions of "battered women"); Austin Sarat, " . . . The Law Is All Over": Power, Resistance, and the Legal Consciousness of the Welfare Poor, 2 YALE J.L. & HUMAN. 343 (1990) (arguing against reductive conceptions of "the welfare poor"); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 470–71 (1984) (discussing how competing visions of lawyering implicitly construct client identity).



influences into the closed system of lawyer-client communication. In this way, the interpreter is a visible marker and an imperfect embodiment of the disparate collection of subjective forces that mediate all lawyer-client relations.

Even where the lawyer and the client ostensibly speak the same language, where there is no interpreter present, there is always a third person in the room. As James Clifford has noted in the context of ethnography, "a third participant, real or imagined, must function as a mediator in any encounter between two individuals."<sup>242</sup> Clifford's conception of the third person is itself a representation of the multitude of individuals, events, and experiences that mediate communication between individuals.<sup>243</sup> Returning to the lawyering context with this insight in mind, we might then ask, who are the third, fourth, and fifth participants who mediate the lawyer's encounter with the client? Which does the client silently bring with her, and which accompany the lawyer? How might we foreground those mediating forces, to test them and to qualify them?

In order to address these "third person" questions that are raised by, but transcendent of, lawyering across language difference, I suggest a shift in the traditional lawyering posture along three dimensions: cultural difference, third-party relationships, and community engagement. I advocate greater attention to the cultural contexts of lawyers and clients, more robust collaboration with other important actors in a client's life, and increased lawyer immersion in the communities of our clients. The themes discussed here draw heavily upon several related literatures, and are all consistent with, and gesture toward, a commitment to community lawyering—that is, a mode of lawyering that envisions communities and not merely individuals as vital in problem-solving for poor people, and that is committed to partnerships between lawyers, clients, and communities as a means of transcending individualized claims and achieving structural change.

Community lawyering is by now a familiar traveler in lawyering theory, though it sometimes goes by different names and takes slightly

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242. JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART* 44 (1988) (citing VINCENT CRAPANZANO, *TUHAMI: PORTRAIT OF A MOROCCAN* (1980)).

243. This insight forms a principal rationale for the ethnographic methodology of participant observation.

different forms.<sup>244</sup> The development, meaning, and value of the theory have been mapped and analyzed skillfully by others.<sup>245</sup> My purpose is not to revisit the community lawyering debate in detail, but instead to suggest how, if taken seriously, the demands of lawyering across language difference might move poverty practice in the direction of more meaningful community engagement.

# 1. Enhanced Attention to Cultural Context

Inquiry into lawyering across language difference dramatizes the centrality of culture in the lawyer-client relationship, as the interpreter is a

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244. See Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 441 (2000) (noting the roughly synonymous use of the terms "critical lawyering theory," "new poverty law scholarship," "representational narrative scholarship," "reconstructive poverty law," "the theoretics of practice movement," "political lawyering," and "community lawyering," and adopting the term "collaborative lawyering" because of the literature's "emphasis on a joint problem-solving partnership with clients").

245. For an excellent review of the community lawyering literature and critiques of it, see Piomelli, *supra* note 244. As Piomelli notes, the movement originally was associated with legal scholars Gerald López, Lucie White, and Anthony Alfieri, *id.* at 432, although its antecedents can be located in the lawyering literature pioneered by Gary Bellow and Bea Moulton, and David Binder and Susan Price, *id.* at 436 (citing GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); BINDER & PRICE, *supra* note 162). Although no such label attached to the approach at the time, Bellow engaged in and described community lawyering approaches as early as the 1960s and 1970s. See Gary Bellow, *Steady Work: A Practitioner's Reflection on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996); Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977).

In large measure, the early works of López, White, and Alfieri have canonized the field. See, e.g., LÓPEZ, *supra* note 86; Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991) [hereinafter Alfieri, *Reconstructive Poverty Law Practice*]; Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1988); Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); López, *supra* note 184; Lucie E. White, *Collaborative Lawyering in the Field?*, *supra* note 86; Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Lucie E. White, *To Learn and Teach*, *supra* note 86; White, *supra* note 85.

For other thoughtful discussions of community lawyering and its challenges, see Susan D. Bennett, *On Long-Haul Lawyering*, 25 FORDHAM URB. L.J. 771 (1998); Cruz, *supra* note 12; Diamond, *supra* note 239; 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); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000). For critiques of community lawyering theory, see Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063 (1994); Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992); Simon, *supra* note 86.

flawed but unavoidable stand-in for the client's cultural practices and understandings. Language difference announces cultural difference, but even when not indicated by the presence of an interpreter, cultural difference animates lawyering. As Sue Bryant has observed, all lawyering is cross-cultural, because there are always differences in values, beliefs, backgrounds, and identities between lawyers and clients, even when we do not immediately recognize them as "cultural."<sup>246</sup> The attention to culture, cultural difference, and cultural analysis necessary when lawyering across language difference is therefore apt in all lawyering contexts, for even where there is no interpreter whose cultural understandings we must evaluate, lawyers still must evaluate their own.

So, too, should the cautions of cultural analysis apply with equal force. The study of lawyering across language difference made here counsels skepticism toward totalizing claims of culture, and vigilance against essentialism.<sup>247</sup> Of course, lawyers, and not just interpreters, make cultural claims and engage in cultural essentialism. A lawyer's cultural competence thus requires a process for acquiring, testing, and refining the lawyer's own cultural understandings, just as an interpreter's cultural understandings must be evaluated.<sup>248</sup> While the specific tools may vary, what matters most, and what the language difference model advocates, is a consciousness of the complexity of culture and the development of a framework for cultural analysis.<sup>249</sup>

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246. See Bryant, *supra* note 12, at 40–41; see also Cruz, *supra* note 12, at 568–69 ("Even if lawyer and client speak the same language, whether it is English or another language, differences in cultural values and world-view can affect the quality of understanding. This is where self-awareness of one's own cultural trappings, coupled with an awareness of the differences in cultural values and world-view of the client can help an attorney.").

247. See *supra* text accompanying note 237.

248. See Avruch, *supra* note 129, at 399 ("Cultural experience can devolve to unproductive, and possibly relationship-damaging, stereotyping unless subject to constant 'quality control.'").

249. Bryant and her collaborator, Jean Koh Peters, have developed a set of enormously helpful approaches—what they call habits—designed to identify and map cultural difference and cultural sameness between lawyers and clients. Bryant, *supra* note 12. Consistent with my analysis here, they argue for a tentativeness in cultural analysis, and a process that is ongoing and iterative. *Id.* Similarly, Kevin Avruch has advocated the importance of developing "a framework for thinking about culture and why it matters." Avruch, *supra* note 129, at 407. Writing in the context of international conflict resolution, he embraces an ethnographic approach to culture as the preferred means of acquiring substantive cultural knowledge, invoking Clifford Geertz's "thick description" as the essential process of cultural analysis. Avruch & Black, *supra* note 131, at 135. And yet, he recognizes that time constraints and other limitations likely will prevent lawyers from acquiring the kind of deep ethnographic knowledge of cultural context one might desire. Thus, he concludes that one must "realistically aspire to a lesser sort of cultural competence—an informed way of thinking about culture along with a general sensitivity to and awareness of different 'cultural styles' and their possible effects on such communication processes as negotiation." Avruch, *supra* note 129, at 403.

## 2. Robust Third-Party Relationships

The interpreter is not only a representative of cultural context, but also the embodiment of third parties more generally. The centrality of the interpreter in the previously dyadic lawyer-client relationship necessarily decentralizes the lawyer, at least tentatively and periodically during the course of the client representation. Such displacement is helpful in encouraging lawyers to recognize the comparative expertise that others may bring to the enterprise of problem-solving with the client, and can facilitate recognition of the importance of greater collaboration with other actors in the client's life. This is especially true of other helping professionals, such as social workers and doctors, but the same insight should be applied to other individuals, such as community organizers,<sup>250</sup> labor organizers,<sup>251</sup> religious leaders, and community-based organizations<sup>252</sup> that might also facilitate solutions to the client's problems.<sup>253</sup>

This shift in orientation resonates with the literatures on holistic lawyering,<sup>254</sup> multidisciplinary lawyering,<sup>255</sup> and the community lawyering literature more broadly. These partially overlapping theories all urge a lawyering practice that rejects narrow legal solutions to clients' problems, and that instead seeks to address underlying causes of poverty and subordination.

250. See Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001) (describing the history and the evolution of joint legal and organizing strategies); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 429 (1995) (describing the Workplace Project, an organization based in Long Island that mobilizes immigrant workers to address the many problems they face at their jobs and in their communities).

251. See Gordon, *supra* note 250, at 430–31 (discussing the labor organizing component of the Workplace Project).

252. See, e.g., Raymond H. Brescia et al., *Who's in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831, 858 (1998) (arguing the importance of collaborations between legal services programs and grassroots, community-based organizations); see also Diamond, *supra* note 239 (urging lawyers to facilitate the growth and the development of community institutions in order for poor people to marshal and leverage power).

253. See LÓPEZ, *supra* note 86, at 53–54 (discussing a “network of co-eminent practitioners,” including “the client himself, his family, friends, neighbors, community activists, organizers, public employees, administrators, policymakers, researchers, funders”).

254. See, e.g., Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 429–38 (2001); Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1071 (2004) (noting that in the criminal defense context, holistic lawyering “recasts the defense role by considering the social, psychological and socioeconomic factors that often underlay [criminal defense] cases”).

255. See, e.g., *The Future of the Profession: A Symposium on Multidisciplinary Practice*, 84 MINN. L. REV. 1083–1654 (2000) (including various articles evaluating multidisciplinary practice as well as the ABA Commission on Multidisciplinary Practice 1999 Report).

While they differ in emphasis, they share a commitment to structural reform through client and community partnerships.

Focusing on holistic lawyering in criminal defense, Michael Pinard aptly describes a “holistic mindset”—that is, an orientation to clients that contextualizes individual client problems within the entirety of the person’s life,<sup>256</sup> with a view toward addressing underlying causes of client involvement in the criminal justice system, and helping to prevent future involvement.<sup>257</sup> This orientation to the breadth of client needs has led emerging community defender programs<sup>258</sup> to adopt multidisciplinary approaches to their work, incorporating social workers, civil lawyers, and community educators.<sup>259</sup> Thus, the contextualization of clients’ specific legal needs impels the lawyer in two related directions: The first is to blur the arbitrary boundaries of legal representation (for example, criminal versus civil, public benefits versus housing), and the second is to erase the distinction between legal and nonlegal dimensions of the clients’ problems (for example, is structural unemployment a legal or nonlegal issue?).

This latter consideration commits the poverty lawyer to multidisciplinary approaches.<sup>260</sup> Multidisciplinary collaborations involving

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256. This insight, that poor people’s problems must be examined by lawyers within a broader societal and structural context, is, of course, not new. See, e.g., Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1050 (1970). And yet, this fundamental point bears repeating, as much of contemporary poverty law practice still disregards it.

257. Pinard, *supra* note 254, at 1067, 1071–73.

258. As Kim Taylor-Thompson describes, “[T]he community defender office sees its clients as individuals with ties to the community, who should be understood in the context of that community, and thereby rejects a wholly individualized conception of its role. . . . As a consequence, the defender office chooses to give greater deference to ‘community’ concerns.” Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2458 (1996); see also Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 606–07 (2006) (discussing the community defender movement).

259. *Id.* at 1094 (describing the Harlem Re-entry Advocacy Project of the Neighborhood Defender Service of Harlem).

260. For additional examples linking holistic lawyering to multidisciplinary practice, see Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice—Encouraging Holistic Advocacy While Protecting Ethical Interests*, 73 U. COLO. L. REV. 787 (2002); Clarke, *supra* note 254, at 430–32. This has been a hot topic in the corporate legal sector in recent years. See, e.g., Susan Poser, *Main Street Multidisciplinary Practice Firms: Laboratories for the Future*, 37 U. MICH. J.L. REFORM 95, 99–108 (2004) (reviewing the history of the multidisciplinary practice debate and evaluating it in the aftermath of the Enron and Arthur Andersen scandals). Multidisciplinary lawyering has also emerged as a model for lawyering for poor and middle-class clients. See Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227 (2000–2001). It has proven especially promising in the context of domestic violence advocacy. See, e.g., Susan Bryant & Maria Arias, *A Battered Women’s Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering That Empowers Clients and Community*, 42 WASH. U. J. URB. & CONTEMP. L. 207 (1992); Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403 (2000–2001).

lawyers have a considerable history, particularly with social workers.<sup>261</sup> And yet, such collaborations seem the exception rather than the rule.<sup>262</sup> In a modest fashion, a robust collaboration with interpreters when lawyering across language difference might help to model the possibility and productivity of other multidisciplinary collaborations.

Such collaborations can not only enhance the quality of service provided to an individual client, but also improve lawyers' overall efficacy in combating conditions of poverty and subordination. Collaboration with community allies enhances lawyers' ability to identify community priorities in the first instance, and to address them collectively thereafter.<sup>263</sup> However, in order for either the needs assessment or the substantive problem-solving to be meaningful, the lawyers' collaborative links must be multiple, diverse, and dynamic.<sup>264</sup>

### 3. Community Immersion

A lawyer's commitments to deeper cultural understanding with clients and broader collaboration with community allies lead necessarily to greater

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261. See Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123, 2130-33 (1999) (assessing the value of social workers in assisting lawyers, particularly in cases involving indigent clients, through a discussion of the various roles that social workers play and shared goals of the two professions).

262. *Id.* at 2144 ("Although poverty law practice traditionally has been oriented towards collaboration, the practice in recent years has become more atomistic. This trend may stem from the current realities of decreased funding of legal services in a time of shrinking resources, issues of morale, the recent decision of the Supreme Court in the IOLTA case [*Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998)], and the adoption of more limited models of providing services" (citations omitted)).

263. See Brescia et al., *supra* note 252, at 856-60.

264. The question of how to identify community priorities begs the question of what constitutes the community. Raymond Brescia, Robin Golden, and Robert Solomon suggest that these questions are mutually constitutive:

[L]egal services offices must train themselves to hear the voices in the communities they serve. This goes beyond asking a few prominent members of the bar and a token representative of a local church to serve on the office's board of directors. Rather, this requires developing relationships with community leaders from all sectors of society, including: representatives of block associations, schools, community development corporations and local businesses; as well as local elected officials, sympathetic government workers, local business, homeowners and leaders of tenant groups. Every community is different and will organize itself according to different physical, political, and geographic fault lines. Members of different sides of the same street might . . . fall in different census tracts, or find themselves in different political subdivisions. [Legal services] [office staff must reach out to and try to understand how community residents relate to each other and solve problems.

*Id.* at 857.

community involvement. In his articulation of rebellious lawyering, Gerald López suggests how these pieces fit together:

In this idea—what I call the rebellious idea of lawyering against subordination—lawyers must know how to work with (not just on behalf of) women, low-income people, people of color, gays and lesbians, the disabled, and the elderly. They must know how to collaborate with other professional and lay allies rather than ignoring the help that these other problem-solvers may provide in a given situation. They must understand how to educate those with whom they work, particularly about law and professional lawyering, and, at the same time, they must open themselves up to being educated by all those with whom they come in contact, particularly about the traditions and experiences of life on the bottom and at the margins.<sup>265</sup>

Similarly, as Christine Zuni Cruz writes, “[c]ommunity lawyers do more than represent individual clients. They represent clients in definable communities. They learn about the cultures, values, beliefs of the people in the community. They see problems of individuals in the context of the community.”<sup>266</sup> Consistent with López’s and Cruz’s visions, a lawyer’s immersion in the community must be ongoing rather than opportunistic, an end in itself and not only a means.<sup>267</sup>

Like its goals and methodologies, the challenges of and objections to community lawyering have been explicated by others. Two limitations in particular recur—the impact of such strategies on client autonomy,<sup>268</sup> and the challenges of engaging in community lawyering strategies within the bounds of the rules of professional conduct.<sup>269</sup> To be sure, these constraints are real, but as the literature in this area demonstrates, they are challenges to be managed, rather than absolute barriers to community lawyering.

The example of lawyering across language difference does not resolve these challenges. Rather, it presents particular permutations of them,

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265. LÓPEZ, *supra* note 86, at 37.

266. Cruz, *supra* note 12, at 572.

267. See White, *supra* note 85, at 538 (arguing the potential of litigation as a site for client participation and education, but noting that such an approach requires that advocates “appreciate the cultural norms and practices in their clients’ own communities”).

268. See, e.g., Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers’ Representation of Groups*, 78 VA. L. REV. 1103 (1992).

269. See, e.g., Cummings & Eagly, *supra* note 250, at 502 (discussing the ethical constraints on collaborations between lawyers and organizers); Marshall, *supra* note 245; Trubek & Farnham, *supra* note 260, at 267–70 (discussing the ethics regulatory system in which multidisciplinary practice resides).

and suggests ways of negotiating them. While lawyering across language difference does not necessarily compel community lawyering, at the same time, effective lawyering across language difference demands an orientation to lawyering that draws upon and is consistent with community lawyering practices. The potential of robust collaboration between lawyer, client, and interpreter thus suggests a far grander vision of lawyer engagement not only in the cases of clients, but in the struggles of communities.

### CONCLUSION

The lawyer's role frequently has been analogized to that of an interpreter: fluent in two vocabularies, cultures, and modalities of expression, and charged with translating client interests into language and form intelligible by the law while translating the cultural idiosyncrasy of law into language intelligible by clients.<sup>270</sup> Lawyering across language difference breathes new life into this metaphor, but also complicates it significantly by deepening our understanding of the nature of interpretation, the centrality and the difficulty of cultural analysis, and the irreducibility of mediating forces in the lives of our clients. As Gerald López has observed, interpreting makes us communitarians.<sup>271</sup> It thrusts us into the lives of our clients, their social and political contexts, and their webs of relationships. It forces us to reckon with the communities to which our clients claim belonging, or which claim belonging of them. The more open and fluid lawyer-client relationship that results is both necessary to protect the agency and voice of the client, and, at the same time, threatening to them. This is nothing more, and nothing less, than the challenge of community.

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270. See, e.g., WHITE, *supra* note 99; Alfieri, *Reconstructive Poverty Law Practice*, *supra* note 245, at 2124 (using the metaphor of translation to highlight the danger of lawyers co-opting and distorting client narratives); Cunningham, *supra* note 184, at 1299; Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); López, *supra* note 184, at 9; White, *supra* note 85, at 544 ("The legal culture might define the attorney's core role as that of a translator who serves to shape her client's experiences into claims, arguments and remedies that *both* the client and the judge can understand. Ultimately, every advocate must perform this translator function. However, the work becomes more challenging as the social and cultural distance between the client and society's elites becomes greater").

271. López, *supra* note 184, at 9.