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

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

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

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

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

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

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

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

IV

INTERPRETING THE TEXTS OF THE ATTITUDE PROBLEM CASE

A. The Police Report

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

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

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

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.[162]

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.[163] 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.[164]

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

162 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.

163 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.

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

165 392 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."[166] 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."[167] 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.[168]

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-*

166 *Id.* at 30.

167 *Id.*

168 *Id.* at 27.

aware v. Prouse[169] that a traffic stop must be based on "at least articulable and reasonable suspicion" that the motorist has violated the law.[170] 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.[171] 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*,[172] 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.[173]

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.[174] Having then stopped the suspect but lacking articulable suspicion that the suspect was armed and dangerous, the officer

169 440 U.S. 648 (1979).

170 *Id.* at 663.

171 Pennsylvania v. Mimms, 434 U.S. 106 (1977).

172 414 U.S. 218 (1973).

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

174 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*, 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).

175 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.

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

177 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).

178 *See* LAFAVE, *supra* note 173, § 9.2(d).

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.[175] 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,[176] in the lowest courts which operate almost invisibly, in part because appeals from such courts rarely result in published decisions.[177] 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.[178] 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

paragraphs later I deliberately translated the officer's request to "pat him down only to dispel the possibility of him having any weapons"[179] 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."[180] 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.

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.[181] 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."[182] 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

181 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.
182 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.[183] 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."[184]

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.[185]

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*

183 *Id.* at 167.

184 *Id.*

185 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[186] 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.[187] 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."[188] He took every opportunity to speak of their need for personal safety.[189]

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

186 414 U.S. 218 (1973); *see* text accompanying notes 172-73.

187 "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.

188 *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.

189 *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."[190] 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.[191] 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.[192] 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

190 *See id.*

191 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.

192 *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).[193] 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-

193 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.[194] 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),[195] 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.[196]

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

194 *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).

195 *See supra* pp. 1322-24.

196 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."[197] 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."[198] 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.[199] 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,"

197 *See* Hearing, *supra* note 32, at 15; *supra* p. 1317.
198 *See* Hearing, *supra* note 32, at 27; *supra* p. 1320.
199 *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.[200]

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.[201] 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."[202] The critical paragraph, "Cause for Arrest," began with the words, "upon continuing the normal course of action on this traffic stop."[203]

200 *See supra* at pp. 1326-27.
201 *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.
202 POLICE REPORT, *supra* note 16, at 1.
203 *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.[204] The prosector 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

204 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.[205]
>
> 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.[206]

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."[207] 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.[208]

205 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.

206 *Supra*, text following note 27.

207 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).

208 "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."[209] 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."[210] 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."[211] 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:

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.[212]

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.[213] But by framing out Johnson's possible larger concern, we may have presented a very distorted and ultimately rather unsympathetic picture of our client.[214] 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."[215]

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

213 *See* Initial Interview, *supra* text accompanying note 44.

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

215 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.[216] 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.[217] 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.[218] The editors deleted the "brown" from her "face," explaining that their editorial policy barred descriptions of "physiognomy."[219] 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."[220] 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"?[221]

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."[222] At one level, of course the

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.

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

217 *Id.* at 44.

218 *Id.* at 45.

219 *Id.* at 47.

220 *Id.*

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

222 *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."[223] 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.[224]

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.[225] 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

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.

223 *See* Hearing, *supra* note 32, at 28; *supra* text accompanying note 40.

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

225 We did file a motion seeking access to the personnel records of Kiser and Mraz to find out if there had been any complaints of 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.[226] 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:

> [Microagressions] "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."[227]

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."[228] 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.[229]

226 *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).

227 Davis, *supra* note 226, at 1565, 1566 (citations omitted).

228 *Id.* at 1565.

229 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 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.

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.[230]

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.[231]

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.[232]

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

231 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 . . . .").

232 *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,[233] has said that it reminds him of the way the Supreme Court in the *Dred Scott* case[234] 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[235] prohibited an alleged slave from testifying in the very proceeding intended to determine whether the person was indeed a slave.[236] 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?[237] 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?[238]

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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).

233 WHITE, JUSTICE AS TRANSLATION, *supra* note 65, at 195.

234 Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

235 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 . . . .").

236 WHITE, *supra* note 65, at 195.

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

238 [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 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.

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.[239] 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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239 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."[240]

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[241] 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.[242] 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 . . . ."[243] 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.[244] 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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240 Initial Interview, *supra* note 44.

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

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

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

244 *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:[245]

> 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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245 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.[246]

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.[247] 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.

246 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.

247 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.[248]

248 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.[249]

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.[250] 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.

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."

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

250 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