blur the distinctions between them, but to sharpen the sense we have of each, and of the differences that play between them." This art must be constantly "remade fresh, in new forms."281

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

III

STUDYING TEXTS OF THE REPRESENTATION OF A CLIENT

A. The Roots of Ethnography in Cultural Anthropology

The metaphor of the lawyer as translator would seem to lead naturally to the metaphor of "representation as text" if the client's story is viewed as a text for the lawyer to translate for legal audiences. "Text" also suggests an analogy to literary interpretation, which is the primary disciplinary cross-fertilization that gives rise to the use of the translation metaphor by James Boyd White.282 Although the methods of literary interpretation do influence this approach, they are brought to bear through a circuitous route that begins in cultural anthropology—and in the remote islands of Indonesia.

In thinking of my representation of Johnson as a text, I am taking as my model the practice of ethnography,283 initially developed in cultural anthropology and since applied in a number of sociological methodologies. A cultural anthropologist traditionally created an ethnography by living in a foreign (usually exotic) society for an extended period. This "field work" involved becoming a "participant-observer," participating in the daily life of the society as much as

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281 White, supra note 65, at 263.
282 For me the translator's art of integration can be a useful metaphor for the kind of multiple consciousness advocated by critical race theorists. See Delgado, supra note 11; Matuso, supra note 14; Patricia Williams, The Obliging Shell, 87 Mich. L. Rev. 2128, 2151 ("It is this perspective, the ambivalent, multivalent way of seeing that is, I think, at the heart of what is called critical theory, feminist theory, and the so-called minority critique. It has to do with a fluid positioning that sees back and forth across boundary. . . . Nothing is simple. Each day is a new labor.").
283 Besides being a law professor, White is also a professor of English literature.
284 Translating its Greek components literally, ethnography means "nation writing" (ethnos—nation; grapho—to write) in the same way that geography means "earth writing." A geography of a country describes (writes down) its terrain and other physical features; an ethnography of a country describes the people who live there.
of Bali. After carefully describing cockfighting as a sport—inventorying its rules, strategies and techniques—and its role in the social economy through the complex systems of gambling that surround such fights, Geertz moves to a consideration of the cockfight as an art form, comparable to a play or poem. He assumes that by participating in a cockfight, the Balinese are saying something, about themselves to themselves. Thus, interpreting the cockfight need not be an imposition of the anthropologist's foreign concepts because the cockfight is already inherently meaningful. "To put the matter this way... shifts the analysis of cultural forms from an endeavor in general parallel to dissecting an organism, diagnosing a symptom, deciphering a code, or ordering a system... to one in general parallel with penetrating a literary text." Geertz thus imagines culture itself as an "ensemble of texts... which the anthropologist strains to read over the shoulders of those to whom they properly belong.

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

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

87 Id. at 445, 450.
88 Geertz finds the cockfight richly evocative. He regards it as saying many things in complex, interrelated ways, like a Shakespearean play. Among other things, the cockfight says that a Balinese man, socialized to be subdued and controlled, especially in conflict, is "at heart" full of passion capable of exploding into the kind of murderous rage exemplified by one cock hacking another into pieces with beak and claw; it also says that the status relationships which are portrayed in the complex patterns of cockfight betting are, like the fight itself, "matters of life and death." Id. at 446, 447. If Americans "go to see <i>Macbeth</i> to learn what a man feels like after he has gained a kingdom and lost his soul, Balinese go to cockfights to find out what a man, usually composed, aloof, almost obsessively self-absorbed... feels like when, attacked, tormented, challenged, insulted, and driven in result to the extremes of fury, he has totally triumphed or been brought totally low." Id. at 450.
89 Id. at 448.
90 Id. at 452.
91 Clifford Geertz, Thick Description, in The Interpretation of Cultures 3, 19 (1973).
the "said" of such discourse from its perishing occasions and fix it in perusable terms . . . [and]; it is microscopic.92

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

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

Although ethnographic methodology was developed to describe cultures alien to the ethnographer and his audience, social scientists have increasingly applied its techniques to their own societies. As Geertz explains, participant-observation of exotic cultures is essentially a device for displacing the dulling sense of familiarity with which the mysteriousness of our own ability to relate perceptively to another is concealed from us. Looking at the ordinary in places where it takes unaccustomed forms brings out . . . the degree to which meaning varies according to the pattern of life by which it is informed.97

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

92 Id. at 20-21.
93 Id. at 23.
94 Id.
95 "Cultural analysis is intrinsically incomplete [and] the more deeply it goes the less complete it is . . . [Its] most telling assertions are its most tremulously based." Id. at 20.
96 "The aim of anthropology is the enlargement of the universe of human discourse." Id. at 14. "To write ethnography . . . [is to] enlarge the sense of how life can go." Geertz, supra note 84, at 139.
97 Id. at 14.
98 Geertz, supra note 85, at 57.
Nonetheless, the descriptive linguists learned to make effective use of speakers' competence through a variety of interactive techniques in which the linguist would first guess at a rule from an apparent pattern in his recorded observance and then test it by generating a new utterance according to that rule and asking a native speaker whether it was well-formed. Many native "informants" developed sophisticated insights into their own languages through this interactive process and could increasingly assist the linguist in determining why apparent exceptions to the hypothesized rules led the way to a deeper consistency. The linguist’s work was constantly driven by the expectation that even seemingly arbitrary speech patterns reflect inherent, meaningful structure of which speaker competence was both evidence and product.

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

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

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111 Interestingly, ethnomethodology has its origin in the famous Chicago Law School empirical study of jury deliberations. See Harold Garfinkel, The American Jury and Law and Language [1967] (David J. Mullen et al. eds., 1984); see also Harold Garfinkel, The Origins of the Term "Ethnomethodology" (Roy Fish ed., 1974). Garfinkel coined the term "ethnomethodology" to describe this "folk method of doing research" (ibid.) that he is "an attempt to do research in the way that people do research." In his doctoral thesis, "The Methodology of the Social Scientists," 73 Iowa L. Rev. 541 (1988).

112 Anthropologist Charles Frake explicitly applies the techniques of descriptive linguistics in his "thick description" of litigation among the Yakan people of the Philippines. Charles O. Frake, Struck by Speech: The Yakan Concept of Litigation, in DIRECTIONS IN SOCIOLINGUISTICS, supra note 104, at 106 (leading some commentators to describe his study as "ethnographic semantics").
analysis must be willing to treat even the most apparently mundane or ordinary events as puzzling enough to be worthy of serious analytic attention. Otherwise, they too [like the subjects studied] are likely to overlook, or take for granted, the very practices that they are aiming to identify and describe.114

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

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

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

One of the most interesting and, for my purposes, suggestive examples of conversation analysis is linguist Deborah Tannen’s study of American male-female conversation described recently in a popularized version entitled You Just Don’t Understand.118 She succeeds in making what might seem most familiar, the speech of one’s own spouse, “anthropologically strange.” Her meticulous examination of apparently thousands of male-female conversations persuasively reveals that American men and women speak in sufficiently different ways which she terms “genderlects.”119 Tannen does not study male-female conversation to assemble evidence that men dominate women. Rather, her work shows how language behavior may result in domination even absent intent to dominate.120 Even men and women striving in good faith to create a nondominant relationship often have great difficulty because of the differences in their genderlects.121 Without rejecting the many

114 Pomerantz & Atkinson, supra note 111, at 287.
116 See, e.g., Emanuel A. Schegloff, Sequencing in Conversational Openings, in DIRECTIONS IN SOCIOGRAMMATICA, supra note 104, at 346.
117 Pomerantz & Atkinson, supra note 111, at 286-87.
119 Tannen obviously creates this term out of “gender” and “dialect.” Id. at 42. For example, if a husband says to his wife, “I just want to be more independent,” the key word “independent” is likely to have different meanings for husband and wife. The husband may mean, “I don’t want to be controlled, I want to be free.” The wife, however, may hear, “I am denying our relationship, I want to be out on my own.” Tannen attributes this difference to a general pattern that emerges from her research. Men tend to treat conversations as negotiations in which people try to achieve and maintain the upper hand and protect themselves from being put down by others; this way of talking reflects a view of the world as a hierarchical social order. Id. at 24-25. Women tend to treat conversations as negotiations for closeness in which people seek and give confirmation and support and protect themselves from being pushed away; this reflects a world view in which the individual is part of a network of connections. Id. at 25. From the man’s viewpoint, life is a contest, a struggle to preserve independence and avoid failure. From the woman’s perspective, life is a community, a struggle to preserve intimacy and avoid isolation. Id. at 24-25. Although acknowledging similarities to the work of Carol Gilligan, e.g., In a Different Voice (1982), Tannen maintains that her analysis derives directly from her own sociolinguistic data. Tannen, supra note 118, at 300 n.25.
120 Tannen suggests that even men and women who grow up in the same family may learn different ways of speaking and hearing, because boys and girls spend most of their formative language acquisition time in same-sex play groups. Ethnographic study of such play groups shows that the forms of play differ greatly, resulting in different uses of language. Boys tend to play outside in large groups that are hierarchically structured around a leader who tells the other boys what to do and how to do it, and tend to negotiate status by giving orders. Play revolves around games with winners and losers, and language is often employed in elaborate discussion of rules. In contrast, girls tend to play in small groups or pairs. Their games, such as jump rope, hopscotch and playing house, are co-operative rather than competitive. Girls measure status by relative closeness; a girl is more likely to strive to be another’s best friend rather than the leader of a group. Girls who give orders are likely to be rejected as “bossy,” so preferences are usually expressed as suggestions. Girls thus tend to use language to create closeness rather than control. Id. at 43-44.
121 Tannen’s work is reminiscent of Geertz’s ethnography in that its microscopic analysis of recorded daily events reveals more and more about entire world views as it becomes more detailed. Like Geertz, she identifies key words (intimacy, independence) as important to participants themselves. And like Geertz, she is primarily interested in expanding the imagination.
120 Id. at 18.
121 Id. at 16.
nonlinguistic factors influencing male-female domination, Tannen offers a partial diagnosis and remedy for unintended domination. By using the metaphor of cross-cultural, even cross-language communication, Tannen avoids attribution of blame and keeps open the possibility of mutual change and mutual growth:

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

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

Can genderlect be taught? . . . [A] more realistic approach is to learn how to interpret each other’s messages and explain your own in a way your partner can understand and accept. Understanding genderlects makes it possible to change—to try speaking differently—when you want to. But even if one changes, understanding genderlects improves relationships . . . Once they know that men and women often have different assumptions about the world and about ways of talking, people are very creative about figuring out how this rift is affecting their own relationships.¹²³

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

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

C. Ethnographic Methodologies for Studying Legal Discourse

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

¹²² Id. at 47-48.
¹²³ Id. at 296, 297.
¹²⁴ For a similar taxonomy, see Maynard, supra note 115, at 5-9; Donald Brenneis, Language and Disorder, 17 ANN. REV. ANTHROPOLOGY 221, 228-29 (1988); R. Dunham, Contest or Coercion: Analyzing Properties of Courtroom "Questions," 7 BRITISH J. L. & SOC’Y 61 (1980).
derstanding shifts constantly as insights are gained and tested with each new reading. 127

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

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

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

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

They adapted the group analytic method, commonly used by conversation analysts, for studying the small claims trial transcripts. 131 A group composed of Conley, O'Barr and usually three or four others trained in law, social science, or both would listen to a tape segment (typically a single witness's testimony or the bench opinion) while following along on the transcript. They would play the tape repeatedly (sometimes five or six times) until all group members were satisfied they had heard it enough; then all would write detailed notes focusing on what each thought was important to the speaker on the tape. They would then present these observations in a roundtable discussion. The entire process typically lasted two hours. 132

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

The inductive nature of Conley and O'Barr's method is exemplified by the way their research changed their very idea of the nature of a dispute. Their original design, in seeking to capture early "uncontaminated" accounts of disputes before they reached the courthouse, presumed that a dispute had a concrete, essential nature independent of the various accounts of that dispute. 137 However, their research brought them to conclude that at any particular point in time the dispute is the account being given at that time. Each new account that the disputants give... reflects somewhat different understandings, beliefs and emphases. Thus, any account is both determined by what has gone before and determinative of the present and future shape of the dispute. 138

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

127 See Conley & O'Barr, supra note 10, at xiii; Maynard, supra note 115, at 4-13, 18-21; DuBrin, supra note 124.
129 O'Barr is on the anthropology faculty at Duke University; Conley teaches at the University of North Carolina Law School and has a PhD in anthropology as well as a law degree. In addition to their own extensive work, Conley and O'Barr edit a new series of publications from the University of Chicago Press entitled Law and Legal Discourse.
130 They also attempted to conduct pretrial interviews with defendants but were generally unsuccessful because the defendants did not have to come to court before trial and were generally uncooperative at interviews at home. Id. at s-xxi.
132 Conley & O'Barr, supra note 10, at xii; id. at 108.
133 Id. at x.
134 Conley & O'Barr, supra note 131, at 109.
135 Conley & O'Barr, supra note 10, at xii.
136 Id. "In listening to litigants' accounts, we have concentrated on what they say and how they say it rather than trying to impose predetermined structures and categories on the data." Id. at xi.
137 Id. at x.
138 Id.
139 Id. at xi-xii.
share with ethnographers an emphasis on careful, detailed observation and inductive analysis, Conley & O'Barr differ from traditional ethnographers in that they observe and analyze language use as the object of their study, while most ethnographers view language as a window through which to view cultural attitudes. Although Conley and O'Barr draw on the techniques developed by conversation analysts, they are interested in more than the accomplishment of conversational interchange. Rather, they study entire accounts in order to learn how language use shapes and constructs social reality.\textsuperscript{140}

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

In my analysis I also have worked toward creating a Geertzian thick description, focusing on key words and offering possible explanations of their broader and more complex meanings as constructions of social reality. In doing so I found guidance in two other ethnographic descriptions of legal discourse. In the first study, the German sociologist Beatrice Caesar-Wolf described the way a judge transformed lay testimony into "adjudicative evidence" in a West German civil hearing.\textsuperscript{144} Her goal was to explicate how the judge, through the way he questioned the two witnesses, transformed their fragmented testimony into "a thematically coherent, sequentially presented story."\textsuperscript{145} Caesar-Wolf subjected the transcript of the hearing to "extensive and exhaustive content analysis with regard to the ... largely latent meaning structures, which may not necessarily be intended subjectively by the parties involved."\textsuperscript{146} In addition to micro-analysis of this text itself, she reconstructed its context by reviewing the legal processing of the case prior to the hearing, including all available documents, a procedure similar to my account of the history of the Attitude Problem Case.\textsuperscript{147} In her view, this method

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

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

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

These recurrent, significant topics seem akin to what I term key words; their "high level content ... signals differences between worlds."\textsuperscript{150} For Agar such textual analysis

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

\textsuperscript{140} Id. at 109.
\textsuperscript{141} See infra text accompanying notes 162-80.
\textsuperscript{142} These audiences included my students, colleagues, and participants in the various conferences listed supra note 1. These audiences typically reviewed at least the judge's bench opinion and Johnson's initial interview description of the stop and arrest; they watched the actual interview videotape and a re-enactment of the bench opinion while following the text displayed by an overhead projector. Many also read the other texts which appear in this Article. Most, however, did not repeatedly review these texts before commenting, unlike the group participants in the Conley and O'Barr research project.
\textsuperscript{143} I also hope that readers' independent interpretations of these facts will provide a check against my bias as a participant in the events, a bias not present in the Conley and O'Barr research.
\textsuperscript{144} Caesar-Wolf, supra note 126.
\textsuperscript{145} See id. at 195.
\textsuperscript{146} Id. at 196.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Agar, supra note 126, at 113.
\textsuperscript{150} Id. at 117. Compare "meaning structures" in Caesar-Wolf, supra note 126.
\textsuperscript{151} Agar, supra note 126, at 124.
One problem I face with applying any of the above studies is that in none of the cases studied was an attorney significantly involved: Conley and O'Barr studied pro se litigants in small claims courts, in the West German civil hearing all the questioning was conducted by the judge, and in Agar's study the truckers apparently spoke for themselves without assistance of counsel. This absence of attorney discourse is actually typical of much of the research done to date, which uses data from small claims courts or informal mediation proceedings. Even more rare are empirical studies of how attorneys talk with their clients in private; no doubt a major reason is the problem of attorney-client privilege.

A notable exception is the research project undertaken by former American Bar Foundation Executive Director William Felstiner and political scientist Austin Sarat to record and study 118 lawyer-client conversations in forty divorce cases. Their analysis documents a consistent failure by the divorce attorneys to translate—or even respond to—their clients' understanding of the significance of the events that brought them to a lawyer's office:

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

153 See, e.g., Conley & O'Barr, supra note 10; Merry, supra note 113; O'Barr & Conley, supra note 131; Pomperzitz & Atkinson, supra note 111; Barbara Yngvevson, Making Law at the Divorce Hearing: The Clerk, the Court, and the Construction of Community in a New England Town, 22 Law & Soc'y Rev. 410 (1988).

154 See Felstiner et al., supra note 5, at 646 ("One of the reasons that data about lawyers and dispute transformation are so incomplete and theoretical is the paucity of observational studies of lawyer-client relationships."); see also Dinerstein, supra note 5, at 577 n.342 (1990). Other, more limited empirical studies of private attorney-client discourse include Byno Bogoch & Brenda Dunant, Challenge and Control in Lawyer-Client Interaction: A Case Study in an Israeli Legal Aid Office, 4 TEXT 249 (1984), and Carl J. Hosticka, We Don't Care What Happened, We Only Care About What Is Going to Happen: Lawyer Client Negotiations of Reality, 20 Soc. Prob. 509 (1973).

155 The project is initially described in Austin Sarat & William L.F. Felstiner, Law and Strategic in the Divorce Lawyer's Office, 20 Law & Soc'y Rev. 93 (1986). Various analyses of the data set, which Sarat and Felstiner collected over thirty months in two sites from different states, are reported in: Footnotes of Matter, supra note 9; Austin Sarat & William L.F. Felstiner, Lawyers and Legal Consciousness, 8 Vala L.J. 1063 (1989); Austin Sarat & William L.F. Felstiner, Legal Realism in Lawyer-Client Communication, in LANGUAGE IN THE JUDICIAL PROCESS, supra note 131; Austin Sarat, Lawyers and Clients: Putting Professional Status on the Agenda of Legal Education, 41 J. LEGAL Educ. 43 (1991); and their contribution to this symposium, Felstiner & Sarat, supra note 7. Sarat and Felstiner do not report using the group session technique employed by O'Barr and Conley, presumably their analyses are largely the product of their own collaborative review of the texts.

156 Sarat & Felstiner, Footnotes of Matter, supra note 9, at 742.

157 In their article in this symposium, Felstiner and Sarat discuss their interviews with both client and attorney about their understandings of what was happening in the relationship. Felstiner & Sarat, supra note 7, at 1475-81, 1491-95. It does not appear, however, that they discussed their own analyses with either participant. Cf. notes 154 and 156, supra.

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

159 By turning the ethnographic gaze onto the apparently mundane activities of the researcher's own culture, the ethnomethodological researcher becomes her own informant, assuming she has exactly the same competence to make sense of a studied event as...
from existing studies of the reflective lay person—client or pro se litigant—as "informant" is even more serious. Conley and O'Barr are typical in asserting that whether their interpretations of recorded discourse are idiosyncratic can be tested against the reader's own assessment of the same texts. But the researcher and her audience are likely to be a rather small, homogenous group of privileged, academically trained persons, probably members of the same intellectual discipline. Thus the gap that these studies consistently reveal between client and lawyer, party and judge—a gap related at least in part to differences in ethnicity, class and education—could well be replicated between researcher and studied participant. 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 particular clients 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 recent experiment in using graduate anthropology students to conduct ethnographic analyses of actual client interviews by clinical law students at the D.C. School of Law suggests that such collaboration is capable of both improving the quality of legal representation and providing useful social science data. See Lynne Robbins, 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, Robbins, 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.

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 substantive verbalism of 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.

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

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 substantive verbalism of 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.

161 For example, Conley and O'Barr report post-trial interviews with parties but do not indicate whether these are 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.

1 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 metaphorical 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, 351, 370; see also id. at 369 n.83 (Sarat questioning his own ability to comprehend his subjects' immediate material needs).