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


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.

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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 of 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 11; 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.
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 "seize," 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 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 "seize" (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 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.

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).

166 Id. at 30.

167 Id.

168 Id. at 27.
aware v. Prouse that a traffic stop must be based on "at least articulable and reasonable suspicion" that the motorist has violated the law. 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. 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, 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.

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. Having then stopped the suspect but lacking articulable suspicion that the suspect was armed and dangerous, the officer 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. 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, in the lowest courts which operate almost invisibly, in part because appeals from such courts rarely result in published decisions. 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. This recommendation, however, has not been acted upon, leaving the thankless task of vigilantly defending petty prosecutions as one of the few potential safeguards.

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

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170 Id. at 609.
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,

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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 corroboration 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(d), 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 4.182(2) (appeals from misdemeanor trials in district court); 7.101 (appeals to circuit court); Mich. Ct. Rule 7.215 (publication of opinions of the court of appeals).
178 See LAFAVE, supra note 173, § 9.2(d).
paragraphs later I deliberately translated the officer’s request to “put him down only to dispel the possibility of him having any weapons” 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.” 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.

180 Id.
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 Martin, The Decline of the Right of Lascivious: The Fourth Amendment to the Streets, 75 Corn. NELL L. REV. 1258 (1990).
of his consistent claim that their actions were taken to protect "the troopers’ safety." 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. 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. 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.” . . . [It introduces us to our constitutional law as a principle of moral and intellectual brutality . . .

Talking About People, supra note 181, at 203, 205.
192 See supra p. 1331.

193 I have slipped into a dramatic metaphor. The prosenium 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 cannot help but exclude much of what happened in the reenacted 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 other participant sees.
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. 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), 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.

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

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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 [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 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.

Cl 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." 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." 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. 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,"

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 translational 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.

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

1997 See supra note 32, at 15; supra p. 1317.
1998 See supra note 32, at 27; supra p. 1320.
1999 See supra note 32, at 27; supra p. 1320.
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, Narrative and Narrative Structure in Plea Bargaining, in LANGUAGE IN THE JUDICIAL PROCESS, supra note 131, at 65, 80.
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 ritualistically restore Johnson's dignity, were not taken seriously. The prosecutor had an irrefutable response: this is not worth my time. The final, authoritative description of "what happened" was spoken in chorus by the prosecutor and judge: "this is a $50 attitude ticket." The initial front 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 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.

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.

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." 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.

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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.

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.


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 Wisner and watch them stop one car after another. They are especially interested in cars with two or more young people. 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.
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." 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." 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." 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.
211 See Hearing, supra note 32, at 27; supra text accompanying note 40.
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":
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. . . .

[There 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. The article as submitted began with a personal account of being denied entrance to a New York City boutique when she presented her "brown face" to the window of the locked door. 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. The editors deleted the "brown" from her "face," explaining that their editorial policy barred descriptions of "physiognomy." 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." 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"?

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." At one level, of course the 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." 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. 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. 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 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 unstructured and unquestioned public access or the presumption of innocence in his or her actions upon mere nervous suspicion.


217 Id. at 44.

218 Id. at 45.

219 Id. at 47.

220 Id.

221 See Hearing, supra note 92, 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.
vigorously rejecting 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 phrase like “racialist,” 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 “racialist” has caused some scholars to introduce a new word, “racist,” to describe judgments and actions controlled by racial stereotypes without adopting an accusatory tone.220 Peggy Davis explains how racial stereotypes produce countless acts of “microaggression” by whites against blacks under circumstances where whites will vigorously deny the influence of race:

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

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 dealt with as a police officer regardless of race, gender, age, or class. (Angela Harris lodged a similar objection against the presumptive assertion by 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)).
230 For an eloquent response to this point, see Early, supra note 215.
231 Davis, supra note 227, at 1567 (quoting Allson 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 insensitive 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 cataloged in that report are the following that parallel the Johnson case:

[A] black male taschiag driver was driving home in his own car when a police cruiser pulled him over and frisked him. When the taschiag 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, has said that it reminds him of the way the Supreme Court in the Dred Scott case 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 prohibited an alleged slave from testifying in the very proceeding intended to determine whether the person was indeed a slave. 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? 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?

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.


White, JUSTICE AS TRANSLATION, supra note 65, at 195.


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 . . . .")

Ward, supra note 65, at 195.

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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. 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

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.

[239] Compare Johnson's post-dismissal statement that during our representation he felt that he was not an adult, supra p. 1529, with his comment to Trooper Kiser that he did not appreciate being treated like a sixteen-year old, infra text accompanying note 240.

[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, unholster 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 11.

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.
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 him241 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剥离 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.

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."
244 ld., cf. Delgado, Storytelling, supra note 14; Matsuda, supra note 14.

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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-

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 myself 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 flight 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 racism because he "didn't want to cloud the legal
Johnson concluded his letter with these words:

[My] 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 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