

# Lawyer as Translator Representation as Text: Towards an Ethnography of Legal Discourse

Clark D. Cunningham

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## Recommended Citation

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

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# THE LAWYER AS TRANSLATOR, REPRESENTATION AS TEXT: TOWARDS AN ETHNOGRAPHY OF LEGAL DISCOURSE

*Clark D. Cunningham*†

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† Associate Professor of Law, Washington University (St. Louis). Earlier versions of this article have been presented to the 1990 Annual Meeting of the Law & Society Association, the Second International UCLA-Warwick Clinical Conference, the 1989 Symposium on Legal Narrative held at the University of Michigan Law School, the Institute for Legal Studies at the University of Wisconsin Law School, and the Law & Society Program at Macalester College. Helpful comments and advice have been received from M. Dujon Johnson, Helen V. Cunningham, James Boyd White, Paul D. Reingold, Thomas D. Eisele, Milner S. Ball, Suellyn Scarnecchia, Anthony V. Alfieri, Roy D. Simon, Patricia Williams, Norman L. Rosenberg, Lewis Henry LaRue, Austin Sarat, Richard Delgado, Naomi Cabn, Jean Koh Peters, and many who attended and participated in the above-mentioned presentations.

## PROLOGUE

This is a true story. It is the story of how the law punished a man for speaking about his legal rights; of how, after punishing him, it silenced him; of how, when he did speak, he was not heard. This pervasive and awful oppression was subtle and, in a real way, largely unintentional. I know because I was one of his oppressors. I was his lawyer.

Earlier drafts of this Article began with the above somewhat melodramatic and self-flagellating words. Although I still hope that the story you are about to read is true, I no longer wish to begin by asserting its meaning. Instead, I strive to present this story in a form that you can interpret yourself, and in so doing, to exemplify a method for both studying and changing the practice of law.

In a recent article, Lucie White points out that the word "client" derives from the Latin verb "cluere," meaning "to be named, hear oneself named." In ancient Rome, persons under the patronage of patricians were called "clientem" because they were known by the name of their patron.<sup>1</sup> White explains that because, even for the most enlightened modern day lawyers, "advocacy is a practice of speaking for [the client,] . . . the advocate . . . inevitably replays the drama of subordination in her own work."<sup>2</sup> The story told below shows how powerful the forces of such client subordination can be despite a lawyer's conscious intent and efforts, but the Article as a whole also strives to offer some hope against White's word "inevitably." I offer the metaphor of the lawyer as translator as a way of both understanding and altering the ways lawyers change the meanings of their clients' stories. By implying that law is a language foreign to the client, the metaphor suggests that the meaning of the client's story will "inevitably" be transformed through the lawyer's representation; no sentence can be perfectly translated from one language to another.<sup>3</sup> Yet if one feels a sense of loss in speaking through a translator, there can also be something gained.

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<sup>1</sup> Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 861 n.2 (1990) [hereinafter *Paradox of Lawyering*].

<sup>2</sup> *Id.* at 861.

<sup>3</sup> By stressing the inevitability of meaning change, the translation metaphor suggests, for example, that the interviewing techniques advocated in the influential texts authored by David Binder and his colleagues at UCLA, see DAVID BINDER & PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); DAVID BINDER, ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991), although valuable, may not be sufficient to assure that the case constructed by the lawyer continues to be the client's "own story" in a way that is meaningful for the client. See *infra* note 159. For differing assessments of the limitations of the "client-centered" model of lawyering, see Anthony V. Alfieri, *The Politics of Clinical Knowledge*, 35 N.Y.L. SCHOOL REV. 7 (1990); Robert Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Robert Dinerstein, "Clinical Texts and Contexts," 39

By speaking through a translator, one can be heard and understood in places where otherwise one is mute. The translator does not silence the speaker but rather seeks to enhance the speaker's voice by adding her own. The good translator does not alter the speaker's meaning without the speaker's consent, and may even collaborate with the speaker to produce a statement in the foreign language that is more meaningful than the speaker's original utterance. Thus, translation offers both an image of the constraints upon a lawyer's ability to represent fully his client's story and a model for recognizing and managing the inevitable changes in meaning in a way that may empower rather than subjugate the client.<sup>4</sup>

More than ten years ago, William Felstiner, Richard Abel, and Austin Sarat pointed out the need to study the process by which disputes are transformed from a layperson's initial sense of injury into legal claims, and noted the dearth of empirical research and scholarly attention to this issue.<sup>5</sup> Legal scholarship that begins with a court's written opinion or even that (all too rarely) delves back to the complaint filed at the outset of litigation misses entirely this critical transformation process. Yet we know that the vast majority of lawsuits filed are resolved without a court decision on the merits and that an even larger number of disputes are handled by lawyers without ever utilizing litigation.<sup>6</sup> The ways lawyers transform their clients' stories into legal terms are the most profoundly important ways that the legal system has effect; yet these transformations have been largely invisible to and unstudied by the legal academy.

What scholarship exists, almost all very recent, provides troubling reports.<sup>7</sup> Works by Tony Alfieri, Gerald Lopez, and Lucie White on poverty and civil rights practice—drawing primarily on their own experiences in these fields—conclude that lawyers routinely silence and subordinate their clients while purporting to tell

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UCLA L. REV. 697 (1992); and William Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980).

<sup>4</sup> Of course, client subordination is caused by many other factors than the problem of "translation" nor will better translation by itself necessarily empower most clients. The translation metaphor is offered to supplement, not supplant, other critiques and models of lawyering. It is interesting to note, however, that even one of the most prominent advocates of a radical reconception of lawyering, Gerald Lopez, views "translation" as a necessary aspect of any effort (even by a non-lawyer) to help another person solve a problem. Gerald Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 9-14 (1984).

<sup>5</sup> William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980).

<sup>6</sup> See Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 11-13 (1981).

<sup>7</sup> A good, brief survey of the empirical literature on attorney-client relations appears in the article by William L.F. Felstiner and Austin Sarat in this symposium issue. See William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1454-58 (1992).

“their” stories.<sup>8</sup> Although these writers tend to emphasize the role of gender, race, and class in such client subordination, the news from other fronts is no better. Felstiner and Sarat have concluded from an extensive empirical study of divorce cases—in which lawyer and client often share the same race, gender, and class features—that “clients largely talk past their lawyers” and that the lawyer’s interpretation takes place without a shared understanding.<sup>9</sup> The anthropologist-lawyer team of William O’Barr and John Conley concludes from its studies of legal discourse that “the law has come to define the problems of ordinary people in ways that may have little meaning for them, and to offer remedies that are unresponsive to their needs as they see them.”<sup>10</sup> Significantly, research consistently shows that people who have been involved with the American legal system have a more negative view of it than those who have not.<sup>11</sup> Litigant discontent is pervasive and notably independent of outcome; “winners” are as critical as “losers.”<sup>12</sup>

In using the metaphor of lawyering as translation, this Article suggests that one can understand at least some of the silencing of the client’s voice as the lawyer’s failure to recognize and implement the art and ethic of the good translator—a translator who shows conscious awareness of shifts in meaning and who collaborates with the speaker in managing these changes. It also suggests a methodology, drawn from anthropology and sociolinguistics, for making a lawyer aware of how meaning is changing and for revealing the complex significances of the story to be translated. This methodology, termed the ethnography of legal discourse, begins by recording as much as possible of what takes place during the representation of a

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<sup>8</sup> Anthony V. Alfieri, *Reconciling Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619 (1991) [hereinafter *Speaking Out of Turn*]; Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-1988); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); *Paradox of Lawyering*, *supra* note 1; Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) [hereinafter *Sunday Shoes*].

<sup>9</sup> Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC’Y REV. 737, 742 (1988) [hereinafter Sarat & Felstiner, *Vocabularies of Motive*].

<sup>10</sup> JOHN M. CONLEY & WILLIAM M. O’BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 177 (1990).

<sup>11</sup> Austin W. Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer’s Office*, 98 YALE L.J. 1663, 1687 (1989).

<sup>12</sup> See Tom R. Tyler, *Client Perceptions of Litigation*, 24 TRIAL 40 (1988); see also TOM R. TYLER, WHY PEOPLE OBEY THE LAW 178 (1990) (“In evaluating the justice of their experiences [people] consider factors unrelated to outcome, such as whether they have had a chance to state their case and been treated with dignity and respect.”).

client.<sup>13</sup> These records are then treated as texts which are given close and repeated reading with the goal of evoking the significance of what was said and done from the standpoint of each participant and, particularly, from the viewpoint of the client. The resulting interpretation is generated through a collective process, perhaps with colleagues and, most importantly, with the client herself. The experience of anthropologists, sociologists, and linguists with similar methodologies suggests that this approach can be an effective way of recognizing the difference of "the other" and expanding imagination sufficiently to have some understanding of the other's story.<sup>14</sup>

In Part I I tell the story of one case I personally handled, and include many verbatim texts of what was actually written and said. While representing this client, I consciously strove to emulate the translator's art and ethic, with decidedly mixed results. In Part II I further explicate the metaphor of lawyering as translation, and in Part III I summarize the theory and practice of ethnographic description of legal discourse. In Part IV I apply the translation metaphor and ethnographic methods to the texts that appear in Part I, and in Part V I share my client's comments on the case as a whole and on my interpretations of what happened. I hope to recreate for you my own experience of growing understanding as it developed through use of the translation metaphor and the methods of ethnography.

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<sup>13</sup> In order of preference, forms of recording are videotaping, audiotaping, verbatim transcripts, contemporaneous notes, accounts written soon after the event, and more distant written recollections checked against other persons present at the time.

As explained *infra* notes 245-46 and accompanying text, my client has consented to the use of his real name and to the disclosure of confidential attorney-client communications in this Article. I have also used the real names of the arresting police officers and the trial judge, and reproduce in figures 1 and 2 actual court and police documents.

<sup>14</sup> By preserving the integrity of the client's own words in texts that are studied and by including the client in the interpretation of those words, the ethnographic method hopefully de-centers the lawyer and strips him of some of the power that may blind and deafen him. Feminist and critical race theorists suggest that those who have personally experienced disempowerment and marginalization can attain a "multiple consciousness" that enables them to imagine other kinds of marginalized viewpoints. See Richard Delgado, *When a Story is Just a Story*, 76 VA. L. REV. 95 (1990); Richard Delgado, *Storytelling for Oppositionists and Others*, 87 MICH. L. REV. 2411, 2414 (1989) [hereinafter Delgado, *Storytelling*]; Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989). In a more modest way that hopefully guards against what Delgado and Stefancic term the "empathic fallacy," Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1261 (1992), the ethnographic method may provide a similar insight into the worldview of those situated very differently, a way of responding to the postmodern concern with being trapped within one's own subjectivity.

I

THE CASE OF THE ATTITUDE PROBLEM

A. The Beginning

This story begins with a sentence of deceptive simplicity, contained within the complaint in a misdemeanor case:

FIGURE 1

Approved, SCAO	Original Complaint - Court Warrant - Court	2nd Complaint copy 3rd Complaint copy	Prosecutor Defendant
STATE OF MICHIGAN 14B JUDICIAL DISTRICT JUDICIAL CIRCUIT		COMPLAINT MISDEMEANOR	
CASE NO.			
District Court ORI:	Court address	Court telephone no.	
MI-	Defendant name and address	Victim or complainant	
<input type="checkbox"/> THE PEOPLE OF <input type="checkbox"/> The State of Michigan	v M. DUJON JOHNSON	Complainant with information & belief Daniel Kopolowicz	
Co-defendant(s)		Date On or about	
		9-5-88	
City/Twp./Village	County in Michigan	Defendant STN	As listed in MI
Hewitt at Washtenaw, Ypsilanti Twp. Washtenaw			4-25-59
Police agency report no.	Charge	Maximum penalty	
4901-88	DISTURBING THE PEACE	90 days and/or \$100	
Witnesses			

STATE OF MICHIGAN, COUNTY OF WASHTENAW

The complaining witness says that on the date and at the location described, the defendant contrary to law,

did make or excite a disturbance in a business place, located at Hewitt at Washtenaw; contrary to MCL 750.170; MSA 28.367; [750.170]

10  
13  
88

The complaining witness asks that defendant be apprehended and dealt with according to law.

(Peace Officers only) I declare under penalties of perjury that the statements above are true to the best of my information, knowledge and belief.

Warrant authorized on \_\_\_\_\_ by: \_\_\_\_\_  
Date \_\_\_\_\_

Prosecuting Official \_\_\_\_\_

*Debra A. Dorc*  
Complaining witness signature

Subscribed and sworn to before me on 10-04-88  
Date

*Debra A. Dorc*  
District Judge/Court Clerk/District Court Magistrate signature

The defendant named in this complaint, M. Dujon Johnson, was arraigned in a district court<sup>15</sup> in Washtenaw County, where the University of Michigan is located. The county seat is Ann Arbor, a wealthy and sophisticated college town located about 40 miles west of Detroit. The other major town in the county is Ypsilanti, a more working-class community with a substantial African-American population. This district court serves Ypsilanti Township, a fairly rural area adjacent to Ypsilanti marked by pockets of suburban encroachment.

Johnson asked for court-appointed counsel because of his limited income. The General Clinic at the University of Michigan Law School was appointed to represent him. At the time, I was one of two clinical professors who taught the General Clinic. The case was assigned to a team of two student attorneys, and I was their supervising attorney.

### B. The Police Report

Apart from the rather uninformative misdemeanor complaint, the first information we received about this case came from the police incident report,<sup>16</sup> which we obtained before the initial client interview. The report, reprinted below verbatim, was signed and apparently authored by Michigan State Trooper Wayne Kiser. The abbreviation which appears throughout as "U/S" ("undersigned") sometimes refers to both Kiser and his partner, Trooper Frank Mraz, and sometimes only to Kiser.

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<sup>15</sup> In the Michigan court system, the district court is the lowest court of record, with jurisdiction over misdemeanors and civil cases in which the amount in controversy is less than \$10,000. MICH. STAT. ANN. § 27A.8301, 27A.8311 (1987). Populous counties are typically divided into several districts, with a separate court for each district. *Id.* § 27A.8101; § 27A.8120(2) (creating district court for Ypsilanti Township).

<sup>16</sup> WAYNE KISER & FRANK MRIZ, MICHIGAN DEP'T OF STATE POLICE, ORIGINAL INCIDENT REP. No. 026-4901-88 (1988) [hereinafter POLICE REPORT].

FIGURE 2

JD-1070 (Rev 11-86)  
Michigan Department of  
Police  
ORIGINAL INCIDENT  
REPORT Page 1

ORIGINAL DATE SEP 05, 1988	INCIDENT NO. 026 - 4901-88
TIME RECEIVED	FILE CLASS 5300

WORK UNIT MSP YPSILANTI #26		COUNTY WASHTENAW	
COMPLAINANT TPR.S KISER / HRAZ # 136-665		TELEPHONE NO. (313) 482-1211	
ADDRESS: STREET AND NO. MSP #26	CITY YPSILANTI	STATE MI	ZIP 48197
INCIDENT STATUS <input checked="" type="checkbox"/> 5 CLOSED			
NATURE OF INCIDENT			

## DISORDERLY PERSON/DWLS:

## VENUE:

Primary incident occurred at: Intersection of Hewitt and Washtenaw Ave. Vehicle NB Hewitt crossing Washtenaw Ave.

Secondary venue occurred at: TOTAL GAS STA. located on the NW corner of intersection described in primary venue.

## DATE/TIME:

Incident occurred on 09/05/88 at: 04:30 A.M. (Monday).

## VEHICLE INVOLVED:

1977 Triumph 2Dr Convertable, Blue in color bearing 89/MI 721 VRJ.  
Disposition of vehicle: Towed from scene to Ypsi Towing. No Hold.

## INFORMATION:

U/S while on patrol were EB on Washtenaw Ave approaching Hewitt Rd. Said intersection was controlled by a traffic signal, traffic signal was observed flashing Yellow for EB and WB Washtenaw Ave traffic.

Signal was further observed, Flashing RED for traffic NB and SB on Hewitt Rd.

Vehicle listed above was observed to be travelling NB on Hewitt Rd. and at an estimated speed of 35 MPH. Vehicle did NOT stop or slow for the flashing RED signal.

Vehicle was then pursued by U/S and a subsequent traffic stop ensued.

U/S observed driver of vehicle to look over at patrol unit, now about to make a NB turn onto Hewitt and behind target vehicle.

PAGE 1	INVESTIGATED BY TPR: HRAZ FRANK KISER, WAYNE	REPORTED BY <i>C. Kiser</i>	REVIEWED BY
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PRINTED ON 1 OF 1

JL-1000 (REV 11-88)  
Michigan Department of  
State Police  
ORIGINAL INCIDENT  
REPORT Page 2

ORIGINAL DATE SEP 05, 1988	INCIDENT NO. 026 - 4901-88
TIME RECEIVED	FILE CLASS 5300

Vehicle then made an abrupt left turn into the TOTAL GAS station and pulled into one of the pump stations.

U/S pulled up to the pump station near suspect vehicle. U/S observed the driver to exit his vehicle and begin walking up toward the building. U/S obtained the drivers attention and requested same to return to the vehicle. Driver began walking towards officers.

CONTACT DRIVER/OBSERVATIONS:

Upon making contact with the Driver U/S was met with irate actions, with Driver stating that this wasnt necessary. U/S advised the Driver that running a RED light was a necessary stop. Tpr. KISER making contact with Driver requested subject to produce his MICH Drivers license, Registration and Proof of Insurance for the motor vehicle.

Driver's attention was then directed away from U/S and to Tpr MRAZ who was utilizing his hand held flash light to look into the drivers side of the vehicle. Driver was observed to make statements directed towards Tpr. MRAZ indicating to the effect, "What are you doing looking in my car"?

Further, Driver stated U/S have no right looking inside his vehicle and that he knew the law well enough to know "WE" need a search warrant to look into his vehicle.

TPR KISER at this time again asked Driver to produce his License at which time Driver again asked what he was being "Harrassed" for. U/S explained that they observed him run the RED light and that this was the reason for being stopped, and U/S did not feel they were conducting themselves in any offensive manner. Driver then began indicating that he did NOT run the RED light, that he came to a complete stop and that U/S were making this up for a reason to Harrass somebody.

Driver continued with verbal accusations of U/S being the "Strong Armed Vigilanties" and "Taking things out on the Working Public". Driver repeatedly stated: "I have no respect for YOU people", and "You are Bigots".

When driver was asked questions pertaining to and surrounding the events leading up to the incident at hand, would make strong, detailed remarks indicating that the POLICE cant get away with these kinds of things.

CAUSE FOR ARREST:

U/S upon continuing the normal course of action on this traffic stop felt uneasy with the situation as the Driver was acting in a manner such to create U/S with a concern for safety of Officers. U/S has made

PAGE 2	INVESTIGATED BY TPR- MRAZ, FRANK TPR. KISER, WAYNE	REPORTED BY <i>C. Wayne Kiser</i>	REVIEWED BY
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JD-1090 (Rev 11-86)  
Michigan Department of  
State Police

ORIGINAL INCIDENT  
REPORT Page 3

ORIGINAL DATE SEP 05, 1988	INCIDENT NO. 026 - 4901-88
TIME RECEIVED	FILE CLASS 5300

many traffic stops and has not come into contact with persons acting in this nature without attempting to hide something or possibly having contraband or a weapon about their person or accessible inside vehicle.

U/S requested driver to place his hands on the hood of his vehicle and spread his feet back in the normal wall search position. U/S asked the subject if he possessed any weapons, guns, knives, etc... Driver stated that U/S could not search him unless he was arrested for some offense.

U/S again explained to the subject that they wished to pat him down only to dispell the possibility of him having any weapons.

Driver continually stated that he was NOT letting U/S pat him down. Driver was arrested for Disorderly Person. Driver was then handcuffed and patted down with no weapons being found.

Subsequent radio traffic with MSP #26 R/O Koths reference Drivers status and vehicle information found Driver to be suspended on two (2) FCJ's out of Detroit.

- #1. Suspension Date / 12/30/87 FCJ # E736428 / Careless Driving.
- #2. Suspension Date / 12/30/87 FCJ # E736429 / Reg and/or Plate violation.

**ARRESTED:**

M DUJON-JOHNSON B/M 04/25/59 of: 800 W Huron St Apt. #5, Ann Arbor, MI. OLN # 252 566 000 318. SS# 381 74 1577. Employed: U of M Medical Records Section/also Student UofM. 5-10 145 Blk Bro. Married.

**Count #1.**

DWLS. Citation issued. Bond of \$100.00 requested. Held at MSP pending that action.

**Count #2.**

Disorderly Person. UD-7B issued. PR bond given, pends subjects contact with 14-B Dist Ct of Juris within 10 Days.

**SOS REQUEST:**

MSP #26 R/O Koths sent request via LEIN to SOS for certified copy of driving record for arrested.

**PROSECUTOR CONTACT:**

Copy of this complaint sent to Wash Co Pros Ofo for Review and Authorization of Disorderly Person.

PAGE 3	INVESTIGATED BY IPR: MRAZ, FRANK KISER, WAYNE	REPORTED BY <i>C. Weber</i>	REVIEWED BY
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EXHIBIT B, p. 3 of 4

JD-1090 (Rev 11-84)  
Michigan Department of  
State Police  
ORIGINAL INCIDENT  
REPORT Page 4

ORIGINAL DATE SEP 05, 1988	INCIDENT NO. 026 - 4901-88
TIME RECEIVED	FILE CLASS 5300

WITNESSES:

Due to the Drivers actions and statements being made, U/S made contact with the two on duty employees of the TOTAL GAS STA.

Said employees were within eyesight of the vehicle in question and were requested to supply U/S with their name(s) for any possible future complaint this subject would make pertaining to actions of officers this night.

- #1. ALLEN ADKINS W/M of:
- #2. PATRICIA WINTON W/F of:

Subject #1 listed above indicated to U/S that he did not watch the entire incident however did observe that the B/M subject was giving U/S officers a hard time and not being very cooperative.

Subject #2 indicated about the same observation(s) as did #1.

COMPLAINT STATUS:

CLOSED.

PAGE 4	INVESTIGATED BY TFR: HRAZ FRANK KISER, WAYNE	REPORTED BY <i>C. Wayne Kiser</i>	REVIEWED BY
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Upon reading the report, I immediately concluded that the encounter between our client and the state troopers was an improper *Terry*-stop that had escalated into a pretext arrest. In *Terry v. Ohio*,<sup>17</sup> the Supreme Court extended the Fourth Amendment's prohibition of "unreasonable searches and seizures" to include the common police practice known as "stop-and-frisk," an interference with liberty short of a full arrest in which a police officer approaches a person she suspects of criminal activity for a brief interrogation.<sup>18</sup> In order to protect the officer's safety during this brief encounter with a possible criminal, the officer is allowed to "seize" the suspect long enough to conduct a "pat-down" search for weapons *if* the officer has particularized reasons for believing that the suspect is presently armed and dangerous.<sup>19</sup> The Court emphasized that such a stop-and-frisk, a procedure now named the "*Terry*-stop" after the *Terry* case, requires more than an "unparticularized suspicion or 'hunch'."<sup>20</sup>

Taking the incident report as true, it was clear that although the troopers could ask our client to produce his drivers license and registration if they had seen him violate a traffic law, that traffic violation alone gave them no reason to believe he was armed and dangerous. As for the statements appearing under the heading "Cause for Arrest" in the report, they certainly added up to no more than mere suspicion. A pat-down search incident to a *Terry*-stop must be based on some particular observation that indicates the suspect has a weapon on his person or in reaching distance, such as a suspicious bulge or a sudden movement toward a pocket, combined with evidence of potential dangerousness, typically supplied by the crime the officer suspects the person committed.<sup>21</sup>

Under my analysis, which continued to take the report as true, when our client (quite justifiably) refused to submit to the pat-down search, the trooper converted the stop into a pretext arrest to cover the impropriety of the search. Under *United States v. Robinson*,<sup>22</sup> a police officer may conduct a complete body search of a person upon arrest regardless of whether the officer has *any* basis for believing that the arrestee has weapons, contraband, or other evidence on his person.<sup>23</sup> When an officer makes an arrest in order to take advantage of the broad *Robinson* exception to the usual Fourth Amend-

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<sup>17</sup> 392 U.S. 1 (1968).

<sup>18</sup> *Id.* at 30, 31.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 27.

<sup>21</sup> *Id.* at 27, 30.

<sup>22</sup> 414 U.S. 218 (1973).

<sup>23</sup> *Id.* at 235.

ment requirements for conducting searches, that arrest is termed by most commentators as a pretext arrest.<sup>24</sup>

In our case, it seemed clear to me, the troopers arrested our client on the pretext that he was "a disorderly person."<sup>25</sup> The "hunch" that our client had a weapon turned out to be wrong and the troopers were then forced to carry through the charade that our client had committed a misdemeanor.

### C. The Initial Client Interview

Students in the Michigan General Clinic work in teams of two. Although each team is closely supervised by a clinical professor who bears the ultimate professional responsibility for representation, one goal of the clinic is to encourage the students to view the cases as their own and thus enter fully into the professional role of lawyer. To this end, the initial client interview usually occurs without the professor present, although, with the client's consent, the interview is videotaped for later review by the students and the professor.

The two student attorneys met Dujon Johnson for the first time on January 25, 1989, more than four months after his arrest on September 5, 1988. The interview took place in the Clinic's conference room, a converted faculty office located off the opulent neo-Gothic library reading room of the Michigan Law School. Johnson was seated at the end of a massive wooden table with the student attorneys located on either side of him along the sides of the table. Above the table, suspended from a florescent light fixture, was a microphone for audio pickup. The video camera was rather obtrusively mounted on an adjacent file cabinet that concealed the recording equipment within. Following standard clinic practice, the students obtained Johnson's written consent to the video recording of the interview before the equipment was turned on.

The videotape of the interview lasted about 50 minutes. I viewed it in the company of the students several days later with three major objectives in mind: to critique the students' interviewing techniques, to get an initial impression of the client, and to check his story against the police report for inconsistencies.

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<sup>24</sup> This substantive Fourth Amendment law is discussed *infra* at notes 162-91 and accompanying text.

<sup>25</sup> The police report indicated that Johnson was also charged with driving while license suspended ("DWLS"). POLICE REPORT, *supra* note 16, at 1. That charge, however, could not have been the basis for the arrest and pat-down, because the troopers only learned about the suspended license after Johnson was searched and cuffed. *Id.* at 3. The license suspension apparently arose out of a misunderstanding regarding whether Johnson had paid two prior tickets. The prior tickets were taken care of and the DWLS charge was dropped before we entered the case.

As for my impressions of Dujon Johnson, he seemed poised, articulate and likeable. Indeed, I remember commenting to the students that it seemed that our client was managing the impressions he created in the interview with at least as much care as the students were managing their interviewing techniques. I learned by way of background that Johnson had served in the military and worked both as an assistant in a law school library and as a paralegal. He was currently finishing his undergraduate degree at the University of Michigan and planning to get a Master's degree in Chinese Studies. He was married and lived in Detroit. His means were very limited. At the time of the interview, he had been unable to repair his car and had to commute the forty miles to Ann Arbor for classes by bus. He had no prior criminal record. He was black, a fact we knew before the interview from the identifying abbreviation in the police report: "B/M" ("Black Male").<sup>26</sup>

As I viewed the tape, I noted four major inconsistencies between the police report and Johnson's story of what happened that night.<sup>27</sup> First, our client adamantly maintained that he had come to a full stop before proceeding through the intersection. Second, he insisted that the troopers did not tell him that he had run a red light or otherwise explain their actions until after his arrest. Third, he said he was neither belligerent nor demonstrative before he was handcuffed. Finally, he denied accusing the troopers of being "strong armed vigilantes" or of "taking things out on the working public." He did, however, confirm saying, "I have no respect for you people." His response when asked if he said, "you are bigots," was ambiguous: "I may have said that. I don't think I said, 'you are bigots.'"

#### D. The Suppression Motion

Our client's story further confirmed my theory that this was a case of a pretext arrest. I also saw in one detail of Johnson's narrative a way of advancing this theory in a pretrial motion. He insisted he was neither demonstrative nor belligerent before Trooper Kiser demanded that he submit to a frisk, a claim that seemed consistent with the personality he displayed during the interview. Arguably, if the demand to be frisked was illegal, then our client *was* entitled to complain loudly; indeed state law suggested he would have even

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<sup>26</sup> The two students and I were all white men. The judge, the prosecutor, and Trooper Kiser were also white men; Trooper Frank Mraz was identified by the judge as a Native American, but our client described him as white.

<sup>27</sup> After consulting with me, the students decided not to show the police report to our client before or during the interview.

had the right to resist by force.<sup>28</sup> But rather than wait until the trial to challenge the legality of the frisk order, it occurred to me to take the offensive and file a suppression motion.

Typically, a motion to suppress on Fourth Amendment grounds is brought to prevent the introduction of incriminating physical evidence. The purpose of our motion was somewhat unusual: to suppress all *statements* made by our client from the moment that the trooper demanded that he submit to the pat-down search, on the theory that these statements were the "fruit" of constitutional violations. If, as our client reported, the only arguably "disorderly" conduct took place after the encounter escalated into the frisk order, suppression of this evidence would greatly weaken, if not destroy, the prosecution's case.<sup>29</sup>

I was far from certain that this somewhat novel tactic would succeed in securing a pretrial dismissal. In part, the motion was appealing simply for tactical reasons. It created the basis for a pretrial evidentiary hearing that would give us the opportunity to cross-examine the troopers for discovery and to preserve their testimony for possible impeachment use at trial. I also wanted a chance to introduce the judge to our Fourth Amendment theory before trial and

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<sup>28</sup> The relevant case law held that a citizen has the right to resist an illegal arrest even by force if necessary as long as the force is no greater than needed. *See* *People v. Landrie*, 335 N.W.2d 11 (Mich. Ct. App. 1983). The illegality of an arrest is a complete defense to the charge of resisting arrest, and the state cannot evade this defense by charging peace disturbance instead of resisting arrest. *People v. Davenport*, 215 N.W.2d 702 (Mich. Ct. App. 1974).

<sup>29</sup> Here, excerpted from our brief in support of the suppression motion, is the story we told the court:

In the police report there is absolutely no evidence other than unparticularized suspicion or hunch that defendant was armed and dangerous. The troopers approached defendant after he had emerged from his car. He stood in their plain view. There is no indication that the officers had any visual clue, such as a lump in his waistband, that might make them suspect defendant of carrying a weapon on his person. He made no threatening movements of any sort. Indeed, all that is reported is the irate questioning of the police officer's actions and accusations of misconduct and harassment. Taking the report at face value, we are asked to believe that the officers could reasonably conclude that defendant was "attempting to hid [sic] something or possibly having [sic] . . . a weapon about [his] person" simply because he made what some people would think were rude statements to police.

. . . .

At no time during the incident in question did defendant do more than object to demands made of him by the police and ask the reason for these demands. The troopers could not have had a reasonable suspicion that defendant was armed and dangerous. The request for pat down thus was improper and the fruit of that unlawful conduct should be suppressed.

Defendant's Motion to Suppress at 5-7, *People v. Johnson*, (No. 88-1205 (1989)) (on file with *Cornell Law Review*).

test his receptivity. If he was receptive, we might elect to have a bench trial, but if he was not, we would proceed with a jury.

### E. The Suppression Hearing

The Ypsilanti Township courthouse rises incongruously out of a wasteland of abandoned fields. A sweeping driveway takes one past a man-made pool complete with fountain and ducks, and up to a modern glass and brick complex. Inside, all is clean and well-appointed; the two courtrooms are flanked by convenient conference rooms and a comfortable lounge marked "for lawyers only."

The undisputed monarch of this small but impressive domain was Judge John Collins. I had appeared before Judge Collins on a number of previous occasions and had mixed feelings about him. I had been told that was an auto worker before becoming a lawyer (Ypsilanti Township is the site of a major automotive plant). He had worked as a prosecutor, township attorney, and in private practice before his elevation. I was surprised on more than one occasion to hear him draw on his personal familiarity with one or more of the parties before him in discussing a case. Indeed, I sometimes wondered how many township residents he did *not* know. His style was folksy but authoritative.<sup>30</sup>

When we showed up in court for the hearing on our suppression motion, we found that despite notice to the prosecutor and the troopers that we intended to examine both troopers at the hearing, neither trooper appeared. The judge accepted the prosecutor's explanation that their supervisor at the state police post had not received sufficient advance notice.

We were therefore forced to begin with our client's testimony and then continue the hearing to another date for the troopers' testimony. Thus, the only testimony at the first hearing was from our client. I have no notes of his testimony, and we never ordered a transcript. Now as I write this article, I have no clear recollection of what he said other than an impression that it was consistent with his interview and favorable to his case if believed. In retrospect, I find ominously significant my lack of attention to his testimony.

My recollection is that Judge Collins paid little overt attention to Johnson's testimony either. Much of the time his chair was rotated away from the witness stand, so that he could not have looked at our client while he testified even if he had wanted to do so. One point definitely did catch his attention, though: the claim that the troopers might have stopped Johnson because he was black. I do

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<sup>30</sup> In personality and style, Judge Collins resembles the "Law Maker" judge described by Conley and O'Barr. See CONLEY & O'BARR, *supra* note 10, at 87-90.

not recall that our client specifically made this claim during his testimony; however, because we had attached the police report to our motion, the judge could have constructed this claim out of the statements in the report that Johnson told Kiser “[you are] making this up [the traffic violation] for a reason to Harass somebody” and “You are bigots.” I know that this point attracted Judge Collins’s attention because he volunteered at some point during that first hearing that Trooper Mraz was an Indian (i.e. Native American); he seemed to thereby imply that the actions of the trooper team that night could not have been racially motivated.

At the conclusion of our client’s testimony, we made a futile attempt to obtain a ruling on our motion based solely on the record as it stood, arguing that the prosecutor had the burden of producing the troopers to rebut our client’s testimony. The judge would have none of it. He wanted to hear “both sides of the story,” and so the hearing was continued to a date five weeks later to take the troopers’ testimony. The prosecutor agreed that he would produce both troopers without requiring us to subpoena them.

The appointed day for the continued hearing came, but Trooper Kiser did not.<sup>31</sup> The prosecutor said that Trooper Kiser was ill. Thus the only testimony was from Trooper Mraz, who seemed a quiet and well-spoken young man.

We took the lead in examining Mraz. Consistent with my usual practice as a clinical teacher, I allowed the student attorneys to conduct the hearing following a detailed outline that we had rehearsed in advance. I spoke only to deal with evidentiary objections and to ask a few follow-up questions at the conclusion of the testimony. I was delighted with the results of the student’s examination of Mraz. When initially asked to admit that Johnson did not appear armed and dangerous when first seen,<sup>32</sup> Mraz responded with a suggestive evasion:

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<sup>31</sup> Our client was also not present. We had told him that although he was not required to be present (since he had already testified), we strongly encouraged him to come to assist us in the examination of the troopers and to observe them as preparation for trial. He had indicated that he would be there so his absence was unexpected. Discussions between the student attorneys and Johnson about attending this hearing proved to be a significant source of tension in the attorney-client relationship. See *infra* notes 54-55 and accompanying text.

<sup>32</sup> The student’s question was: “At the point and time which you got out of the car and saw the defendant walking up to the station, he didn’t appear to be acting in a way that would indicate that he was armed and dangerous, did he?” Evidentiary Hearing at 4 (1988) (No. 88-0128), *People v. Johnson* (on file with *Cornell Law Review*) [hereinafter *Hearing*].

At that point there was no way of telling, he had clothes on it was winter time,<sup>33</sup> he could have been armed, he could have been dangerous. Any time you make a traffic stop, it could be a [sic] armed and dangerous person behind the wheel, or a passenger in the vehicle.

The student pressed for an answer:

Q But there was nothing that he specifically did that indicated that he was carrying a weapon? At that point.

A Like I said, stated every time we pull over somebody we treat it as if they were armed and dangerous.

Q So, at that point and time, you didn't really have any reason to believe there was any criminal activity afoot, did you?

A Besides running the red light, no.

...

[colloquy between court and counsel deleted]<sup>34</sup>

...

Like I said before, I treat them like everyone is armed and dangerous, I don't relax.<sup>35</sup>

The student attorney then went through a litany of possible reasons under *Terry* that would justify a frisk, and Mraz consistently admitted that none were present in their encounter with Johnson.<sup>36</sup>

<sup>33</sup> In fact the arrest took place on September 5. We never pointed out this inconsistency to Mraz or the judge.

<sup>34</sup> At this point I objected that the witness had not answered the question. The judge directed us to rephrase the question, which I stated as, "whether or not there was anything he specifically did that led them to believe that he was armed?" Hearing, *supra* note 32, at 6.

<sup>35</sup> *Id.* at 5-6.

<sup>36</sup> The relevant testimony included the following:

Q So during the time right after Mr. Johnson came back to the area of the two cars, and Trooper Kiser began asking questions . . . did you see any lumps or bulges in his clothing?

A No I did not.

Q That might conceal a weapon?

A A lot of times you don't see bulges in the clothing.

Q But at that point you didn't see anything that looked like a weapon?

A No I did not.

\* \* \*

Q During the course of the incident you heard Mr. Johnson accuse you and Trooper Kiser for harassing you didn't you?

A Yes.

Q And you also heard him call you and Trooper Kiser bigots, is that correct?

A Yes.

Q But you never heard him threaten you or Trooper Kiser with physical harm did you?

A No.

Q And you never heard him state that he was carrying any kind of weapon or contraband did you?

A No.

Q And he didn't make any furtive gestures did he?

A Is, what do you mean by furtive?

He then attempted with some success to trap Mraz into admitting that our client was frisked, not because he appeared armed and dangerous, but simply because he spoke up for his rights.

Q Then isn't it true that Mr. Johnson didn't really do anything that caused Trooper Kiser to submit him to a pat down search, other than make the statements that [are] recorded in your report?

A I'm sorry what statements are they?

Q That him calling you and Trooper Kiser bigots and accusing you of harassing him.

A No. The reason Trooper Kiser patted him down is that, for his safety along with mine. Any time somebody exits the car that we believe, we don't know ok, we do a pat down, it's not a search, it's a pat down for any sense of weapons.

Q I understand.

A And he, Mr. Johnson ah, argued about that our pat down, was illegal and said you are not patting me down, that brings up our intensity level a little bit higher, more cause for alarm, so Trooper Kiser patted him down for offensive weapons.

Q So, the reason, the main reason for the pat down was then because he had refused to submit voluntary [sic]?

A Basically the pat down was done for the officer's safety, the troopers' safety, myself and Trooper Kiser.<sup>37</sup>

I then conducted the following series of follow-up questions:

Q It's your testimony that it is your policy, your partner's policy to conduct a pat down search of any driver who is outside his car after a traffic stop, is that your testimony?

A That's correct.

Q And it was for that reason in this case you asked Mr. Johnson to submit to a pat down search, is that correct?

A I did not.

Q Or your partner did?

A Yes.

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Q I mean he didn't make any sudden movements with his hand toward a pocket or the interior of any of his clothing.

A Well, when he was talking, he was talking with his hands, and they were moving thrashing about and so forth. As far as going into a pocket or anything like that, I don't recall him making any motion going into his pocket.

Q And he didn't try to run away at any point, did he?

A No.

Q And he didn't try and get back into his car and leave, before the arrest was made?

A No.

*Id.* at 8-10.

<sup>37</sup> *Id.* at 10-11.

Q Ok. And it is your testimony that when your partner asked Mr. Johnson to submit to a pat down search, Mr. Johnson refused, is that true?

A That's true.

Q His refusal, in your testimony heightened you [sic] suspicion of him, is that your testimony?

A Yes.

Q And because of his refusal, you and your partner then did conduct a pat down search, is that your testimony?

A No.

Q Because of his refusal, you and your partner arrested him?

A My partner arrested him.

Q All right. And he arrested because of his refusal to submit to the pat down search?

A No, he arrested him for being disorderly throughout the whole incident.

Q If Mr. Johnson had not refused to voluntarily submit to a pat down search, he would have not been arrested for a disorderly person at that time, isn't that true?

A I can't ah, I can't say one way or another.

Q Because you did not make the arrest?

A You're asking me a hypothetical and I can't answer what would have been, I can only answer the facts of the case.

Q Was Mr. Johnson's refusal to submit to the pat down search, one of the reasons he was arrested for being a disorderly person.

A Yes.

Q At that point, what other things had he done, to be a disorderly person, other than refuse to submit to the pat down search?

A By saying that the only reason that we stopped him was because he was black, that we couldn't do things that we did as far as myself flashing the flashlight in through the windows to check for any contraband in the vehicle, Trooper Kiser stopping him in the first place, because he knew his rights, his howling [sic - hollering?] at the, ah myself and Trooper Kiser for things that he knew we were doing illegally, all led up to that, acting disorderly.

THE COURT: Maybe for the record, when we got into this bigot and racial thing, maybe for the record we should indicate that Mr. Dujon Johnson is a black american.

MR. CUNNINGHAM: That is correct your honor.

THE COURT: And can we stipulate as to what the nationality or race the other officers are.

PROSECUTOR: We're going to, I'm sure that this isn't the end of this hearing, your honor, so we're going to have Trooper Kiser on the stand at some point and time, so he can probably tell us himself.

Q Trooper Mraz, was it your understanding, that part of what Mr. Johnson was saying prior to his arrest that he believed he was being stopped and investigated because that he was black?

A Yes.

Q You said he was hollering?

A Yes, he kept yelling at us, "you can't do this, you can't do that" and of course of our traffic stop.<sup>38</sup>

The prosecutor's examination of Trooper Mraz was limited:

Q Just a few questions. . . . What did you stop, what was the traffic offense for?

A The stop was made initially because of the ah, ah Mr. Johnson running the flashing, going under the flashing red light, ah on northbound Hewitt and Washtenaw.

Q When you came upon him, or at what point and time was the arrest made, do you recall? Was there any search prior to the arrest?

A No.

Q Now, when you asked him if you could perform a pat down search on him, or when you went to perform a pat down search on him, what words did you use?

A You can't ah.

Q What you [sic] words did you use?

A Did I use. I didn't use any words.

<sup>38</sup> My questioning then concluded with the following interchange:

Q Who was present at the time other than you and your partner?

A There were two people in the Total gas station booth.

Q Inside the booth?

A Inside.

Q Do you have any evidence that they could hear what they were saying?

A No I do not.

Q He was hollering only at you and your partner, is that true?

A Yes.

Q As far as you know, you and your partner are the only ones that heard what he said, as far as you know?

A As far as I know.

Q Ok. My understanding of your testimony is that you listed five things that he did, which caused him to be arrested for disturbing the peace or being a disorderly person. Is there anything else you want to add in terms of what he did, or have you told me everything as far as you remember?

A As far as I remember.

Q I don't think we have any more questions at this time.

Q Did you, were any words used?

A Trooper Kiser talked to him.

Q Ok. What did he say?

A He informed him that the reason that he was doing a pat down, for ah, all I'm going to do is check for offensive weapons.

Q And did he, was it a question, was it, was he looking for a response, was he asking him if he could pat him down?

A Basically informed him that he was going to be doing a pat down for the safety of both the troopers present.

.....

Q Now, tell me about his, about the defendant's demeanor.

A Very hostile toward the, myself and Trooper Kiser.

Q What about his tone of voice?

A In an angry type voice.

Q What was the intensity of his voice?

A Loud.

Q What about his physical actions.

A Thrashing about, waving his arms and fists and saying (sic).

Q Is this usual, on a civil infraction for somebody to act like this?

A No, no not at all.

Q And uh, what were some of his personal behaviors? . . . Towards yourself and just his actions in general on that specific date and time.

A Hostile toward us, really for no uh.

Q Any other customers in the area in the parking area. . . Were there any other individuals?

A No.

Q Pedestrian traffic?

A No.

Q That's it. Nothing further.

THE COURT: Did you know this individual?

A No I did not.

THE COURT: Did you get any indication that Officer Kiser knew him?

A No.<sup>39</sup>

Mraz's testimony ended at this point. One of the cliches of teaching trial practice is the warning against asking one too many questions, the wisdom of knowing when to stop. We were so pleased with Trooper Mraz's testimony—his admission that there were no specific facts suggesting our client was armed and dangerous, his description of their practice of treating every driver as if the person were armed and dangerous, and his catalogue of the "things our client had done" to be a disorderly person—that we decided to submit our motion for decision that day rather than insist on ob-

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<sup>39</sup> *Id.* at 17-21.

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CONTINUED FROM PAGE 1517  
taining the testimony of Trooper Kiser at yet another continued hearing. Although I still wanted a chance to meet Trooper Kiser and preserve his testimony for impeachment use at trial, I was willing to give up these desires rather than risk altering what I viewed as a near-perfect record for our motion.

The hearing on our motion therefore concluded that day with brief arguments by one of the student attorneys and the prosecutor. Of course I was prepared for the possibility of losing our motion, despite the strength of the record. However, when the judge immediately issued his bench opinion after our arguments, I was shocked by the words he used in articulating his decision to deny our motion:

THE COURT: Well, there's no doubt in my mind, this is definitely an attitude arrest and had the person not exhibited the attitude that he exhibited he never would have been arrested, I think that's pretty obvious, and I don't think there's anything wrong with that. I think that officers out on the street are human subject to the same human responses that other people have, and that they react as humans react.

I don't have any problems at all with the traffic stop, this is a valid traffic stop[.] [T]he elements of a valid stop are that a stop must be based on specific and [sic] conduct which would lead a reasonable person to believe that criminal activity is afoot, that's Terry versus Ohio. Civil infraction is sort of a [hybrid], it really isn't quote criminal activity, but certainly the officers had justification to stop this vehicle[.] [T]hey didn't just see a black man in a gas station and say ["oh there's a black man in the gas station, let's go and arrest him,"] and that didn't happen. [And] the fact that one person is black and the other person is caucasian does not make it a racial instant [sic-incident?]. I don't see any problem with stopping this individual.

[O]nce having stopped him, he was the author of his own problems[.] [H]e started getting, acting strange and unusual, started walking away from the car as if he was conducting some business in the gas station, raising his hands, howling [sic] at the officers, causing a disturbance of his own making, howling [sic] racism because they stopped him for running a red light[.] I'm sure that these two officers had no clue when they saw this person run the red light, whether he was black or white or brown or red or green or any other color[.] [T]hey just didn't know and so the person was walking around with a chip on his shoulder and these officers were the object of that behavior.

Then the officer asked him, and again in the Terry case, they say once a valid stop is made the officer may engage in a protective search if there's reason to believe the stopped individual is armed and presently dangerous[.] [O]n this particular case they didn't have any reason to believe that the person was armed and presently dangerous. I have said on numerous occasions and I

think I'll continue to say until some Court tells me that I'm dead wrong, that the first duty a police officer has in this society is to survive and I don't think that I'm ever going to find that the police officer is acting unreasonably when he stops an individual for a valid stop and does a brief pat down to protect both himself and his partner.

In this particular case there seems to be a request for pat down which was denied[.] [N]ow at that point and time, had the individual agreed to the pat down and it turned out that he did not have any weapon, then obviously that would have been the end of it and the police would have just exercised their discretion and moved on. On this particular case, the individual case, the individual says no, I'm not going to let you pat me down[.] [At] that point and time I think the officers exercised their discretion and said look, we didn't have to arrest this guy for disorderly conduct for running his mouth in the manner that he did, but if he's gonna act like this then we're gonna exercise that discretion and arrest him. [O]nce they put him under arrest they have a right to do a pat down search, which they did. I think it's definitely an attitude ticket, no question about it.<sup>40</sup>

The most obvious surprise in the bench opinion was the judge's apparent refusal to follow the authority of *Terry*. He acknowledged that in this case the troopers "didn't have any reason" to believe that our client was armed and presently dangerous. Yet he implied that the troopers nonetheless could require our client to submit to a search, by saying that he did not think he would ever find that a police officer had acted "unreasonably" by conducting a pat-down search, because the officer's "first duty" was to survive.

The more enduring surprise, though, was the judge's confident description of "what happened" as an "attitude ticket." I had never heard the phrase before, but I thought I had a good idea of what the judge meant. Our client was arrested for having a "bad attitude," pure and simple. The judge was sure that this was what happened, did not think there was "anything wrong with that," and was as casual as he was confident in his comments.

In describing my reaction to hearing Judge Collins's bench opinion, I use the word "shock" quite deliberately without any desire to be overdramatic. "Shock" evokes the image of touching a live wire, producing two successive, but very different reactions. First, I felt momentarily paralyzed and numb—my breath was taken away, I was speechless. What could I possibly say? The judge had with casual authority sanctioned not just a specific instance of police misconduct, but a whole way, a whole world of police-citizen inter-

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<sup>40</sup> *Id.* at 27-29.

action, that seemed to me clearly unlawful. What was obvious to him, and obviously acceptable to him, was obviously wrong to me.

But the death-like paralysis of a shock passes, sometimes to be replaced with galvanized movement, for a shock can be a jolt that revitalizes. Judge Collins's bench opinion jolted me out of thinking about what happened only in Fourth Amendment terms.

#### F. Returning to the Client's Story

At the time of the suppression hearing I was working on an earlier article that experimented with the metaphor of translation both by examining its epistemological implications and by applying it to two earlier clinic cases I had handled. (The article was called *A Tale of Two Clients: Thinking About Law as Language*.)<sup>41</sup> I presented a draft of the article at a symposium about a week before Johnson's trial was scheduled to begin. In the small-group symposium discussions that preceded my presentation,<sup>42</sup> I found myself talking more about Johnson's case than about the two cases described in the draft. In the midst of the symposium I decided to devote my twenty minute presentation in the final session to a presentation and discussion of the Johnson case, not just as an illustration of my theory of lawyering as translation, but as a shared opportunity with the other symposium participants to apply and test that theory in practice.

To prepare for my presentation, I went back and reviewed the videotape of the initial client interview. In particular I watched several times the following portion in which Johnson described "what happened" after he exited his car at the gas station:<sup>43</sup>

CL: He whipped around and pulled in off of Hewett. In other words, he pulled in as if he was blocking my car. And, um, I didn't do anything about it, as far as I was concerned. And the guy said "Hey Yo." That kind of ticks me off. I saw a police officer getting out, putting on black gloves, and he says "Hey yo, you." And I said you're not talking to me, are you? "Yeah, I am talking to

<sup>41</sup> See Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1987).

<sup>42</sup> The Law Review editors who organized the symposium had designed an admirable format. For the first day of the conference, symposium authors, editors, and conference participants met in small editing groups to read, discuss, and provide feedback on the papers. This procedure resulted in much more collaborative and less adversarial interaction than is often found at such conferences. See Kim L. Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2076-77 (1989) (describing symposium format).

<sup>43</sup> I produced this and later transcriptions from the videotaped interview by recording the audio portion of the videotape on cassette tape which was then stenographically transcribed by my secretary. I then edited her transcript by repeatedly watching the videotape to correct ambiguities and fill in barely audible segments from context. "CL" indicates statements by the client; "ST" indicates statements by either student attorney.

you.” I asked him what he stopped me for. Well, he walked to me —

ST: How far from the car were you when he called you?

CL: Four meters from the car. He pulled in front of the car, blocking it after I got out. And he was the first one out of the car because I really didn't realize they were there until he said “Hey yo.” By that time he was right in front of my car and I was walking away. And I said, “You are not talking to me, are you?” And he said, “Yeah, you, yo.” And he was putting gloves, his old black gloves on— macho kind of thing. And —

ST: Were they white?

CL: Yeah.

ST: Both of them?

CL: Yes. I said, “Is there a problem here?” He said, “Yeah— come here.” And as he was talking the other officer had a flash light and was looking into my car.

ST: So that one guy was talking to you and the other guy was flashing a light into your car? Were you, were the windows in your car rolled up?

CL: Everything was rolled up. I told him, “You don't have permission to look in my car nor can you look without my consent.” I wasn't sure but that's what I told them—I'm not sure if that's the law. “But if you want to look, that's OK. I have nothing to hide.”

I said, “What did I do wrong?” He said, “What's your name?” I said, “What did I do wrong?” He said, “What's your name?”

So they said, “Do you have your license?” “I don't have a license on me, it is in the car.” So I went inside the car. And I said “I want to know why you stopped me.”

So I had my wallet with my running bag with the gear. I moved all the bagels and reached out my wallet.

He said, “You stand over here.” I said, “What's the problem? And he said, “You stand over here.” He said, “Are you going to be a tough guy?” I said, “I want to know why you stopped me. You just can't arbitrarily stop me for no reason.”

So then the guy takes out his cuffs. I asked him, “What are you doing?” I said “You are arresting me?” But he didn't say a thing.

ST: He didn't answer you!?

CL: No. No. I told him, "Now unless I'm mistaken and unless I'm misinterpreting the Supreme Court opinion, if you are putting cuffs on me, and you are detaining me, I am certainly under arrest. And if you are arresting me, then read me my rights and then I want to know why you are arresting me."

He put the cuffs on me, told me to turn around, and I said, "I want to know why you are arresting me." He sort of turned me around and pushed my head forward.

...

CL: Part of the conversation when my face was on the hood was essentially that I let him know I did not appreciate him addressing me in the type of language he used.

ST: In what type of language did he use?

CL: He didn't use profanity. He just [inaudible]. I told him that I was a tax-payer. If this was a suburbanite, you wouldn't approach him with "Hey, yo." My wife and I worked hard to go to school, to be respectable, and I didn't appreciate you treating me like I was a sixteen-year old kid, which obviously I am not.

He claims that, he claims then that "I treat everybody like that." "Well I don't think you do, personally." And that was really the end of the story.<sup>44</sup>

As I watched this segment of the tape, the word "attitude" kept percolating in my mind. I found myself naming this "The Case of the Client with an Attitude Problem" and then suddenly working out the implications of that pun. Our client did in fact have an "attitude problem," but the problem was not *his* attitude but that of Trooper Kiser. As soon as I thought in terms of this characterization of "what happened," I was amazed by how much more I "saw" and "heard" in Johnson's narrative than when I had viewed it initially, having already framed what happened in Fourth Amendment terms. Every action by the police bristled with assertive authority. The car did not simply "pull[] up to the . . . station near [his] vehicle," as neutrally described in the police report; it "whipped around and blocked [his] car." When Trooper Kiser "obtained the driver's attention," he did so by calling out "Hey, yo!" The most obviously symbolic detail was Johnson's observation that as Trooper Kiser approached, he "put on his black gloves."

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<sup>44</sup> Videotape of Initial Client Interview with M. Dujon Johnson at the University of Michigan General Clinic (Jan. 25, 1989) (on file with author) [hereinafter Initial Interview].

I also noticed in Johnson's story a recurrent pattern in each exchange between Johnson and Trooper Kiser: Johnson would ask a question and receive an order instead of an answer; Johnson would repeat the question and receive the same order.<sup>45</sup> According to Johnson's account, he never argued with the troopers nor lost his temper until after the arrest. Instead, his attitude was a consistent demand for respect, typified by the initial interchange. When Kiser said "Hey yo," Johnson replied, "you're not talking to me, are you?" My impression was not that Johnson actually thought the trooper was addressing someone else, but rather that our client had refused to acknowledge an address that was demeaning. His insistence on an explanation from Kiser for the stop and frisk was likewise not just a search for information, but maintenance of a considered position that he was a citizen who deserved an explanation from the police. When Johnson referred to himself as a "respectable" person, he seemed to mean that not only was he "of decent character," but more literally "worthy of respect," a respect that Trooper Kiser refused to give.

The encounter thus became transformed for me into an escalating clash of conflicting attitudes: Johnson's demand for respect and Kiser's show of authority. Seen in this light, the arrest no longer seemed motivated by the trooper's desire to search the client. Rather, Johnson *was* arrested for being a "disorderly person"—that is a person who would not take orders, who was stubbornly resistant to authority, what Trooper Kiser referred to as "a tough guy."

Indeed, in the taped interview, Johnson recognized that his response to authority was a central issue and eloquently explained why he did not consider his actions to be those of a "disorderly person." When asked if he used profanity at any point during the encounter, Johnson said:

I don't use that kind of language. First of all—[pause]—authority, I think a person should respect it. At the same time, that places a high level of standards on authority. So while I respect authority, the abusing of it I don't respect. I told him [Kiser], I don't respect you whatsoever.<sup>46</sup>

At my symposium presentation, I shared the first excerpt from the client interview as well as portions of the police report and the bench opinion. Almost everyone found the details I had previously ignored, especially the black gloves, to be essential in persuasively

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<sup>45</sup> As one of the students perceptively observed later, the client was always hearing demands when he had asked for answers. The client himself emphasized that "he wouldn't answer me."

<sup>46</sup> Initial Interview, *supra* note 44.

recreating what happened from the client's viewpoint. Although all the comments contributed to the events of the next week, two comments from a fellow participant, Derrick Bell,<sup>47</sup> had the most immediate and long-lasting effects. One comment lay fallow until much later, and will therefore be discussed below. His other comment had immediate effect. He observed that both the two tales of my draft article and Johnson's case were fundamentally about clients who sought to preserve their dignity and identity. His comment highlighted a fact that I have not shared yet in this article, precisely because it had been largely excluded from my thinking about the case up until the time of the symposium.

One day during the period between the two evidentiary hearings on our suppression motion, one of the students stopped me to relate a telephone conversation he had just had with Johnson. In this conversation our client had revealed for the first time that, at the arraignment before our appointment, the prosecutor had offered to dismiss the criminal complaint if Johnson paid court costs. Johnson told the student he had refused this deal.

Johnson's rejection of a deal that for fifty dollars would have eliminated the risk of being found guilty made clear that he wanted something more than simply being cleared of the misdemeanor charge. Therefore, I began to think that my translation task might require not only an innovative expression of "what happened" but also a "new word" for relief.

### G. Collaborating With the Client

Several days after the symposium ended, Johnson came in for a meeting to plan for the upcoming trial. He arrived a few minutes early, before the students had come down to the clinic, so I took the opportunity to talk with him. I asked him what he wanted out of this case. His response, as best as I can reconstruct from my memory and a few notes taken at the time, included the following points: "I would like to have my reputation restored, and my dignity. The inconvenience can't be corrected. It got me a little unsettled, which is very unusual for me. It's my honor, my name. I feel violated. They tarnished my name." We talked for a few minutes about the results of the arrest, how his car was towed, how he spent several hours held at the state police post, how he had to show up late for work the next day and felt that people knew he had gotten into some kind of trouble.

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<sup>47</sup> Professor Derrick Bell is a distinguished African-American lawyer and academic. See, e.g., DERRICK BELL, AND WE ARE NOT SAVED (1987); Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

I then told him how I had been thinking about his case and relating it to my ideas about representation. I said I wanted to find a way to communicate to the judge and jury what the events had meant to *him*. During the ensuing conversation, we developed the idea of literally giving him a voice in the courtroom by having him cross-examine Trooper Kiser.<sup>48</sup> The idea had some appeal as a matter of trial strategy because such a cross-examination might almost re-enact for the jury the confrontation of that night, giving them a chance to see Johnson and Trooper Kiser interact directly rather than through proxies. In effect we would be saying:

Observe Dujon Johnson as he asks the trooper to explain his actions; he was doing the same thing that night. Today he stands behind a podium with the force of this court behind him as he asks his questions; therefore, he receives answers. That night he stood with only his own courage behind him; therefore, he received no answers, only orders to submit to arbitrary authority. Today he receives the respect to which all free citizens in a democracy are entitled; he deserved no less that night.

But more importantly, under this novel approach the trial itself could potentially provide the relief Johnson sought: the restoration of his dignity. The very structure of the trial would enable him to obtain the answers, and the respect, he was denied that night. The trooper would have to answer questions about why he stopped Johnson, "what the problem was," and why he needed to conduct a pat-down search. If Trooper Kiser was a smart witness, he would answer directly and with courtesy, thus treating his interrogator as a respectable person. If he did not treat Johnson with respect, assuming that Johnson conducted the examination properly, the jury, hopefully, would vindicate Johnson's view of who had the attitude problem that night.

I emphasized to Johnson that this approach would require a substantial amount of preparation time and would involve perhaps some higher risk of conviction; the strategy could backfire and alienate the jury. He said he was more than willing to put in the required time and take the risk.

Reflecting back on this strategy, it seems to me that I was trying to use the cross-examination of the trooper as a bridging experience for two different translations. First, I wanted to translate to the jury

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<sup>48</sup> As best as I can recall, I was the first to raise the idea, but Johnson immediately responded that he had been thinking about asking us if he could participate in cross-examining Kiser. I did not discuss this important change in trial strategy with the student attorneys before presenting it to the client, thus "taking over" the case from them at a critical point. My intervention at this point without first involving the students was inconsistent with the goal of encouraging them to take primary responsibility for their clinic cases, *see supra* p. 1310, and probably was a mistake in terms of clinical pedagogy.

our client's understanding of what happened by creating an analogous event in the courtroom. I also wanted to bridge the gap between the relief our client said he wanted and the relief that the limited vocabulary of the law enabled us to express. The law attempts to tailor judicial remedies to the harm caused. We speak of making a plaintiff "whole" as if courts can always restore what was taken. But in this case, clearing Johnson of the charge of peace disturbance seemed to have nothing in common with the harm he felt, as made clear by his refusal to accept the prosecutor's deal. By thinking of the cross-examination, rather than the verdict, as the relief, however, we could make available a legally enabled experience that shared structural and substantive elements with the experience of harm.

### G. The Disastrous Day of Trial

On the morning of trial we arrived at court early, armed with our detailed jury instructions and trial brief. But yet another surprise awaited us in this case. As soon as our case was called, the prosecutor rose and said:

Your honor, in this case I've had an opportunity to talk to the police officers about this case. I've reviewed it myself. I've made the decision and the record should reflect it's solely my decision that the People do not wish to proceed. We're moving to dismiss. It's a 90 day, hundred dollar misdemeanor. Under the facts of the case even if the Defendant were found guilty a nominal fine would probably be the appropriate sentence. I don't see a great use to the taxpayers of the State of Michigan to expend literally thousands of dollars with police officer's time and overtime, witness fees, court time, to proceed in this particular case. And again, it's fully my decision. Due to the nature of the case, also due to the nature of other cases I have to have prepared by Monday morning I would like to state that the police were ready to proceed. They do not agree with my decision, that the witnesses were in fact here this morning and this is over their objection, the Michigan State Police. But I cannot justify a trial on the costs to the taxpayers of the State of Michigan.<sup>49</sup>

The judge responded as follows:

Well, I said on the record from the very beginning that there was no question in my mind that it was an attitude ticket. I'm not saying that that's even improper. The police officers do have a good deal of discretion. We see it everyday. Sometimes they ex-

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<sup>49</sup> Dismissal at 3-4, *People v. Johnson* (No. 88 1205) (April 7, 1989) (on file with *Cornell Law Review*) (the prosecutor on the day of trial was a different person than the prosecutor at the evidentiary hearings).

ercise it in a manner that we think is commendable, other times we think that maybe they shouldn't have exercised it that way. But nevertheless they do have discretion.

....

We give a man a badge and a gun and a bunch of training and put him out on the street, we have to assume that they have some discretion and give them some discretion to operate. I think this was an attitude ticket. We see a lot of attitude tickets and um, no question about it. If the person had behaved in a different manner the ticket never would have happened and I don't find fault with the Prosecutor in bringing it, I don't find fault with the Prosecutor in dismissing it.

....

[To the students] As a practical matter there are very few people that would have spent the kind of time and effort and legal talent to fight, as the Prosecutor has pointed out, a fifty dollar attitude ticket. Very few people would have gone through the effort you did. But it's a great experience for you.<sup>50</sup>

It might have been a great experience for the students, but it certainly was not for Dujon Johnson. I could tell that he was fuming. His first words as he left the courtroom were "Patronizing, patronizing!" I decided to take advantage of the unexpected free time that we all suddenly had in our morning schedule to "debrief" with our client in the "lawyers only" lounge at the courthouse. What I thought would be a 20 minute conversation turned into a deeply-challenging, and for me soul-searching, exchange.

Immediately after we settled in the lawyers' lounge, Johnson said,<sup>51</sup> "I didn't get what I wanted. I'm very upset by this." The students asked why he was not at least happy that he did not have a conviction. The ensuing discussion led him, with my encouragement, to talk about how he felt about our representation.

He said that our representation of him placed part of his life in the control of someone other than himself. Too much of the case had been out of his hands "from the get-go." "Sometimes I feel like I'm not an adult, always responsible to someone else." He observed that

the fact you are in law school makes you see differently. I can't fault you guys for having more control over your life than I have; this is my lot in life. The fact I had to come to you and I'm not

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<sup>50</sup> *Id.* at 9-11.

<sup>51</sup> Of course, I do not have a recording or transcript of this conversation with our client. What follows is a reconstruction taken almost directly from notes I made at the time. The phrasing and sequence therefore may be slightly different than what actually occurred.

paying you, that fact alone means that I'm in the back-seat.<sup>52</sup> Even today during court this morning, I'm in the back-seat.<sup>53</sup> Always the secondary person.

He said that at times we had made him conscious that he was different and specifically treated him as if he was "an indigent mentally as well as physically." He felt that this treatment suggested that we expected him to exhibit a kind of "laziness, nonchalance." He gave specific examples of conversations in which the students had reminded him of the importance of attending various court dates. He asked, "Why must I qualify myself, reveal my soul to you, convince you that I wasn't there for good reasons?"<sup>54</sup>

Our client then spoke more directly about how it seemed we were treating him "differently."

I have a big thing about respect. Sometimes it was as if you were talking to a child, trying to make me understand as if I had no common sense. . . . Do you guys actually think I'm stupid, lazy and slow? Most black people have that stereotype, of being that way. You don't know that? . . . The way you guys talk to me and approach me—it's a little like the way Trooper Kiser approached me.

Up to this point, Johnson had been speaking primarily to the two student attorneys. But he then turned his attention to me.

You're the kind of person who usually does the most harm. You have a guardian mentality, assume that you know the answer. You presume you know the needs and the answers. Oversensitivity. Patronizing.<sup>55</sup> All the power is vested in you. I think you may go too far, assuming that you would know the answer.

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<sup>52</sup> As I recall, Johnson made this point literally by stating that whenever he and the students travelled in the same car, the two students sat in the front seat while he rode in the back. There had been several such trips because the students had offered to pick Johnson up at the bus station in Ann Arbor and take him to court.

<sup>53</sup> By this statement, Johnson was referring to the fact that he was sitting behind the bar in the audience section rather than at counsel table when the prosecutor moved to dismiss and the judge responded. I cannot recall why this was the seating arrangement. Certainly we would have had our client seated with us for the trial. Perhaps we forgot to make room for Johnson at the table when the case was called and were too surprised by the prosecutor's motion to explicitly invite Johnson to cross the bar and join us. I will confess it never occurred to me to ask Johnson if he wanted to respond to the prosecutor's motion himself or to speak directly to the judge.

<sup>54</sup> Apparently Johnson was referring, at least in part, to a telephone conversation with one of the student attorneys in which the student encouraged him to attend the hearing during which the troopers would be examined and to a later telephone discussion when one of the students asked him why he failed to appear for that hearing. *See supra* note 31.

<sup>55</sup> This was the second time that day Johnson had used the word "patronizing." The first time was in reference to the judge's speech in the courtroom. *See supra* p. 1329.

And here the story ends, at least the story of my efforts to represent Dujon Johnson.<sup>56</sup> After the symposium, but before the trial date I had thought of changing that earlier article into *A Tale of Three Clients*, by adding Johnson's case to illustrate how the translation approach could be applied. But faced with Johnson's devastating critique, I quickly changed the title back to *A Tale of Two Clients*. I was hesitant to assume "that I knew the answer"; indeed, I was sure I did not understand "what had happened" well enough to write about it.

But in a sense, the story has continued, as I have presented this case to various audiences, thought about it, and finally attempted to write about it. The next sections tell the story of my struggle to understand what happened, and thereby test the translation metaphor as a way of both thinking about and changing the way I practice law.

## II

### TRANSLATION AS A METAPHOR FOR LAWYERING

My ideas for describing the practice of law as a kind of translation have their foundation in a very simplified theory of knowledge. This theory uses a model of mental activity divided into three separate levels: sensation, experience, and knowledge. In this model, the level of sensation consists of the raw input from the external world, the complex pattern of nerve impulses from the sensory organs. This is the lowest level of animate being; pure sensation can stimulate an animate response but cannot be consciously experienced in that form. In order for sensation to rise to the level of experience it must be sorted and structured in relation to independent forms of intuition. For example, the impulses from the optic nerve are sensation; visual perception is experience. We perceive an object as having a certain shape, size, and position, all in relation to an inherently assumed space.<sup>57</sup>

Instead of a sharp dichotomy between an external "real" world and an internal "subjective" world, this model postulates a dynamic relation. The internal world we experience is *constituted* out of sense

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<sup>56</sup> On that last day, we did discuss with Johnson the possibility of a civil rights suit against the troopers. He was quite interested in such a suit; unfortunately, we had to tell him later that our clinic was not able to take on that kind of litigation. I did contact the director of the Michigan ACLU, who indicated they might be interested in assisting Johnson. Two months after the trial date, I left Michigan to take my current job, but I wrote a long letter to Johnson referring him to both the ACLU and several private attorneys who did civil rights litigation. I also said in that letter that I had called both the Michigan Civil Rights Commission and the Intra-departmental Affairs Office of the state police and had been told that both agencies would review any complaint he filed with them regarding the arrest.

<sup>57</sup> See I ERNST CASSIRER, *PHILOSOPHY OF SYMBOLIC FORMS* 100-01 (Ralph Manheim trans., 1953).

data derived from the external world. A similar relation is proposed linking the levels of experience and knowledge. Knowledge is neither independent of nor simply dependent on experience; rather, the conceptual world is constituted out of the elements of experience.

In this model, language plays a central role in the constitution of knowledge out of experience. The very process of naming reduces the particularity of experience to reveal inherent factors of form and relation, and then formalizes and stabilizes them.<sup>58</sup>

This model differs from both empiricism and idealism. It asserts that concepts are neither abstracted from empirical objects nor derived from transcendent ideals, but rather are *realized* in the process of objectifying experience. By giving a name to experience, consciousness frees itself from passive captivity to sensation and experience and creates a world of its own, a world of representation. It is this world of representations that we "think" about and communicate to others.

The world of representation, the realm of knowledge, is in a dynamic relation with the world of experience. Initially, experience gives rise to the concepts which can be known and communicated. However, these forms of knowledge in turn may alter the way in which we experience, just as the forms of intuition structure our sensations.<sup>59</sup> Under this model, "reality," as we know it, is neither simply "out there" nor merely a social construction.<sup>60</sup>

One way I have attempted to explain this model of knowledge to my students is to show them the following picture on an overhead projector:

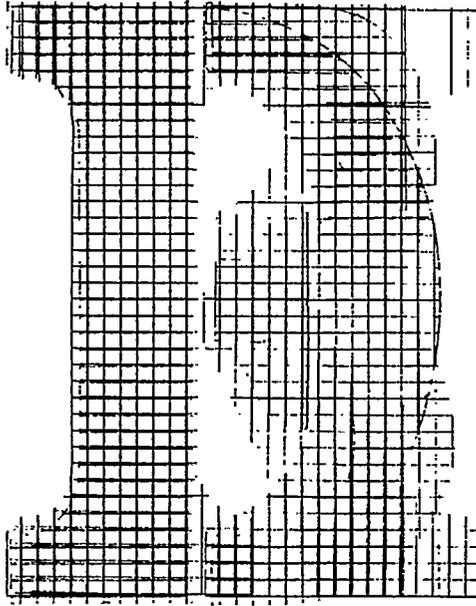
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<sup>58</sup> *Id.* at 281.

<sup>59</sup> For discussion of a scientific experiment that appears to show language differences influencing actual perceptions of color, see Cunningham, *supra* note 41, at 2475-79.

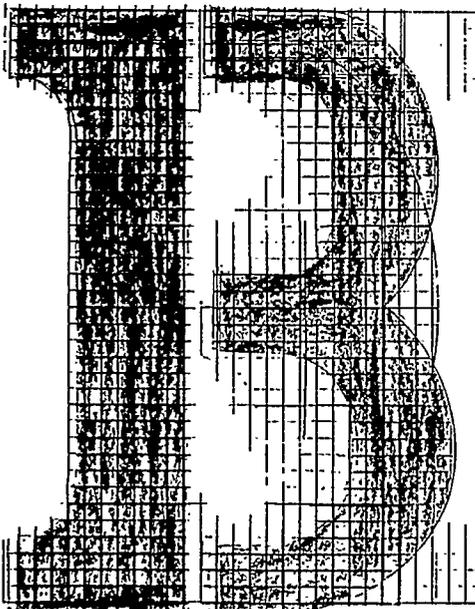
<sup>60</sup> This rather simple epistemological model resembles in many ways Steven Winter's experientialist approach, which I find very congenial. See Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2230-55 (1989); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1152-59 (1989). Feminist epistemology has played an important role in emphasizing to legal scholars the importance of experience and context in conceptualization. See Bartlett & Goldfarb, *infra* note 63, and sources cited therein.

FIGURE 2A



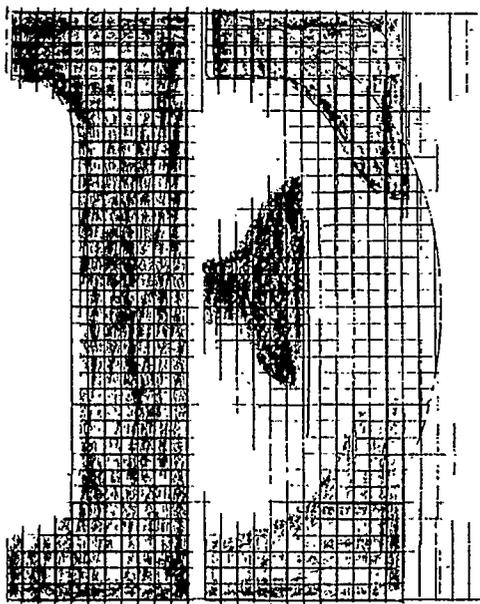
I ask them what they see in this picture; most respond that they see nothing but a lot of lines. I then overlay a second transparency with the shape of a capital *B* highlighted in color:

FIGURE 3



Next I repeat the process using a transparency highlighting the shape of a capital E:

FIGURE 4



Seeing a letter in the picture requires them to exclude part of the picture and focus only on certain lines. Whether they see a *B* or *E* depends on what they exclude and what they emphasize. These letters are neither simply “in” the picture<sup>61</sup> nor imposed on it by the color frames. Rather the letters are constituted out of the bewildering array of lines through a process of selection and exclusion.

The “framing” metaphor created by this exercise, although helpful in clarifying my abstract model of mental activity,<sup>62</sup> overemphasizes exclusion and deemphasizes the equally important concept that language and other forms of knowledge *add* something in the process of constituting experience. The framing metaphor also suggests a unilateral progression from experience to knowledge rather than a dynamic interaction in which the mind moves back and forth

<sup>61</sup> One might suggest my illustration is fundamentally flawed because both letters were “in” the picture before the framing exercises—I created the initial picture by overlapping pre-existing pictures of “B” and “E.” Although I did create the picture in this way (actually I also added pictures of “K” and “D”), students also plausibly saw other patterns in the picture, such as “F” and “13,” that I did not “put” there. Indeed, “13” may be a more plausible pattern because to “see” the letter “B,” one must “fill in” gaps between the upright and horizontal strokes according to the conventions of Gothic typeface, while the gaps are consistent with the standard image of “13.”

<sup>62</sup> For an analogous use of “framing” to discuss the exclusionary nature of legal narratives, see Schepelle, *supra* note 42, at 2085.

from experience to knowledge, always testing concepts against experience, the results of which in turn are used to create altered concepts.<sup>63</sup>

The idea of translation captures and communicates more of the theoretical model than the narrower metaphor of framing. In applying the word "translation" to the practice of law,<sup>64</sup> I have been influenced by James Boyd White's presentation of translation as a complex and creative practice requiring of the translator both high art and a demanding ethic. White uses the etymology of "translation" (from the Latin "*trans*" (across) and "*latus*" (carried)) to illustrate what he considers a common but fundamental epistemological mistake about the nature of language and translation.<sup>65</sup> To think of translation as "carrying across," transportation, is to treat language as if it were simply a vehicle for transporting invariable meanings from the shores of one mind to another. But White persuasively argues that meanings invariably change as part of the "trip" because they do not exist apart from language.<sup>66</sup> Borrowing from the terminology of the Spanish linguist Ortega y Gasset, White describes every translation as involving two kinds of meaning transformation:

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<sup>63</sup> Katherine Bartlett has advocated a form of feminist epistemology she terms "positionality" that similarly emphasizes a dynamic relationship between experience and knowledge. See Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880-87 (1990). Phyllis Goldfarb has applied such an epistemology to describe how the clinical approach to legal education promotes the use of experience to develop and test theory. See Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991).

<sup>64</sup> The translation metaphor is appearing more and more often in legal scholarship. See, e.g., Gerald Lopez, *supra* note 4 at 11 (in lawyering, a representative "translates and, if necessary, transforms" the story a person is living into a story that an audience "can identify, believe and find compelling"); Lucie White, *Mobilization on the Margins of the Lausuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 544 (1987-88) (legal culture defines 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 judge can understand"); Nancy Rourke, *The Language of the Law: A Comment on the Legitimacy of the Adversarial Trial*, 1990 Annual Meeting of the Law & Society Association 8 ("It is fairly widely acknowledged that lawyers engage in a process of translation, changing the client's problem into a claim the law can recognize."). There are strong similarities between the translation metaphor and the concept of "voice" in feminist legal scholarship. See, e.g., Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992); Lucinda Finley, *Breaking Women's Silence: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989); Carrie Menkel-Meadow, *"Portia in a Different Voice: Speculations on a Women's Lawyering Process"*, 1 BERKLEY WOMEN'S L.J. 39 (1985); Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VERMONT L. REV. 139, 141, 144-45 (1990). For an interesting description by a linguistic anthropologist of legal education as the teaching of a new language, see Susan Philips, *The Language Socialization of Lawyers: Acquiring the "Cant"*, in *DOING THE ETHNOGRAPHY OF SCHOOLING* 177 (G. Spindler, ed. 1982).

<sup>65</sup> JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 233-34 (1990).

<sup>66</sup> *Id.* at 234-35.

deficiency and exuberance.<sup>67</sup> Deficiencies are aspects of meaning of the original expression not replicated in the translated expression; exuberances are aspects of meaning that appear in the translation but are not part of the original.<sup>68</sup> Because, for White, meaning is inextricable from language, to become aware of the deficiencies and exuberances of a translation is to become aware of the limits and potentialities of one's own mind and of the mind of another.

According to White, these epistemological implications of translation make translation a model for a kind of ethic:

[Translation] recognizes the other—the composer of the original text—as a center of meaning apart from oneself. It requires one to discover both the value of the other's language and the limits of one's own. Good translation thus proceeds not by motives of dominance or acquisition, but by respect. It is a word for a set of practices by which we learn to live with difference . . . . It is not simply an operation of mind on material, but a way of being oneself in relation to another being. . . . The activity of translation . . . offers an education in what is required for [the] interactive life [of lawyering], for . . . to attempt to "translate" is to experience a failure at once radical and felicitous: radical for it throws into question our sense of ourselves, our languages, of others; felicitous, for it releases us momentarily from the prison of our own ways of thinking and being.<sup>69</sup>

The following story of how the English word "lawyer" could plausibly be translated as "translator" is intended to illustrate how through translation one can recognize profound difference, respond to that difference with imagination and mutual education, and expand the meaning of one or both languages.

Imagine an American lawyer visiting the court of the emperor of China in 1800.<sup>70</sup> Through a Mandarin translator, he starts to tell the emperor that he is a lawyer, only to be informed by the translator that there is no word in Mandarin for "law." The closest approximation is the word *fu*, meaning "punishment" or "sanction."<sup>71</sup>

<sup>67</sup> *Id.* at 235.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 257.

<sup>70</sup> My assumption that an American lawyer in 1800 would describe the practice of law as we would today is no doubt anachronistic. In fact, in the pre-Revolutionary period, many colonies shared the Chinese attitude reflected in this story by barring lawyers from court and prohibiting pleading for hire. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 81-82 (1973). However, by 1835, if we are to believe de Tocqueville, lawyers enjoyed the highest status and influence in American society. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284-90 (1973).

<sup>71</sup> In constructing this story I was assisted by my colleague, William Jones, a translator of Chinese legal texts. See *A Translation of the General Provisions of Civil Law of the People's Republic of China*, 13 *REV. SOCIALIST L.* 357 (1987); Translation, *Fourth Draft of the Civil Code of the People's Republic of China*, 10 *REV. SOCIALIST L.* 193 (1984).

Thus, if the translator described the American as one who practices *fu*, the emperor would assume that he was a judge, one who administers punishment.

The American is encouraged to learn that at least the emperor has a word for "judge," but the translator quickly informs him that a better translation for the title of the Chinese official who administers *fu* would be "magistrate," because such officials exercise administrative as well as judicial functions.<sup>72</sup> The American then asks the translator if there is a word for a person who assists those appearing before a magistrate. The translator replies there is, *song-gun*, but suggests against using the word because it is a term of scorn, perhaps similar to the word "shyster."<sup>73</sup> He explains to the puzzled American that in Chinese "courts" the parties always represent themselves. Illiterate persons often employed the services of a scrivener, but these scribes were generally prohibited from giving advice or trying to influence the magistrate's decision. A scrivener who ignored such prohibitions was called a *song-gun*. Thus there is no word for a professional court advocate, and indeed no noun "advocate."

The translator asks the American to explain what exactly a lawyer would do in a court. The American suddenly decides to use the translator himself as an example, saying that as he helps the lawyer explain himself to the emperor, so too the lawyer helps his client explain his case to the judge. The language gap between the speakers of different languages is thus bridged by a common experience: the event that the emperor and the American are sharing at the very moment. This move may be especially plausible in this context because for both Anglo-American and Chinese cultures there has been a similar evolutionary relationship between the court of a ruler, literally the physical space where subjects can approach the ruler and be heard (the space where the American is now located),<sup>74</sup> and the court of a judge (the space where he functions as a lawyer). For both cultures "court" has shifted in meaning from a specific location

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<sup>72</sup> For a fascinating description of a Chinese Magistrate, see CELEBRATED CASES OF JUDGE DEE, (Robert Vangulik trans., 1976)(anonymous 18th century detective novel based on the legendary exploits of the famous Tang dynasty Judge Dee Jen-djeh (630-700 A.D.)).

<sup>73</sup> Jones, *supra* note 71, informs me that *song-gun* literally means "litigation stick," i.e., one who "stirs up" litigation. "Shyster" apparently entered the English language around 1840, derived either from the name of a specific New York lawyer, Scheuster, frequently rebuked for pettifoggery, see WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1967) "shyster" (at 306), or from the German word *Scheisse*, meaning excrement, see STUART BERG FLEXNER, I HEAR AMERICA TALKING: AN ILLUSTRATED TREASURY OF AMERICAN WORDS AND PHRASES 167 (1976).

<sup>74</sup> Indeed, "Court" originally meant something like "yard," thus showing the common link among such diverse uses as "tennis court," "court of law," and "courtyard."

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

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

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

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

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

<sup>76</sup> *Id.* at 484, 485.

<sup>77</sup> *Id.* at 484.

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

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

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

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

### III

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

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

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

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

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<sup>80</sup> WHITE, *supra* note 65, at 263.

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

<sup>82</sup> Besides being a law professor, White is also a professor of English Literature.

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

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

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

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

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

For example, in perhaps his most famous ethnographic essay,<sup>86</sup> Geertz studies the practice of cockfighting on the Indonesian island

<sup>84</sup> CLIFFORD GEERTZ, *WORKS AND LIVES: THE ANTHROPOLOGIST AS AUTHOR* 4-5 (1988).

<sup>85</sup> CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 58 (1983) (emphasis added).

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

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

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

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

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<sup>87</sup> *Id.* at 445, 450.

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

<sup>89</sup> *Id.* at 448.

<sup>90</sup> *Id.* at 452.

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

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

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

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

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

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

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

<sup>92</sup> *Id.* at 20-21.

<sup>93</sup> *Id.* at 23.

<sup>94</sup> *Id.*

<sup>95</sup> "Cultural analysis is intrinsically incomplete [and] the more deeply it goes the less complete it is. . . . [Its] most telling assertions are its most tremulously based." *Id.* at 29.

<sup>96</sup> "[T]he aim of anthropology is the enlargement of the universe of human discourse." *Id.* at 14. "To write ethnography . . . [is to] enlarge the sense of how life can go." GEERTZ, *supra* note 84, at 139.

<sup>97</sup> *Id.* at 14.

<sup>98</sup> GEERTZ, *supra* note 85, at 57.

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

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

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

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

<sup>99</sup> *Id.* at 58.

<sup>100</sup> See *supra* text accompanying note 88.

<sup>101</sup> GEERTZ, *supra* note 85, at 59-68.

<sup>102</sup> For example, see Geertz's comparative description of what "law" means in Morocco, Java, and Bali. *Id.* at 184-214.

<sup>103</sup> In attempting to translate words that are so complexly bound to their cultural context as to seemingly defy translation, Geertz is demonstrating for us the translator's art and ethic.

<sup>104</sup> John J. Gumperz, *Introduction*, in DIRECTIONS IN SOCIOLINGUISTICS: THE ETHNOGRAPHY OF COMMUNICATION 6 (John J. Gumperz & Dell Hymes, eds., 1972).

<sup>105</sup> *Id.*

<sup>106</sup> Recurrent differences in grammatical usage between two groups who speak the "same" language signal the existence of different dialects, not linguistic incompetence

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

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

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

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

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

<sup>108</sup> See *supra* text accompanying notes 57-81.

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

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

## B. From Ethnography to Ethnomethodology

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

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

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

<sup>112</sup> Gumperz, *supra* note 104, at 15, 18.

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

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

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

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

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

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

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<sup>114</sup> Pomerantz & Atkinson, *supra* note 111, at 287.

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

<sup>116</sup> See, e.g., Emannuel A. Schegloff, *Sequencing in Conversational Openings*, in *DIRECTIONS IN SOCIOLINGUISTICS*, *supra* note 104, at 346.

<sup>117</sup> Pomerantz & Atkinson, *supra* note 111, at 286-87.

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

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

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

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

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

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

<sup>120</sup> *Id.* at 18.

<sup>121</sup> *Id.* at 16.

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

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

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

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

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

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<sup>122</sup> *Id.* at 47-48.

<sup>123</sup> *Id.* at 296, 297.

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

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

### C. Ethnographic Methodologies for Studying Legal Discourse

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

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

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

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

derstanding shifts constantly as insights are gained and tested with each new reading.<sup>127</sup>

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

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

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

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

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

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

<sup>128</sup> EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1949).

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

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

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

the speaker on the tape. They would then present these observations in a roundtable discussion. The entire process typically lasted two hours.<sup>132</sup>

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

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

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

Conley and O'Barr distinguish their approach from both traditional ethnography and conversation analysis.<sup>139</sup> Although they

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

<sup>133</sup> *Id.* at xi.

<sup>134</sup> Conley & O'Barr, *supra* note 131, at 109.

<sup>135</sup> CONLEY & O'BARR, *supra* note 10, at xii.

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

<sup>137</sup> *Id.* at x.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at xi-xii.

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

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

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

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

<sup>141</sup> See *infra* text accompanying notes 162-80.

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

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

<sup>144</sup> Caesar-Wolf, *supra* note 126.

<sup>145</sup> See *id.* at 195.

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

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

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

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

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

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

<sup>146</sup> *Id.* at 196.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Agar, *supra* note 126, at 113.

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

<sup>151</sup> Agar, *supra* note 126, at 124.

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

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

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

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

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

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

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

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

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

<sup>156</sup> Sarat & Felstiner, *Vocabularies of Motive*, *supra* note 9, at 742.

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

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

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

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

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

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

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

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

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

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

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

#### IV

##### INTERPRETING THE TEXTS OF THE ATTITUDE PROBLEM CASE

###### A. The Police Report

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

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

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

police report. When I read the police report for the first time, something like the following sentences formed in my mind: "Our client wasn't really arrested for disturbing the peace. This is a case of a traffic stop that escalated into an abortive *Terry* stop-and-frisk which was then converted into a pretext arrest." The second sentence can only be fully understood if one knows the meaning of the three key phrases in the language of the Fourth Amendment: traffic stop, *Terry* stop-and-frisk, and pretext arrest. The use of these phrases brought into play a complex way of conceptualizing the relationship between American citizens and the police, a conceptual system built on the single sentence of 54 words that constitutes the Fourth Amendment to the United States Constitution.<sup>162</sup>

The Fourth Amendment protects the right of the people to be secure against "unreasonable searches and seizures" and specifically prohibits issuance of warrants for searches and seizures unless the warrant is based on probable cause, supported by sworn statement, and specifies the place to be searched and the person or things to be seized. The paradigmatic examples of permissible Fourth Amendment activity are the seizure of a criminal suspect pursuant to an arrest warrant and the search of a house for evidence of a crime, pursuant to a warrant specifically identifying the location of the house and the items of evidence to be seized.<sup>163</sup> However, the core activities of arrest and house search pursuant to warrant now represent only a small part of the Fourth Amendment world. Primarily through a process of expanding and complicating the meanings of "reasonable," "search" and "seizure," a Fourth Amendment language has developed which can now be used to describe and regulate an enormously wide variety of interactions between citizens and the police.<sup>164</sup>

The Supreme Court's 1968 decision in *Terry v. Ohio* initiated one of the most important expansions of Fourth Amendment language.<sup>165</sup> A policeman had approached Terry on the street, asked him his name, and then patted Terry's breast pocket, feeling a pistol

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<sup>162</sup> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

<sup>163</sup> Implicit within the Fourth Amendment meaning of "warrant" is a process of presenting the probable cause evidence to an independent magistrate; the search or seizure can only take place if the magistrate decides to issue the warrant and then the activity must take place within the limits set forth in the warrant.

<sup>164</sup> In Cunningham, *supra* note 109, I discuss extensively the semantic history and currently confused meanings of "searches" in the language of Fourth Amendment law.

<sup>165</sup> 392 U.S. 1 (1968).

within. At that time, those actions did not readily translate into Fourth Amendment terms. The Court chose to expand the language of the Fourth Amendment to cover what happened to Terry by adding to Fourth Amendment vocabulary two words from police vernacular: stop and frisk. The brief interrogation of *Terry* on the street (the stop) although not an arrest was still a kind of seizure of his person. The pat of his pocket (the frisk) was a kind of search, albeit far less intrusive than the paradigm search of a house

*Terry* was not, however, a case of simplistic translation of “stop” (police vernacular) into “seizure” (Fourth Amendment), or of “frisk” into “search.” Stop, frisk, search, and seizure *all* changed in meaning as a result of the way they were used in the *Terry* opinion. Indeed, the creation of new meaning in *Terry* is routinely recognized through reference to this new category of search and seizure as the “*Terry* stop-and-frisk.” Before *Terry*, the stop and frisk were entirely discretionary police procedures. *Terry* transformed the stop and frisk into exercises of Fourth Amendment power and thus subjected them to the Fourth Amendment principles of justification and restraint. But because the stop and frisk clearly could not fit within the warrant process, the meaning of “reasonable searches and seizures” in the Fourth Amendment suddenly became much more complex. The Court held that if a seizure of a person is only a *Terry* stop, it is reasonable as long as the officer has observed “unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot.”<sup>166</sup> If the search of a person is only a *Terry* frisk, then it is reasonable so long as the officer can reasonably conclude “that the persons with whom he is dealing may be armed and presently dangerous.”<sup>167</sup> Gone from the meaning of “reasonable search and seizure” in this context is the requirement that the police suspicion of criminal activity be based on the far more demanding standard of probable cause or that an independent magistrate first evaluate the suspicion based on sworn statement before the search or seizure can take place. However, the officer must be able to articulate specific observations to support a stop and frisk—an “unparticularized suspicion or ‘hunch’ ” will not suffice.<sup>168</sup>

The expansion of Fourth Amendment language to encompass the *Terry* stop and frisk also led to the specialized meanings I understood when I used the phrases “traffic stop” and “pretext arrest.” Stopping a motorist to issue a traffic ticket clearly is not an arrest, but after *Terry* “stop” now suggested Fourth Amendment activity. The Court has indeed extended *Terry* to traffic stops, holding in *Del-*

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<sup>166</sup> *Id.* at 30.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 27.

*aware v. Prouse*<sup>169</sup> that a traffic stop must be based on "at least articulable and reasonable suspicion" that the motorist has violated the law.<sup>170</sup> Could a traffic stop then lead to a *Terry* frisk? Again the answer is yes: an officer engaged in a traffic stop can go so far as to order a motorist out of the car and then frisk him.<sup>171</sup> However, as in *Terry*, the frisk must be justified by two separate articulable suspicions: (1) that the suspect is engaged in a crime (the traffic violation) necessitating the investigative stop, and (2) that the stopped suspect is armed and presently dangerous.

The phrase "pretext arrest" also has special meaning in the post-*Terry* legal world. Although *Terry* declined to apply strict probable cause and warrant protections to the frisk, it retained the underlying principles of justification (by requiring articulable suspicion that a frisk was necessary to protect the officer from armed assault during the encounter) and of restraint (by limiting the frisk to searching activities likely to eliminate that risk). However, five years after the *Terry* decision, the Supreme Court abandoned even these principles in the context of frisks taking place after an arrest. In *United States v. Robinson*,<sup>172</sup> the Court held that incident to a lawful arrest, an officer could conduct a complete search of the suspect even if he had no basis for believing that the suspect was armed or carrying evidence of a crime. Because earlier decisions had already sanctioned warrantless arrests if the officer had probable cause and needed to act swiftly to prevent escape or further crime, *Robinson* created the obvious danger that an officer who wanted to frisk someone, but lacked the articulable suspicion required by *Terry*, would arrest the person on a pretext and then conduct the frisk with impunity.<sup>173</sup>

By changing the meanings of "searches and seizures" in the Fourth Amendment, the Court not only created new ways of talking about police-citizen interactions; it changed those interactions in profound and widely-varying ways. Although *Terry* may have been intended to protect citizens from unjustified or excessive police tactics, it also created new incentives to abuse the traffic stop and warrantless arrest. A patrolling officer wanting to interrogate and frisk a suspect might be tempted to find a pretext to issue a traffic ticket.<sup>174</sup> Having then stopped the suspect but lacking articulable suspicion that the suspect was armed and dangerous, the officer

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<sup>169</sup> 440 U.S. 648 (1979).

<sup>170</sup> *Id.* at 663.

<sup>171</sup> *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

<sup>172</sup> 414 U.S. 218 (1973).

<sup>173</sup> See 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.8(a), at 59-63 (2d ed. 1986).

<sup>174</sup> Fear of such potential abuse of the traffic stop led the Court in *Delaware v. Prouse* to bar the practice of stopping motorists without evidence of a traffic violation. *Prouse*,

might then make an arrest for a petty crime and frisk incident to the arrest. Police discretion over traffic violations and misdemeanors is broad in practice and abuse is likely to go unnoticed, particularly if the frisk reveals no evidence of serious crime. If the frisk turns up an unregistered handgun or illegal drugs, then, in a felony prosecution based on the discovered evidence, the prosecutor may have to litigate the legality of the stop or arrest in a suppression hearing.<sup>175</sup> But if the frisk is unproductive, only the pretextual traffic ticket or misdemeanor charge remains. Such cases rarely draw the attention that could uncover abuse because they are litigated, if at all,<sup>176</sup> in the lowest courts which operate almost invisibly, in part because appeals from such courts rarely result in published decisions.<sup>177</sup> Thus it is the totally innocent person, who neither committed a traffic violation or petty crime nor carried evidence of a crime, who is least likely to receive vindication for violated Fourth Amendment rights.

Because of these dangers, many commentators have recommended that *Terry* stop and frisk activities be permitted only on articulable suspicion of serious offense, excluding such petty crimes as loitering and disorderly conduct.<sup>178</sup> This recommendation, however, has not been acted upon, leaving the thankless task of vigilantly defending petty prosecutions as one of the few potential safeguards.

Application of Fourth Amendment language to the police report operated in several different ways. When I read the phrase "traffic stop," I assumed that the phrase had the same meaning in the officer's vernacular as in my Fourth Amendment language. I did not consciously translate; I just assumed the writer of the report and I at that point were speaking the same language. However, several

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440 U.S. at 663. Nevertheless, the Court left open the possibility of less-intrusive "spot checks." *Id.*

The Court has sanctioned the use of roadblocks which stop all motorists to check for sobriety in large part because the police have no discretion to stop particular motorists on the pretext of checking for drunkenness but with a real agenda of looking in the car or frisking the driver. *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990).

<sup>175</sup> Although the felony defendant may have the incentive and resources to challenge a police abuse of the *Terry* doctrine, such settings are inimical to correction of the abuse. The defendant is often unsympathetic—many cases reach appellate courts on a guilty plea conditioned on the right to appeal a lost suppression motion. And, of course, it appears that the "abusive" practice has in fact ferreted out and perhaps prevented criminal activity.

<sup>176</sup> Many searches are undertaken without any intent to prosecute. *LAFAYE, supra* note 173, § 9.4(f), at 537 & n.197.

<sup>177</sup> For example, in Michigan, appeal from the district court is to the circuit court which, unlike the intermediate state courts of appeal, does not issue published opinions. *See Mich. Ct. Rules 4.102(E)* (appeals from misdemeanor trials in district court); 7.101 (appeals to circuit court); *cf. Mich. Ct. Rule 7.215* (publication of opinions of the court of appeals).

<sup>178</sup> *See LAFAYE, supra* note 173, § 9.2(d).

paragraphs later I deliberately translated the officer's request to "pat him down only to dispel the possibility of him having any weapons"<sup>179</sup> as an attempted *Terry* frisk. Understood as a *Terry* frisk, the officer's initial attempt at a pat down was "abortive" because the officer's feeling "uneasy with the situation" did not translate into Fourth Amendment articulable suspicion that our client was armed and presently dangerous. The statements under the heading "Cause for Arrest" added up to no more than a hunch that our client might be armed and dangerous. The officer did not report observing anything specific, such as a bulge under clothing or a sudden movement toward a pocket, that would indicate our client had a weapon on his person or in reaching distance.

Still using Fourth Amendment language, I then substituted my interpretation of what happened (a pretext arrest) for the officer's statement, "arrested for Disorderly Person."<sup>180</sup> When Johnson (quite justifiably) refused to submit to a frisk, the officer converted the *Terry* encounter into a pretext arrest in order to cover up the impropriety of the frisk. When his hunch that Johnson possessed a weapon or was hiding something such as contraband turned out wrong, the officer was forced to carry through the charade that Johnson had committed a misdemeanor.

By translating the police report into Fourth Amendment terms, I sought to bring what happened into a universe of carefully regulated relationships between citizens and police where the officer, not our client, was the wrongdoer. At the same time I imposed on a rather inchoate mass of shifting and fast moving events a structure, sequence, and set of rules, rather like a chess game or courtly dance.

This translation appealed to my desire for a sense of moral outrage to fuel my advocacy and seemed to promise a winning strategy. Of course it had nothing to do with our client's story—which I had not yet heard—but at the time developing a theory of the case based entirely on the police report seemed perfectly normal. Strategically, we would win more easily if we could take the police version of what happened as true rather than force the fact-finder to make a credibility choice between the police account and our client's story. But as a result, when I did hear the client's story by reviewing the videotape of the interview, I had already decided to translate the events into Fourth Amendment terms.

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179 POLICE REPORT, *supra* note 16, at 3.

180 *Id.*

## B. The Suppression Hearing

In retrospect, thinking of my advocacy as translation, I now see the suppression motion as motivated in significant part by our desire to shift the language in which the opposing lawyer and judge discussed the case from that of substantive criminal law (the peace disturbance) to the language of the Fourth Amendment. In the translation of "what happened" into the language of the misdemeanor complaint much was lost from Johnson's viewpoint. The complaint failed to indicate that the only persons "disturbed" by Johnson were police officers. Likewise, the only setting for what happened in the complaint was "a place of business" (the gas station). The context of police interrogation and searching was lost. The complaint's language seemed to limit us to be arguing either that our client did not speak and act as alleged or, if he did so, that his conduct did not rise to the level of criminal peace disturbance. We could hardly speak of the troopers as police at all. In contrast, the suppression motion brought into play a language rich in vocabulary about police conduct that we could use to talk persuasively about our client as victim rather than wrongdoer.

However, like all vital languages, the language of the Fourth Amendment had both limitations and potentialities beyond my comprehension at the time I chose to use it. I thought of that language, if at all, as simply one of many tools I could take to hand in the service of my client. It took a shocking defeat to make me realize that what I thought was well in hand possessed a life of its own.

The shock of hearing the judge's blatant disavowal of what I thought *Terry* stood for caused me to become aware of how meaning was both lost and added by translating "what happened" in Fourth Amendment terms. James Boyd White has suggested that the Supreme Court's interpretations of the Fourth Amendment be read as creating a language that citizens and police officers might actually use in talking about their interactions.<sup>181</sup> One correlative of this concept is that the citizen and the police officer each would demand of Fourth Amendment language that it "speak to the situation in a way that he can respect."<sup>182</sup> This standard does not require the Court to satisfy the expectations of both citizen and officer; in any given interpretation one or the other might justifiably feel that his

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<sup>181</sup> James Boyd White, *The Fourth Amendment as a Way of Talking About People*, 1974 SUP. CT. REV. 165 [hereinafter White, *Talking About People*]. A revised and edited version appears as Chapter 8 in JUSTICE AS TRANSLATION. See WHITE, *supra* note 65, ch. 8. In the original article, White refers to this concept as a "discourse of adjudication." White, *Talking About People*, *supra*, at 166. In the revised version which appears in JUSTICE AS TRANSLATION he has changed his terminology to "language of adjudication." WHITE, *supra* note 65, at 178.

<sup>182</sup> White, *Talking About People*, *supra* note 181, at 166.

rights and needs have not been given adequate weight. But nonetheless, as long as the Court's language provides a vocabulary in which each participant can voice his concern, the Court successfully creates a "comprehensible public world" that both can respect.<sup>183</sup> The alternative is an interpretation creating a language that one of the participants, either citizen or officer, "cannot speak, in which he cannot locate himself, which does not deal in intelligible ways with claims he regards as important."<sup>184</sup>

*Terry* can thus be read as providing a language that gives a voice to both the citizen and the officer. The officer can speak of his interest in protecting his safety and his corresponding need to make quick, on-the-spot decisions; thus, in his view the court should respect his judgment and discretion. In turn, the citizen can speak of even a momentary interrogation against his will, or a brief intrusion on his personal privacy, as a violation of his legal rights. *Terry* gives the citizen a voice to ask the officer to justify his actions in terms of the officer's mission to detect or prevent crime, and further empowers the citizen to ask the officer to limit his intrusion to the minimum necessary to serve that mission.

However, there is a potential danger in the language created by *Terry*. What if the officer turns the language of *Terry* against the decision by arguing to a court in the following way:

You are not speaking fairly to the hazards and uncertainties of my task. When I stop a suspect, my decisions must be made quickly and on the basis of incomplete information. You are asking me to risk my life just because I might not be able to justify my actions months later to a judge by pointing to what you call "articulable" facts. Yet I know and you know that my sense of danger may be both real and accurate even if I cannot articulate it.<sup>185</sup>

Before *Terry*, the officer, in her attempt to describe the search as "reasonable," would have been largely limited to speaking of the need to preserve evidence and the limited intrusion of the search. The ensuing discussion would have therefore implicitly balanced the citizen's Fourth Amendment rights only against the effective detection and prosecution of crime. The citizen could speak of his own real and specific harm caused by the search, but the officer could invoke only speculative prevention of harm to a hypothetical future crime victim if the search could not take place. But *Terry*

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<sup>183</sup> *Id.* at 167.

<sup>184</sup> *Id.*

<sup>185</sup> This passage is based on a similar imaginary argument in White's article. See *Id.* at 199; WHITE, *supra* note 65, at 193-94. For a well-reasoned argument that *Terry* and its progeny strike the wrong balance of competing Fourth Amendment values, see Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990).

changed this by giving the officer an enormously powerful new rhetorical resource: the ability to match, and perhaps overwhelm, the citizen's voice by also speaking in the first person of his own rights and of the not very speculative potential harm to him while conducting his perilous public service.

The *Robinson* decision<sup>186</sup> can be read then as fulfilling the dangerous potential of the language created by *Terry*. Under the Court's holding in *Robinson* the simple fact of arrest terminates the citizen's right to speak in the language given to him by *Terry*: once arrested, a citizen can no longer ask the officer to justify a search of his person, on grounds of either preserving evidence or protecting the officer's safety.<sup>187</sup> The *Robinson* decision shows that, once the citizen is thus silenced, the voice of the officer, speaking of the need for a standardized practice of disarming and discovering evidence in all arrests, carries the day.

Interpreted in this light, Trooper Mraz's testimony was charged with a force I did not recognize at the time. His responses to our insistent questioning about whether Johnson appeared armed and dangerous no longer appear to be evasions designed to cover a weak case. Instead, Mraz was saying that from his point of view it did not matter whether there were visible signs that Johnson was a potential threat to their safety because, in order to protect themselves and perform their duty, the troopers must treat every motorist "as if they were armed and dangerous."<sup>188</sup> He took every opportunity to speak of their need for personal safety.<sup>189</sup>

When we wrote our suppression motion, we thought with satisfaction that we were mounting our client on a vehicle that might carry him to victory; instead, we had set in motion a juggernaut that rolled right over him. I had failed to recognize that our Fourth Amendment translation included the semantics of *Robinson* as well as *Terry*. Beguiled by the superficial holding of *Terry*, I thought Mraz's testimony was favorable to us and thus did not hear the force

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<sup>186</sup> 414 U.S. 218 (1973); see text accompanying notes 172-73.

<sup>187</sup> "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the arrest which establishes the authority to search." *Robinson*, 414 U.S. at 235.

<sup>188</sup> See *supra* p. 1315. Mraz essentially made this statement three times within two pages of the hearing transcript. Toward the end of the student's examination, Mraz emphasized the point again: "As I stated previous [sic], every time we make a traffic stop we treat the person as if, doesn't mean that they were, as if they were carrying a weapon, for our safety." Hearing, *supra* note 32, at 13.

<sup>189</sup> See Hearing, *supra* note 32, at 11; *supra* p. 1316 ("The reason Trooper Kiser patted him down is that, for his safety along with mine. . . . Basically the pat down was done for the officer's safety, the troopers' safety, myself and Trooper Kiser.") I do not know whether Mraz's emphatic testimony on these points was spontaneous or part of a standard police "script" for testifying on *Terry* stop issues.

of his consistent claim that their actions were taken to protect "the troopers' safety."<sup>190</sup> But Judge Collins heard Mraz's voice loud and clear, so clearly that he extended the logic of *Robinson* to explicitly reject the holding of *Terry* itself. Acknowledging that in this particular case the troopers "didn't have any reason to believe that the person was armed and presently dangerous," he nonetheless said that Trooper Kiser acted reasonably in doing "a brief pat down to protect both himself and his partner" because Kiser's "first duty" was to survive. It seemed that in the world created by the language of *Robinson*, Dujon Johnson had no right to ask for explanations or justifications; his role was to submit.<sup>191</sup> Even worse, his effort to speak the *Terry*-language of the Fourth Amendment to the police was properly punishable as the wrong "attitude." The police had the first, last, and only word.

### C. What the Client Said

#### 1. *A Respectable Person*

When I reviewed the videotape of Johnson's interview before the trial date, the judge's key phrase "attitude ticket" alerted me to a correlative key word in Johnson's narrative: respect. He referred to himself as a "respectable person" and made a careful distinction between respecting authority and not respecting the abuse of authority.<sup>192</sup> I thus interpreted his narrative as being about the troopers' failure to give him the respect he deserved and his appropriate refusal to accord them the respect they wrongfully demanded: a problem of attitudes.

Although our intent in shifting the case's language from substantive criminal law to that of the Fourth Amendment was to move the focus from our client's alleged wrongdoing to that of the troopers, the Fourth Amendment language did not enable us to talk meaningfully about what Johnson perceived as their "attitude problem." The central question at the suppression hearing was whether

<sup>190</sup> *See id.*

<sup>191</sup> If a citizen asked how . . . *Robinson* defined his place in a public world, he would find that he is given no right to insist that the officer explain or justify what he does; his role is simply to submit. . . . *Robinson* . . . stands as a permanent rhetorical resource . . . [for] anyone who wishes to argue that the police should have one blanket power or another as a matter simply of "authority." . . . [I]t introduces into our constitutional law a principle of moral and intellectual brutality . . . .

[*Robinson*] expose[s] to a substantial, arbitrary, and unreviewable exercise of police power every person who violates a substantial traffic rule, which is in practice virtually everyone . . . [and] defines the arrested person as an object of unregulated power . . . .

*Talking About People*, *supra* note 181, at 203, 205.

<sup>192</sup> *See supra* p. 1331.

the troopers had particularized suspicion that Johnson was armed and presently dangerous. Therefore, the probing spotlight we intended to shine on the troopers promptly reflected back onto our client. And that refracted light had a very narrow focus. The physical space illuminated was a short, narrow corridor extending from Johnson's car at the gas pump to the point where he first stopped when Kiser called out to him. The temporal space was even smaller: the minute or so from the time Kiser called out to the moment of arrest. Left obscured in darkness were the images of the police car "whipping in" to block Johnson's car, the swaggering Kiser pulling on his black gloves as he stepped toward Johnson, and Mraz peering into Johnson's car with a flashlight.

And the loss was even greater. By translating the event as a "Terry-stop," we narrowed the issue to whether Kiser justifiably felt a threat to his safety, making only two aspects of "what happened" relevant: how our client appeared to the trooper and how the trooper felt about that apparent behavior. The Fourth Amendment story we sought to tell could be imagined as a scene played out on a tiny, briefly illuminated stage on which only one isolated actor appeared (Johnson), who spoke and responded to an unseen person in the wings (Kiser).<sup>193</sup> How the troopers behaved, and how our client felt about their behavior, were simply not part of the picture.

The impact of the judge's "translation" of what happened, "attitude ticket," not only shocked me loose from the constraints of viewing the events solely in Fourth Amendment terms but also suggested a new way of hearing and communicating our client's story. The word "attitude" inherently assumes an interactive relationship. One can not have an attitude in total isolation. The underlying question always is, "attitude in relation to what?" Judging Johnson's attitude therefore required inclusion of the troopers' behavior, opening the door for us to argue that our client's attitude was en-

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<sup>193</sup> I have slipped into a dramatic metaphor. The proscenium arch that separates the stage from the audience in a typical theater is literally a frame and even a "real-life" play must be a kind of translation. No matter how the playwright, actors, and director strive for accuracy, they can not help but exclude much of what happened in the re-enacted events and add their own interpretations.

One could make the same point by imagining our Fourth Amendment framing in terms of a television camera. By using the report as our experiential foundation, we had used the trooper's perspective for our camera angle. We presented only what he saw without shifting the angle to our client's perspective, putting the trooper "on screen," or moving the camera to a third party perspective which would have placed both client and trooper in the camera's frame. Like the play, even the apparently verbatim nature of videotaping is a translation, because any perspective and focus necessarily involves exclusion, an exclusion that results in an interpretation of what happened. For example, even if the camera is held from the vantage point of a disengaged third party, it cannot then "see" exactly what *either* participant sees.

tirely appropriate *in response* to what the troopers were doing and saying.

## 2. *Being Treated Differently*

The last meeting with our client on the day of trial had left me with the gnawing doubt that much of his bitter frustration resulted from our inability to understand enough of what he was saying to translate well, that our "attitude problem" translation was incomplete. But it took months before I recognized the first of what were to be many clues that my doubt was well-founded.

As I pondered this problem, the other comment Derrick Bell made at the symposium came back to me.<sup>194</sup> This comment was as casually confident, in its own way, as the judge's "attitude ticket" description. He was sure that the "problem" was a very familiar one: our client got in trouble simply because he was viewed as "an uppity nigger."

Bell's comment suggested that the lack of respect was part of a story of racial oppression. Of course, such a story would extend far beyond the narrow confines even of our lifetimes. But that story, at a minimum, began several minutes earlier and several hundred yards outside the frame that my "respect" translation imposed: back at the intersection of Hewitt and Washtenaw Avenues.

When I had replayed the videotape of the client interview in reaction to Judge Collins's bench opinion, I had deliberately fast-forwarded to the point where Johnson described what happened after he got out of his car at the gas station. I only studied this three-minute segment of the videotape (which is reprinted above),<sup>195</sup> as I prepared and presented the first draft of this article. Although I had seen the entire tape shortly after it was made, I did not view the tape from the beginning of the interview again until several months after first presenting the draft article, when I prepared to use the tape for a discussion of interviewing in my class on pre-trial practice.<sup>196</sup>

I asked the students in watching the tape to apply the translation model by using one word or phrase to summarize from the client's description "what happened" and then asking themselves what was necessarily left out from the client's story when that word or phrase was used. Regardless of the phrase used by the various students (typically "illegal search"), almost all of them "left out" the

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<sup>194</sup> See *supra* text accompanying note 47 (discussing Bell's first comment on the Attitude Problem Case made at the University of Michigan Law Review's *Legal Storytelling* Symposium).

<sup>195</sup> See *supra* pp. 1322-24.

<sup>196</sup> I was willing to play a longer sequence because I had a captive audience for a longer period and I wanted my students to see how the interview began and developed.

following rather long narrative about Johnson's trouble with the clutch in his car—a part of the videotape that I had literally omitted up to then by my selective viewing and which of course I have left out of the story I have told you so far:

Cl I was having problems with the clutch; I had run down on hydraulic oil. And when I went shopping previously and [inaudible] observed I needed some gas, I went shopping for some oil because every time I went to a stop light, you know, the clutch, I couldn't shift it, so I had to turn it off, in order to shift it.

St Wait. You had to turn the car off to . . .

Cl You see, I was having problems with my clutch.

St Right.

Cl The significance will, will develop as I [inaudible]. Well, I had problems with the clutch. I know at the time it was short of hydraulic oil. I'm not a mechanic. Uh, I went to Meijer's for the shopping and went to the auto department and asked them, well I've got this problem, what can I do?

St Was this, this right before . . .

Cl Right before I realized I needed gas.

St Are they open 24 hours?

Cl Yes, they most certainly are.

Other St Oh yeh!

St I didn't know that — so that's good to know.

Cl I can't recall the cashier's name but I know his face so if I went back, he probably . . . He explained to me that I need, um, hydraulic oil. The problem with the clutch was that it would stick. I couldn't shift. In order to shift the gear, I would have to turn the engine off — that way I wouldn't damage it. So after telling me some hydraulic oil — I bought some, purchased some. And I said . . . I got into the car and [inaudible] the gas. I said, what I'll do, I'll put this in when I pump my gas. So I proceeded to the gas station on Hewitt and Washtenaw. And there was a flashing red light. I turned the car off.

St Right.

Cl Because I couldn't slow down and shift. Turned the car off. Put it in first. Crossed the street and then went on. There wasn't any traffic coming.

St So, did you come to a complete stop?

Cl Came to a complete stop. Lights stayed on and everything, though.

The failure to pay attention to this part of the interview is particularly striking because Johnson himself emphasized that the clutch problem's significance "would develop" as he told the whole story.

When I pre-viewed the tape before class, I had mentally skipped over the clutch story much as I had done earlier by fast-forwarding the machine. However, as I watched the tape again with my students in class, I suddenly "saw" for the first time why the clutch problem was significant to Johnson and why generally the moments *before* our client entered the station, which I had edited out, might in fact be indispensable to a faithful translation of Johnson's story.

The problem with the clutch was important to Johnson because it made him certain that he had come to a full stop at the intersection. Because the clutch was "acting up," he needed to stop and turn off the engine in order to shift gears. Thus, when Trooper Kiser approached him at the gas station, Johnson apparently felt sure that the trooper could not have thought, even mistakenly, that he had run the flashing red light. Given that certainty, what was the most likely explanation in Johnson's mind for the stop?

Trooper Mraz testified that Johnson had said that night "the only reason that we stopped him was because he was black."<sup>197</sup> Indeed, Mraz listed this statement as the first "reason" when asked what our client had done to be a "disorderly person." Judge Collins clearly thought our client was making this claim and rejected it, saying "they didn't just see a black man in a gas station and say oh there's a black man in the gas station, let's go and arrest him . . . that didn't happen."<sup>198</sup> Yet at no point during the entire 50 minute initial interview, nor later during our representation, did Dujon Johnson tell *us* that he thought the trooper stopped him because he was black or otherwise claim that their actions were motivated by racism. Indeed, he did not even volunteer the information that the troopers were white; the students asked that question on their own initiative. I believe that Judge Collins introduced the actual word "racism" first into the language of the case when he described our client as "hollering racism" in his exchange with the troopers.<sup>199</sup> I find it telling that the two-page statement of facts written by the students after the initial interview not only did not mention a possible issue of racism, but also did not even indicate that our client was black.

As best as I can recall, I had from the outset a common-sense impression that what happened that night was a "racial incident,"

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<sup>197</sup> See Hearing, *supra* note 32, at 15; *supra* p. 1317.

<sup>198</sup> See Hearing, *supra* note 32, at 27; *supra* p. 1320.

<sup>199</sup> See Hearing, *supra* note 32, at 27; *supra* p. 1320.

but as a lawyer I did not talk about "the case" that way, and therefore I ceased to *think* in terms of racial issues as our various translations shaped and limited our shifting understanding of what was legally relevant. The Fourth Amendment theory seemed race neutral, and even our "attitude problem" trial strategy did not (at least explicitly) present Johnson's demand for answers in racial terms.<sup>200</sup>

But my long-overdue recognition of Johnson's emphasis on *why* he was stopped in the first place forced me to face the possibility that we needed to include in our representation of Johnson a legal translation of the statement, "I was stopped because I was black." Once I began trying such a translation, I also started noticing other elements that I had previously excluded from the descriptions of events given by the troopers, prosecutor, and judge. Indeed, as I re-read the incident report in this new light, I found myself thinking that I might have mistranslated the police report as much as our client's narrative.

My initial reaction to reading the report had been that, despite its title, it was not a story about arresting a "disorderly person," but rather the account of a *Terry*-stop that went awry, turning into a pretext arrest. This translation not only caused me to ignore much of my client's narrative; it also excluded the first page and a half of the report itself by beginning the story after Johnson exited his car. Because the new translation focused on why Johnson was stopped in the first place, rather than simply on what happened after the stop, I needed to examine the reasons given in the report for the stop.

Once I shifted my attention, I noticed immediately that the report itself began by identifying the "primary incident" as occurring at the intersection; the events at the gas station were described as "secondary." Given this clue, I soon realized that the language of the entire report was that of routine traffic regulation, not crime detection and enforcement.<sup>201</sup> Johnson was referred to, not as "suspect," but as "Driver." The description of events at the gas station was prefaced with the phrase, "a subsequent traffic stop ensued."<sup>202</sup> The critical paragraph, "Cause for Arrest," began with the words, "upon continuing the normal course of action on this traffic stop."<sup>203</sup>

<sup>200</sup> See *supra* at pp. 1326-27.

<sup>201</sup> See POLICE REPORT, *supra* note 16. In analyzing narrative structure in plea bargaining, Maynard emphasizes the importance of "the police report as a socially constructed "documentary reality" . . . one that aims for particular readings in contexts other than that in which it was written." Douglas W. Maynard, *Narratives and Narrative Structure in Plea Bargaining*, in LANGUAGE IN THE JUDICIAL PROCESS, *supra* note 131, at 65, 80.

<sup>202</sup> POLICE REPORT, *supra* note 16, at 1.

<sup>203</sup> *Id.* at 2.

Because we thought we had a strong argument that Trooper Kiser had exceeded the proper scope of a traffic stop when he sought to conduct a pat-down search, we never contested the powerful and pervasive claim implicit in the report that what happened was "incident to" a routine traffic stop. But as I reread the report, I suddenly recalled other words Johnson said at our post-dismissal meeting: "I'm not trying to put my story against their story. They're trying to paint a picture and I'm trying to destroy it." What was the "picture" Johnson was trying to destroy? Probably not the pretext that grounds for a *Terry* frisk existed; that was more like putting our story against their story, and accepting the basic premise, as did the judge, that the police had legitimate reasons to be interrogating Johnson in the first place. Perhaps Johnson wanted to destroy that basic premise.

Because I did not realize the force of the language describing what happened as a "routine traffic stop," I also failed to appreciate the significance of the word "ticket" when I seized upon Judge Collins's phrase "attitude ticket." Instead, I just focused on the word "attitude." But the "ticket" aspect of his translation set us up for the devastating day of trial by trivializing what happened. What we viewed as criminal prosecution, and what Johnson viewed as a serious assault on his dignity, the troopers, the prosecutor, and the judge viewed as a ticket.

What were the implications of translating what happened as a ticket? First, it continued the primacy of the "routine traffic stop," making the interrogation, search and arrest "incident" to a traffic ticket. Second, it radically decreased the importance of what was at stake. Citizens are not expected to seriously contest tickets. They either pay them or ignore them. Because this was just a ticket, our efforts to convert the criminal procedure into a re-enactment of the event, a courtroom drama that would ritually restore Johnson's dignity, were not taken seriously.<sup>204</sup> The prosecutor had an irrefutable response: this is not worth my time. The final, authoritative description of "what happened" was spoken in chorus by the prosecutor and judge: "this is a \$50 attitude ticket." The initial affront to our client's sense of respect was thus repeated in the guise of resolving the case in his favor.

As these implications of accepting the "routine traffic stop" characterization sank in, I began looking harder for ways to accomplish Johnson's goal of destroying the whole picture. As a result, I

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<sup>204</sup> Maynard's study of plea bargaining in a California misdemeanor court has led him to conclude that such judicial processes are essentially bureaucratic, that defendants are treated "as objects in [an] assembly-line," and that the courtroom ritual is structured so as to be "status degrading for defendants." MAYNARD, *supra* note 115, at 30, 48.

noticed a number of other details that were excluded from our prior translations:

The car: Johnson was driving a 1977 Triumph two-door convertible, no doubt a very sporty-looking car despite its age.

The time: The events took place at 4:30 a.m., a time when police might be particularly suspicious of criminal activity.<sup>205</sup>

The clothes: Johnson was still wearing his jogging clothes.

The location: the intersection was located near the county country club in a fairly affluent white suburban area between Ypsilanti and Ann Arbor, at some distance from the "poor black" part of Ypsilanti.

The disposition of the traffic ticket: the ticket for running the flashing light was dismissed when neither trooper showed up for the scheduled court date.

I also recalled another fact we had largely ignored: Johnson's insistence, contrary to the report, that the troopers had *not* told him that he had run a red light when they stopped him.<sup>206</sup>

These details, combined with Johnson's certainty that he had made a full stop, suggested that the troopers were engaged in what might be euphemistically called "good police work."<sup>207</sup> They saw someone who fit their own profile of a drug dealer or burglar and decided to investigate to see what might "turn up." The fact that the person was black might have been an important reason why the profile "fit," both because he was "out of place" in a white part of town in the middle of the night, and because of stereotypes about the criminal propensities of blacks, especially young black men.<sup>208</sup>

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<sup>205</sup> Johnson told us he was out so late because he had worked an evening shift, went running after work, stopped at a relative's house in Ypsilanti to shower and change, and then did some shopping at a 24-hour grocery store before beginning to head home for Detroit.

<sup>206</sup> *Supra*, text following note 27.

<sup>207</sup> One survey of police officers revealed that 80% believed the need to deter crime by an aggressive police presence justified rigorous stop-and-question tactics, even if those tactics exceeded the letter of the law. Dan Stormer & Paul Bernstein, *The Impact of Kolender v. Lawson on Law Enforcement and Minority Groups*, 12 HASTINGS CONST. L.Q. 105, 115 n.56 (1984).

<sup>208</sup> "Studies show . . . that police officers perceive blacks as more likely to engage in criminal activity or to be armed and dangerous. When minorities are found outside minority neighborhoods, race may become the principal basis for an officer's suspicion." *Id.* at 116 (citations omitted).

Spend an evening on patrol with Mobile Reserve officers Dick Burgess, John Frank or John Winter and watch them stop one car after another. They are especially interested in cars with two or more young black males, or in rental cars with out-of-state plates, which they say can be a telltale sign of a drug car. It is all constitutional, according to the police lawyers. 'Reasonable suspicion,' they say.

John M. McGuire, *Reasonable Suspicion: The Law's on Their Side*, ST. LOUIS POST-DISPATCH, July 9, 1991, at 1D, 4D.

From this perspective, the fact that this person objected to a search of his car and person only confirmed their hunch, or in the words of Trooper Mraz, “[brought] up [their] intensity level a little bit higher.”<sup>209</sup> Thus the motive for a pretext arrest changed from the grounds expressed by the judge at the suppression hearing—an anxiety over personal safety—to a deliberate plan to search for evidence of some unknown crime based largely on the race of the suspect.

My new focus on why the troopers stopped Johnson revealed another detail in the police report that we had ignored before. On the first page of his report, Trooper Kiser stated that, as they “pursued” the car after it went through the intersection, he “observed driver of vehicle to look over at patrol unit . . . . Vehicle then made an abrupt left turn into the TOTAL gas station.”<sup>210</sup> This detail acquired significance for three different translations of what happened. From the perspective of the police report, Trooper Kiser’s observation apparently suggested to him that the driver was attempting to evade pursuit, thus providing the first articulated basis for suspecting the driver of criminal activity. According to Johnson, he planned to stop for gas before he reached the intersection and, far from pulling in to evade pursuit, was not even aware of the troopers until he got out of his car. Combining these facts with what I was now assuming to be Johnson’s belief that there was no nonracial reason for stopping him, Kiser’s “observation” did not translate into reasonable suspicion, but rather into either hypersensitivity because the driver was black or an after-the-fact lie made up to justify his actions at the station. However, this detail in the report took on greatest significance for the judge’s translation of what happened. Although we had made no assertion in our brief that what happened was racially motivated, the judge obviously assumed that was Johnson’s view. His confident rejection of that view was critical to his conclusion that what happened was a justified attitude ticket. His logic was: (a) the officers had justification to stop the vehicle, (b) they “didn’t just see a black man in a gas station and say . . . let’s go and arrest him,” and (c) “once having stopped him, he was the author of his own problems.”<sup>211</sup> Of course for purposes of the suppression motion we had conceded the first premise of Judge Collins’s argument. However, our focus on the gas station portion of the report led us to miss an important admission in the report that undermined the judge’s second premise. The judge said:

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209 See Hearing, *supra* note 32, at 11; *supra* text accompanying note 37.

210 POLICE REPORT, *supra* note 16, at 1.

211 See Hearing, *supra* note 32, at 27; *supra* text accompanying note 40.

I'm sure that these two officers had no clue when they saw this person run the red light, whether he was black or white or brown or red or green or any other color. They just didn't know *and so* the person was walking around with a chip on his shoulder and these officers were the object of that behavior.<sup>212</sup>

Judge Collins obviously assumed that the troopers saw only a *car* and not the driver within it, yet Trooper Kiser's acute observation that the driver "looked over at patrol unit" certainly suggested, to the contrary, that he got a good look at Johnson as the car passed through the intersection.

By eliminating race from our translation of what happened, we not only excluded a possible alternative explanation for the troopers' actions, we also probably distorted Johnson's motivations. Our story of what happened portrayed Johnson as a person with a lawyer's concern for the technicalities of the law, asking the police to justify their investigative actions in terms of the Fourth Amendment. In telling this story we did not invent elements; our client really did report to us that he referred to Supreme Court precedent in responding to the troopers' demand to submit to a pat-down search.<sup>213</sup> But by framing out Johnson's possible larger concern, we may have presented a very distorted and ultimately rather unsympathetic picture of our client.<sup>214</sup> What the judge "saw" were two state troopers just trying to do their jobs, whose patience was exhausted by a guy who was "too smart for his own good."<sup>215</sup>

<sup>212</sup> Hearing, *supra* note 32, at 28; *supra* text accompanying note 40 (emphasis added).

<sup>213</sup> See Initial Interview, *supra* text accompanying note 44.

<sup>214</sup> But see Johnson's own explanation for why he did not raise the issue of racism, *infra* note 248 and accompanying text.

<sup>215</sup> During the fall of 1991, Gerald Early, a black professor at Washington University, was subjected to a *Terry* stop at a suburban St. Louis shopping mall because a shopkeeper had called the police when he saw Early window shopping while waiting for his wife to come out of a meeting. In an Op-Ed article entitled, "Living in Fear of Fear," Early responded to the view that the shopkeeper's fear was reasonable and that the police officer was "only doing his job":

This is what happens when one becomes a category instead of a person. Life takes on all the depressing dimensions of something vaguely yet ominously totalitarian because, if one is at the caprice of fearful whites because of one's skin color, then one is always at the mercy of something that one can neither defend against nor deny. . . .

[When] I received calls and expressions of support from blacks . . . almost always they were accompanied by a story of some similar indignity that they themselves had suffered and how they were unable to get it publicized because they were not "distinguished university professors." They were ordinary people (of course I am no less ordinary) for whom my interrogation and demand for apology became all the interrogations they had ever endured because some white thought them "suspicious" or in the wrong place at the wrong time.

. . . .  
[T]here is a far more important principle at stake than concern for the shopkeeper's security: In order to have a free society, a democratic

In thinking about the way that our translations of Johnson's story erased his racial identity, I am reminded of hearing Patricia Williams, a black law professor, tell her experience of having her race literally edited out of an article she had submitted to a law review.<sup>216</sup> The article as submitted began with a personal account of being denied entrance to a New York City boutique when she pressed her "brown face" to the window of the locked door.<sup>217</sup> Her rage when the clerk within looked at her and said, "We're closed" (at one o'clock in the afternoon) became the springboard for the rest of the article.<sup>218</sup> The editors deleted the "brown" from her "face," explaining that their editorial policy barred descriptions of "physiognomy."<sup>219</sup> She reported that, "Ultimately, I did convince the editors that mention of my race was central to the whole sense of the subsequent text; that my story became one of extreme paranoia without the information that I am black."<sup>220</sup> It seems obvious that the reader needed to know that Williams was black to appreciate her rage and to understand its application to her article, but as she pointed out, it was "the blind application of principles of neutrality, through the device of omission [that acted] . . . to make me look crazy."

Had we, through a similar blind application of legal language, acted to make our client look paranoid, crazy? How much blame did we share for Judge Collins's judgment that our client was "acting strange and unusual" and "was walking around with a chip on his shoulder"?<sup>221</sup>

Of course even if Judge Collins believed that the troopers could tell that Johnson was black when they first saw him at the intersection, he apparently still would have rejected a claim that their actions were racially motivated. In a very telling remark, the judge stated: "the fact that one person is black and the other is caucasian does not make it [a] racial incident."<sup>222</sup> At one level, of course the

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society, everyone must be permitted equal and free access to public spaces so long as he or she is engaged in publicly acceptable behavior. To understand and accept democracy is to understand and accept the risk implicit in this principle, for no one forfeits his or her right to unscrutinized and unquestioned public access or the presumption of innocence in his or her actions upon mere nervous suspicion.

Gerald Early, *Living in Fear of Fear*, ST. LOUIS POST-DISPATCH, November 27, 1991, at 3C.

<sup>216</sup> This story is told in PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* ch. 3 (1991).

<sup>217</sup> *Id.* at 44.

<sup>218</sup> *Id.* at 45.

<sup>219</sup> *Id.* at 47.

<sup>220</sup> *Id.*

<sup>221</sup> See Hearing, *supra* note 32, at 27, 28; *supra* text accompanying note 40.

<sup>222</sup> See Hearing, *supra* note 32, at 27; *supra* text accompanying note 40. It is not accidental that the judge used the singular when describing "the other" as caucasian

difference in race makes the incident “racial.” What Judge Collins seemed to mean was that the fact that Trooper Kiser was white did not automatically mean that his conduct toward a black was *racist*. Further, Judge Collins implied that our client had wrongly assumed that the conduct was racist simply because the trooper was white: “the person was walking around with a chip on his shoulder and these officers were the object of that behavior.”<sup>223</sup> If there was any racial aspect to the incident, the source of the tension was entirely Johnson himself. “He was the author of his own problems,” the judge ruled.<sup>224</sup>

Up to this point our failure to argue that our client was the victim of racism may have not appeared really a problem of translation. Rather the cause seemed to have been due to our client’s failure to raise this claim to us directly and our distraction from evidence pointing toward such a claim by our preoccupation with other legal theories. The translation metaphor does, however, suggest why we were so easily distracted. While one is speaking a language, its limitations seem so natural that they are invisible. At the outset of our representation, I seized upon the details of the frisk in the police report in large part because I could talk about them easily in legal language. Facts that did not translate well were excluded as irrelevant in a way that seemed perfectly natural and appropriate to us.

Perhaps use of the translation metaphor might have alerted us to the narrowness of our Fourth Amendment account of what happened that night and prompted us to follow up on the obvious clues; we might have asked Johnson directly if he thought race was an issue and, if so, in what ways. An investigation might have resulted that could have produced further evidence that the troopers’ actions were racist.<sup>225</sup> But the translation metaphor also suggests that a more profound problem existed than attention to evidentiary proof would solve—a problem that might explain Judge Collins’s

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thus omitting reference to Trooper Mraz. My new sensitivity to the racial overtones of the case caused me to remember that the judge placed considerable emphasis at the first hearing on that fact that Trooper Mraz was Native American. He apparently was making the common, but erroneous, assumption that the presence of a nonwhite person automatically purges a white-dominated enterprise of any potential racism. He further made the mistake of equating all persons of color, ignoring the obvious fact that there can be racism between different nonwhite groups.

<sup>223</sup> See Hearing, *supra* note 32, at 28; *supra* text accompanying note 40.

<sup>224</sup> See Hearing, *supra* note 32, at 27; *supra* text accompanying note 40.

<sup>225</sup> We did file a motion seeking access to the personnel records of Kiser and Mraz to find out if there had been any complaints or discipline. Judge Collins denied the motion out of hand and, unfortunately, discovery rights in Michigan criminal proceedings were quite limited. But we could have taken other steps (e.g., trying to find former black employees of the state patrol troop who might have confided in us, talking with public defenders or local community leaders who might know the troopers’ reputation, and seeking records under the state freedom of information act).

vigorous rejection of a claim of racism and our client's failure to raise the claim with us.

Johnson might have failed to entrust us with his belief that what happened that night was a "racial incident," because he anticipated the same skepticism from us that his assertion received from the troopers and Judge Collins. When a white person hears a black person use a word like "racist," the response is often a strong defensive reaction that implicitly says to the black person, "prove it!" And the standards of proof are those white people are comfortable with: evidence of conscious racial animus, intent to harm and degrade.

The possibility of such narrow meaning for the word "racist" has caused some scholars to introduce a new word, "racialist," to describe judgments and actions controlled by racial stereotypes without adopting an accusatory tone.<sup>226</sup> Peggy Davis explains how racial stereotypes produce countless acts of "microaggression" by whites against blacks under circumstances where whites will vigorously deny the influence of race:

[Microaggressions] "are subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders." Psychiatrists who have studied black populations view them as "incessant and cumulative" assaults on black self-esteem. . . . Management of these assaults is a preoccupying activity, simultaneously necessary to and disruptive of black adaptation. . . . The microaggressive acts that characterize interracial encounters are carried out in "automatic, preconscious, or unconscious fashion" and "stem from the mental attitude of presumed superiority."<sup>227</sup>

Because racial prejudice is now widely treated as socially unacceptable, whites are motivated to deny that they are influenced by racial feelings. As a result, "Anti-black attitudes persist in a climate of denial. The denial and the persistence are related. It is difficult to change an attitude that is unacknowledged."<sup>228</sup> Kiser's disrespectful, swaggering attitude reported by Johnson can be seen as just such an example of microaggression and Kiser's insistence that he "treats everybody that way" part of the same system of behavior.<sup>229</sup>

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<sup>226</sup> See, e.g., Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1579 (1989). She attributes invention of the term to Stephen Carter, *id.* at 1570 n.51; see Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 443 (1988).

<sup>227</sup> Davis, *supra* note 226, at 1565, 1566 (citations omitted).

<sup>228</sup> *Id.* at 1565.

<sup>229</sup> When Patricia Williams, see *supra* notes 216-20 and accompanying text, and *infra* note 237, read a draft of this article, she told me that she was particularly offended by Kiser's use of the word "everybody." Placing herself in Johnson's place, she resisted Kiser's assumed authority to include her in a single, undifferentiated mass of people defined by him. Presumably "everybody" to Kiser was everyone he deals with as a police officer regardless of race, gender, age, or class. (Angela Harris lodged a similar objection against the presumptive assertion by the white male authors of the Declaration of

At the conclusion of one of my presentations of this article in draft form, a white person attending the presentation identified himself as a former police officer (and prosecutor) who now was a lawyer in private practice (and who did substantial criminal defense work). He said that our client's effort to receive courteous answers from the police officers was doomed to failure because the police are trained from the academy to take command of situations like the one that night. By issuing only orders, not answers, the police officer creates a show of authority that prevents resort to potentially deadly force by either suspect or officer. From this perspective, the troopers conduct was simply sound, standard operating procedure.<sup>230</sup>

But what happens when the "everybody" subjected to this standard procedure is differentiated by race? Davis tells us that the most potent form of microaggression is the long-established American color-caste behavior described as "deference" by scholars of racism more than fifty years ago:

The most striking form of . . . "caste behavior" is deference, the respectful yielding exhibited by the Negroes in their contacts with whites. According to the dogma, and to a large extent actually, the behavior of both Negroes and white people must be such as to indicate that the two are socially distinct and that the Negro is subordinate.<sup>231</sup>

Derrick Bell made the point more succinctly when he used the key phrase, "uppity nigger," to tell me what the Johnson case was "really" about.<sup>232</sup>

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Independence when they begin the document with the words "We the People." Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 582 (1990). The problem is not just that Kiser might in fact not treat everybody the same by the standard of observable behavior, but that white and black Americans are not the same "everybody." As Johnson reported saying to Kiser that night, Kiser probably would not have approached a white, apparently middle-class suburbanite, with the opening phrase, "Hey yo," but even if he addressed all stopped motorists that way, the impact might be different on black persons. Williams saw in the "Hey, yo" expression a deliberate caricature of what a white person understands to be black dialect, a form of microaggression she encounters frequently.

<sup>230</sup> For an eloquent response to this point, see Early, *supra* note 215.

<sup>231</sup> Davis, *supra* note 227, at 1567 (quoting ALLISON DAVIS ET AL., *DEEP SOUTH* 22-23 (1941); see also Delgado & Stefancic, *supra* note 14, at 1288 ("Racism . . . is ritual assertion of supremacy . . . . It is performed largely unconsciously . . . . Racism seems right, customary and inoffensive to those engaged in it . . . .").

<sup>232</sup> See *supra* text accompanying note 194. In 1990 the Massachusetts Attorney General issued a report on practices of the Boston Police Department in response to complaints of racism. Among the many incidents catalogued in that report are the following that parallel the Johnson case:

[A] black male taxicab driver was driving home in his own car when a police cruiser pulled him over and frisked him. When the taxicab driver

James Boyd White, in commenting on the way that the *Robinson* decision treated the arrested suspect as an object "belonging to the police" rather than as a person with a voice,<sup>233</sup> has said that it reminds him of the way the Supreme Court in the *Dred Scott* case<sup>234</sup> denied Scott the right to speak in court as a plaintiff by turning him into a piece of property, and of the way the 1850 Fugitive Slave Act<sup>235</sup> prohibited an alleged slave from testifying in the very proceeding intended to determine whether the person was indeed a slave.<sup>236</sup> It seems obvious that there is a difference between treating a black American as if he were property and treating a white American in "the same way." But how does one make this point in legal language?<sup>237</sup> In Fourth Amendment terms, Johnson was simply "Everyman"; his Fourth Amendment rights were supposedly no greater nor less because he was black. But what if the whole world created by our current Fourth Amendment language was inherently racist? Does the language of *Robinson* become racist whenever it is spoken by a white officer to a black citizen, creating a vicious cycle seeming to lead inevitably to the consequences suffered by Dujon Johnson?<sup>238</sup>

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asked why, he was arrested for disorderly conduct. The charge was eventually dismissed.

A 20 year-old black man reported that . . . two police officers approached him while he was parked outside a local high school waiting to pick up a friend. The officers searched his car. When he asked a question he was told to "shut the fuck up."

A 30 year-old black man . . . was stopped while driving in Boston with a friend. An officer told him, " 'Get out of the motherfucking jeep and don't let me have to tell you twice.' When the [man] said, 'Excuse me?', the officer reportedly responded, 'Oh, you're a fucking tough guy. Give me your registration.' The [man] was taken from the jeep, handcuffed, and placed in the police cruiser.

Report of the Attorney General's Civil Rights Division on Boston Police Department Practices (Dec. 18, 1990) at 21, 22, 23, *quoted in* Tracey Maclin, *Black and Blue Encounters:—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. L. REV. 243, 251-52 (1991).

<sup>233</sup> WHITE, JUSTICE AS TRANSLATION, *supra* note 65, at 195.

<sup>234</sup> Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

<sup>235</sup> Federal Fugitive Slave Act, Ch. 60, Sec. 6, 9 Stat. 462, 463 (1850) ("In no trial or hearing under this act shall the testimony of such alleged fugitive be admitted into evidence . . .").

<sup>236</sup> WHITE, *supra* note 65, at 195.

<sup>237</sup> See Patricia Williams' meditation on this point. PATRICIA WILLIAMS, *On Being Property*, in WILLIAMS, *supra* note 216, at 216.

<sup>238</sup> [The police officers] are especially interested in cars with two or more young black males. . . .

A curious thing happens when some cars are stopped. Without being asked, some of the male occupants get out, unhitch their belt buckles and place their hands on the roof of the car—a frisk procedure they've obviously been through before.

McGuire, *supra* note 208, at 1D.

In their own eyes, officers stop no one except for good cause. They expect detainees to recognize that they have been detained for good reason

Was the context that made my client's experience understandable as a "racial incident" as invisible to me, the student attorneys, and the white judge as the air we breathed? How then could I understand Johnson well enough to even attempt to translate his story to other white Americans? What in my own experience could I possibly draw upon? Many times I approached this question in writing this Article: my fingers grew still on the computer keyboard, and I eventually moved to a different part of the Article. But in reviewing my notes of that painful meeting with Johnson on the day the case was dismissed I may have found a possible bridge: my own experience of representing Dujon Johnson.

This idea was not my own; Johnson himself suggested it. Johnson made an explicit analogy between the way we treated him and the way he was treated by Trooper Kiser. He said, "The way you guys talk to me and approach me—it's a little like the way Trooper Kiser approached me." At the time and for months thereafter I did not think about those comments, perhaps because I did not understand them, perhaps because it was too painful to try and understand them.

The most obvious common element between our representation and Johnson's treatment at the hands of Trooper Kiser seemed to be that he did not feel he was treated as an adult.<sup>239</sup> More subtle was the similarity between our reaction to what Johnson was saying and the reaction he received from Trooper Kiser and Judge Collins. Naturally, we were defensive, saying that we certainly did not intend to treat him differently or like a child. The students went further and asserted confidently that they would not have treated him any differently if he were white—that if they had been rude or impatient, it was just their personalities, not him. Only when I was deep into writing this article did I notice the uncanny way that this interchange echoed the end of the story Johnson told during the initial interview:

I told him [Trooper Kiser] that . . . I didn't appreciate you treating me like I was a sixteen-year old kid, which obviously I am not. He

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and to defer politely to authority. However, based on their prejudices, police officers are more likely to stop minorities, and minorities are less likely to respond with deference because of their hostility toward police. An officer will view lack of cooperation as an indication of guilt, thereby justifying an arrest.

Stormer & Bernstein, *supra* note 207, at 117.

<sup>239</sup> Compare Johnson's post-dismissal statement that during our representation he felt that he was not an adult, *supra* p. 1329, with his comment to Trooper Kiser that he did not appreciate being treated like a sixteen-year old, *infra* text accompanying note 240.

claims . . . then that "I treat everybody like that." "Well I don't think you do, personally."<sup>240</sup>

Perhaps Johnson realized the risk that, like Trooper Kiser and Judge Collins, we might interpret his complaints about being treated differently as a strong accusation of being racist, "racist" as the word is understood by white Americans. Recognizing the gap, he told us, "I never said you were racist." Instead, he urged us to admit that we *were* different from him<sup>241</sup> and therefore were necessarily going to treat him differently. He asked that we be sensitive to the differences and adjust what we said and did accordingly.<sup>242</sup> What he said was something very close to the following words:

What's wrong with realizing that different people have different needs? You wouldn't say "Hi" to someone you know doesn't speak English. You wouldn't say, "let's run over to the store," to someone who doesn't have legs. If both parties are making an effort, there eventually will be a consensus about how to deal with the solution, about how to communicate.

Rereading these words in my notes, it finally, belatedly occurred to me that at that last meeting, it was perhaps our client who was the translator, not us. He was right: by being trapped in my assurance as a lawyer and professor that I knew the answers, I could not be a student, could not learn. Perhaps only if the humiliation of that encounter matures into some humility can I begin to appreciate our client's skill and sensitivity in trying to bridge a terrible gap.

I originally ended this Article here by quoting Patricia Williams's description of the dilemma she feels in her separation from white Americans: "[the distance] is marked by an emptiness in myself, . . . [which] is reiterated by a hole in language, by a gap in the law . . . ."<sup>243</sup> Williams goes on, though, to move from this sense of emptiness to conclude in hope that we can achieve a nonracist sensibility through the hard work of boundary-crossing in which a person somehow can see multiple perspectives simultaneously.<sup>244</sup> In that earlier draft I concluded with regret that I could not move further because Dujon Johnson was no longer my client and, therefore, I could not ask him to express in his own language his understanding of how what happened was a "racial incident." Nor could I collaborate with him in reworking my legal language to express that understanding.

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<sup>240</sup> Initial Interview, *supra* note 44.

<sup>241</sup> Some of the comments printed *supra* pp. 1329-30 were made in this context.

<sup>242</sup> At one point he said, "I'm not sure you guys are as careful about what you say as I am."

<sup>243</sup> Patricia T. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2151 (1989).

<sup>244</sup> *Id.*; cf. Delgado, *Storytelling*, *supra* note 14; Matsuda, *supra* note 14.

However, as I mentioned above, through no virtue of my own, Dujon Johnson contacted me during the late spring of 1991 on his own initiative and has since reviewed this Article and provided his own comments. I therefore conclude differently, by relating the dialogue between us, striving to make the last words of this Article not only mine but also those of Dujon Johnson.

V  
LAST WORDS

In May 1991 I unexpectedly received a letter from Dujon Johnson which read in part as follows:

Dear Clark,

It has been quite some time since I've been in contact with you (July 3rd, 1989), and I thought I would drop you a short letter to say all is well. . . . I appreciate all that you did for me concerning my experience with the Michigan State Troopers. I can only wonder what might have happened without your (and the Univ. of Michigan Legal Clinic) assistance. Did you ever write the article concerning lawyer-client relationships for a law review? If so, I would like to read it. . . .

I wrote back, enclosing the then-current draft of this Article (which did not include Parts II and III), along with a letter asking for his comments in general and responses to a number of specific questions. He responded, first with a telephone call, and then with a detailed letter.

The first of several surprises I experienced came in his response to this question:

Although I recall your giving me permission to write about your case, in the more recent drafts of the Article I have used fictional names because of concern that I may be revealing more private information than you would be comfortable with. In some ways I regret this change, because it diminishes the "true story" force of the narrative. Please let me know whether you would like to be identified or want me to continue to use fictional names.

When Johnson called me, he said not only did I have his permission to use his real name, he *insisted* that I do so. He said:<sup>245</sup>

If my name is not used I would be a non-person again. [During the case] I was talked over; I was talked through. [In the version of the Article sent to him] I still don't exist. *I want to be identi-*

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<sup>245</sup> I am relying on almost verbatim notes taken during the telephone conversation.

fied. This anonymity has to end somewhere; I was anonymous in the courtroom.<sup>246</sup>

In what I thought might have been an excess of concern for Johnson's feelings and for the confidentiality of his communications, I had replaced his real name (and the names of the locations and other actors) with pseudonyms. It had never occurred to me (nor do I think would it occur to most attorneys) that my client might be upset by this removal of his identity from a recounting of "his" case—a striking example of apparent paternalism operating below the threshold of awareness.

I will present Johnson's other comments by alternating excerpts from my questions with an edited version of his written responses.

#### Cunningham

I leave out of the article the fact that you did not, in fact, prepare to cross-examine Kiser.<sup>247</sup> My recollection is that your car broke down on the day you planned to come to Ann Arbor to prepare. What, if anything, would you like me to say about this fact? What other reasons, if any, were there for the failure of our plan to have you share in the trial? What could have been done differently to make the plan work? (One obvious possibility is that we could have come to Detroit to work on the preparation.)

#### Johnson

I believe that the strategy to cross-examine Kiser was planned, not the content itself. We did not develop it further than talking strategy. I would have, and could have prepared to cross-examine Kiser. I believe that counsel waited too far into the legal process to allow me to become involved, thus any attempts to involve me seriously into my case (with my personal responsibilities in mind) would have been rushing it too fast. I do, however, agree that some attempt to work with me in Detroit could not only have been more convenient, but would have shown me that my counsel understood the economical, social constraints that I felt I had in dealing with the legal system. The failure of my student-attorneys and yourself to make such an attempt showed me that it was too inconvenient (or unimportant) to leave the ivory tower(s) of Ann Arbor. No one really asked me what I wanted or how I wanted to proceed until long after (and in some cases after) the legal proceedings were underway.

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<sup>246</sup> Johnson's seemingly effortless skill at metaphoric extension of key words is displayed in these comments; the transition from the anonymity of "the client" in the earlier draft of this article to his anonymity in the case is apt and powerful.

<sup>247</sup> I also omitted what may seem to some readers this important fact from the case narrative in Part I because I wanted it to be interpreted at this point, in the context of Johnson's comment.

## Cunningham

Have I done a fair job of presenting what you said to us after the case was dismissed? Have I left out important things that were said? Are there thoughts and feelings you remember from that meeting that you did not express that you would like me to know about now?

## Johnson

More or less. What I said, or meant to imply is that as white educated men (or as two law students), the three of you would never have to worry about finding employment or about providing for your families. This society is geared toward and protected by white men. No matter what the outcome of my case, no one's life would be changed. In fact, in a matter of time this would be forgotten by the attorneys themselves. I dealt with a situation which probably led to me losing my job at the University of Michigan, the loss of respect and dignity in my arrest, and now I was threatened with the very real and near prospect of being convicted. The very fact that I was involved in the legal proceedings, as I saw it, was a presumption of guilt (I have the two requirements: I was a person of color, and I didn't know my place.) This then was a fight of survival for whatever control I had left. How can I not have control of my life and still have goals, dreams, and ambitions? How could I be a husband? And father? How would my wife view me? Yes, these were things that were pressing against my mind when I referred to control over one's life. I felt very emasculated, less than a man.

## Cunningham

Am I right in thinking that you did not tell us in our various meetings that you thought you were stopped because you were black? If you did tell us, can you remember when and how you told us and what our reaction was? If you did not tell us, did you think nonetheless that Kiser's actions were racially motivated? If you thought so, why did you not say so explicitly to us? (I have some guesses as to the answer to the last question, but would prefer to hear from you.)

## Johnson

I did not tell you it was a racial issue, although I knew from the very beginning that it was (my arrest) racially motivated. I would have confided this, but who would have believed me anyway? I felt that on the basis of law itself that I did not have to interject the aspect of racial bias. I knew, legally, that Kiser's actions were wrong. And I felt I had taken the higher moral and legal ground.<sup>248</sup>

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<sup>248</sup> My biggest surprise was learning that Johnson had made a deliberate choice to exclude the issue of race from his defense of the misdemeanor charge. As he further explained to me in his telephone call and at our subsequent meeting in Iowa City, he did not want to interject the issue of racial bias because he "didn't want to cloud the legal

Cunningham

I would like to hear more specifically what happened when you tried to pursue your complaint against Kiser.

Johnson

Basically, I was told that there wasn't any substantial damage physically, and despite a clear violation of rights, it wasn't worth their time to pursue without a substantial monetary deposit.<sup>249</sup>

Cunningham

Most importantly, how could we have represented you better? Some who have read the draft article have suggested that my translation metaphor misses the key point, which is that the judge (and jury) needed to hear and understand your story told in your own voice and words. In other words, you didn't need a "lawyer-translator." Other readers say that the inherent flaws of the legal system made it impossible for you to get any meaningful relief (i.e. the restoration of dignity that you wanted) and that we should have told you so. Or do you think it is possible that you and we could have collaborated together and produced a better translation of what happened, one that made sense to you and was effective in the courtroom?

Johnson

I agree with your two stated points, although I would argue that the "untrained" needs a "lawyer-translator" to some degree.<sup>250</sup> I do believe some type of collaboration would have been most effective for the officers involved and for the court as well, if indeed the court wanted to be educated.

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issues. I felt that I had enough rights in the legal realm to go on; there was a sound legal basis for what I did." Thus while I was berating myself in Part IV, *see supra* pp. 1377-83, for being insensitive to the racial issues inherent in the arrest or for failing to gain sufficient trust from my client so that he could confide "the real issue," I failed to consider that his seemingly strange omission of the claim "I was stopped because I was black" might be his own strategic construction of the case that he expected us to honor. A similar point was made when Johnson explained that his comments on the day of the dismissal (that I had a "guardian mentality," assumed I knew the needs and answers, and was oversensitive and patronizing, *see supra* p. 1330), were directed in large part to my efforts in that meeting to point out to the student attorneys that our representation of Johnson might have been tainted by our own racism even though Johnson himself had not gone so far as to say so. He told me: "That which has not been said, hasn't been said; that would indicate I didn't want to say it."

<sup>249</sup> Johnson told me that one lawyer he contacted wanted \$2000 up front and that the ACLU never got back to him.

<sup>250</sup> In conversation, Johnson elaborated:

I didn't see you as a translator; in order for me to get even the appearance of my day in court, I needed you guys. The judge wasn't interested in a translation of what I had to say; he was interested simply in justifying the actions of the troopers. You are assuming that the judge—the system—was interested in a translation.

Johnson concluded his letter with these words:

[M]y deepest regret [is] that the judge assumed he knew how I was as an individual, and, on this assumption, he judged me on what he believed and not on what was said by me, my counsel, or even on what he saw (other than my race). To be voiceless was the greatest pain of all. What struck me most about the judge is that he seemed so compassionate [to other parties in other cases I observed] in the 10 months or so that I came to the courthouse waiting for hearing after hearing to be rescheduled. I never saw this compassion, I never received the “I have been there before, I can relate” talks that he frequently gave to those who came before him. I suddenly and unconsciously realized why.

Before I received Dujon Johnson’s letter in May 1991, my draft of this Article ended with these words that he said to us on the day his case was dismissed:

You guys can afford to examine yourselves. I can’t. I’m on the threshold of existence. There’s no safety net. You guys know you won’t be walking the streets tomorrow. I can’t know that. The moment you guys drop me off, I need to start thinking about where the next month’s rent is coming from. Most of the time I don’t come into contact with guys like you. We don’t walk in the same streets.

In that earlier draft I wrote that I was haunted by these words. I still am. But I want to add to them the concluding sentences of Dujon Johnson’s May 1991 letter:

In closing, I did attempt to, two years ago, pursue my complaint against Officer Kiser’s conduct, but no attorney or legal organization considered it worth their while without a considerable monetary sum up front. I guess laws are for those who can afford it. But I consider it a valuable experience and a lesson learned. I wish you continued peace.

Sincerely,

M. Dujon Johnson