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Inside the Law School Classroom: Toward a New Legal Realist Pedagogy

Elizabeth Mertz[*]

In recent years, the legal academy has been experiencing a strong renewed interest in empirical legal research. Referred to by various analysts as a "new legal realism" or as "empirical legal studies," this restored focus on the social sciences in many ways echoes an earlier era of legal realism in American law, with some important differences.[1]

Within the legal academy, empiricism may seem to be a new discovery; however, there has been continuous intellectual concern

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1. For a general description, see Howard Erlanger et al., *Foreword: New Legal Realism Symposium: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, and in particular, see Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used To Be"*, 2005 WIS. L. REV. 365, 391-403.

with social science research on legal topics for many decades now, most notably embodied in the Law and Society movement.[2] At the same time, there has been growing interest in introducing possible reforms to the U.S. system of legal education, an interest to which this Symposium issue gives eloquent expression.

This Article combines these two themes: empirical research on law and careful examination of legal education. It reports on an empirical study of legal education, which I have been conducting under the auspices of the American Bar Foundation (a research institute that also has been actively developing an interdisciplinary program of research on law for many decades).[3] After discussing that study, I will consider its implications for the teaching of law. This Article raises the core issue of how law works when it translates information about the wider society into legal language, from social science findings to the nitty-gritty details of plaintiffs' and defendants' lives. For example, when attorneys ask expert witnesses questions about social science findings on the stand, they are using a legal framework that is often at odds with some of the basic assumptions of the social science discipline in question. Plaintiffs and defendants may understand the conflict addressed in court much differently than do the legal professionals who are translating their stories into legally-viable frames.

I argue for a more rigorous approach to conceptualizing and teaching this process of legal translation. Legal professionals may have to change or distort the results of social science research to serve their clients' cases, or to fit within the applicable doctrinal categories, but they can at least begin with a better understanding of the issues involved. We generally do not train law students in the standards of assessment used by social science to evaluate assertions about people and society. Both legal professionals and social scientists sometimes proceed as if their fields operated from the same basic standards and

2. Since 1964, the U.S. Law and Society Association has been working actively to bring together social scientists and law professors interested in interdisciplinary research on law and to publish peer-reviewed material in its flagship journal, *The Law & Society Review*. International interest in the area is apparent from the 2006 joint meetings to be held in Berlin which will bring together law-and-society scholars from around the world.

3. *See* American Bar Foundation, Home Page, http://www.abf-sociolegal.org (last visited Jan. 6, 2007). The opening paragraph of the ABF's Home Page reads:

> Established in 1952, the American Bar Foundation is an independent, nonprofit national research institute committed to objective empirical research on law and legal institutions. This program of socio-legal research is conducted by an interdisciplinary staff of Research Fellows trained in such diverse fields as law, sociology, psychology, political science, economics, history, and anthropology.

Id.

epistemological assumptions. We do not give much systematic thought to the ways the fields of law and social science differ, or to what is involved when we move between them. I contend that this kind of rigorous thought should be central to any new legal realist or empirical project in the legal academy.

I. INSIDE THE LAW SCHOOL

As legal scholars return to a focus on the empirical study of law, they inevitably confront the question of method: what are the best social science methods for studying law "on the ground"? Although some would argue for a limited set of preferred empirical methods, a consensus seems to be emerging that a neutral approach to selecting methods is important so that the chosen methods will fit the questions asked.[4] For example, quantitative and qualitative methods give us different kinds of information, as do experimental and econometric approaches. Large-scale survey and statistical studies provide a better sense of how general a pattern is, but do a poor job of sensitively tracking subjects' own understandings of events.[5]

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4. For example, Vanderbilt law professor Tracey George advocates "a model-based approach coupled with a quantitative method" as the preferred way of studying law empirically, urging that scholars combine "a positive theory of a law or legal institution," which should then be tested using "quantitative techniques developed in the social sciences." Tracey George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools* 1 (Vanderbilt Univ. Law Sch. Law & Econ. Working Paper No. 05-20, 2005), *available at* http://ssrn.com/abstract=775864. However, ABF Director (and Northwestern sociology professor) Robert Nelson notes that "theoretically driven research that uses multiple methods can produce stronger validity claims, can better illuminate the social mechanisms through which law operates, and may lead to research findings that more readily translate to broader publics." Posting of Robert Nelson to Empirical Legal Studies, http://www.elsblog.org/the_empirical_legal_studi/2006/06/combining_quant.html (June 21, 2006, 16:44 EST). Cornell law professor Michael Heise, a founder of Empirical Legal Studies, similarly notes:

> I've always been of the mind that different methodological approaches possess different blends of strengths and weaknesses and that none possess an exclusive lock on advancing knowledge. To be sure, certain research questions, designs, and data might lend themselves more appropriately to one methodology or another. But using 'multiple methods,' where appropriate and helpful, strikes me as a good idea.

Posting of Michael Heise to Empirical Legal Studies, http://www.elsblog.org/the_empirical_legal_studi/2006/06/ combining_quant.html (June 21, 2006, 15:59 EST); *see also* The New Legal Realism: It's Not About Breakfast Blog Forum, http://www.elsblog.org/the_empirical_legal_studi/blog_forum/index.html (June 19-23, 2006). There are a variety of ways of defining "empirical," but what they have in common is an emphasis on experience and observation, which are core features of a variety of social science methods. In disciplines such as history, of course, the original data are of necessity more archival, but this can be true in other fields as well.

5. In their well-known text on the use of social science in legal decisions, Monahan and Walker discuss the way social science studies generally make trade-offs in methodological precision. When researchers attempt to achieve higher "internal validity" within a study, they

Participant observation has the advantage of generating more accurate information about subjects' cultural and social frameworks and also often gives us a better picture of what is actually happening than do self-reports; people may behave in observably different ways than indicated by their self-reports on surveys.[6] However, as studies

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use experimental kinds of methods that permit them to gain tight control of the research situation. When they do that, we can be more certain that the conclusions reached are true of tbis particular experimental situation. In other words, the effects of one kind of factor on an outcome are more certain because the researcher has created an artificial situation in which only that factor varies–as, for example, if two otherwise similar groups of college students are asked to complete the same task but given slightly different instructions. We are surer that the variation in instructions is the cause of any differences we find in how the students do the task, because we have held constant other kinds of factors that might influence the outcome. However, if we want to assume that the average juror will make a similar decision, we face some great difficulties, because the artificial experimental situation is not real life. Jurors are likely to be more diverse demographically. And we cannot assume that they will make decisions in the same way when faced with a real-life death penalty situation, for example, as they do when they are dealing with a hypothetical situation in an experimental setting.

Researchers who aim for higher "external validity" want to be able to generalize what they find in their studies with more certainty to real-life situations. Tbey may decide to settle for less internal validity in order to achieve this:

> Often a research strategy that yields results high in internal validity does so at the cost of leaving external validity questions unanswered, and vice versa. A study randomly assigning collegiate "jurors" [i.e., college students pretending to be jurors] to deliberate in groups of eitber 6 or 12 would have high internal validity as a test of the effects of jury size, but would be open to the external validity issue of generalization across persons (college students versus real jurors). A study of "naturally" occurring instances in which reaI juries have consisted of 6 as compared with 12 jurors would have high external validity, but would leave many internal validity questions (e.g., how were the cases tried . . . ?). The choice of which type of validity to maximize and which to sacrifice is a hotly debated issue in the social sciences. Usually, researchers reach some sort of pragmatic compromise. They trade-off a bit of internal validity to achieve a higher level of external valiDity, and vice versa.

JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND METHODS 66 (6th ed. 2006).

6. Anthropologist Clifford Geertz, for example, long ago made the case that anthropological methods do a better job of capturing what is happening on the ground than do more removed methods. If we want to understand how people perceive their own hves, we may have to stand for a moment in their shoes, rather than imposing our own analytical categories (as will increasingly occur when we move to more structured researcb instruments). We find this argument in Geertz's famous essay, *Local Knowledge: Fact and Law in Comparative Perspective*, (first given as the Storrs Lectures at the Yale Law School), where he states:

> [Fields like anthropology] may have more to offer us in making our way through such perplexities as the shape-shifting nature of the fact/law distinction across cultural traditions and historical phases than supposedly more 'scientific' enterprises, where everything that arises must converge. If there is any message . . . , it is that the world is a various place, various between lawyers and anthropologists, various between Muslims and Hindus, . . . and much is to be gained, scientifically and otherwise, by confronting tbat grand actuality rather than wishing it away in a haze of forceless generalities and false comforts.

grow more detailed and accurate about law on the ground, the focus is narrowed and it is more difficult to assess how they can be generalized. For this reason, leading socio-legal scholars have urged empirical legal researchers to combine multiple methods where possible, to consider evidence from studies using a variety of approaches, and/or to take care in fitting research questions to research methods (and in being appropriately modest about the reach of their results).[7]

The study on which I report here examined the linguistic interactions between professors and students in eight different law schools in great detail.[8] The question animating the research was whether law school pedagogy has a shared linguistic structure and/or epistemological message across otherwise quite diverse classrooms (which varied in terms of professorial teaching styles, the forms of student responses to their professors, and other non-linguistic characteristics of professors, students, and law schools). My research team also examined differences among the classes we studied, asking how a variety of factors interacted to create more and less inclusive classrooms for students.[9] In-class observation and taping were clearly necessary to address these research questions. I drew on the methods of linguistic anthropology and sociolinguistics, which insist on detailed observation of classroom exchanges and on the use of verbatim linguistic data.[10] Interestingly, a recent research report to be

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CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 234 (3d ed. 2000). In other words, it is easier to catch and understand the divergence between our own thought and that of our research subjects when we live beside them for an extended time, absorbing their way of life and attitudes.

7. *See supra* note 4 (on the issue of combining methods); *see also* CHARLES C. RAGIN, CONSTRUCTING SOCIAL RESEARCH: THE UNITY AND DIVERSITY OF METHOD 26, 47-52, 78-79, 99-100 (1994) (discussing, *inter alia*, benefits of data triangulation in which results obtained by use of various methods are brought together, and explaining how to choose research methods to fit questions asked). For an example of a discussion of methodological tradeoffs in the context of a particular kind of research–here, network analysis–see Karen Zwijze-Konnig & Menno de Jong, *Auditing Information Structures in Organizations: A Review of Data Collection Techniques for Network Analysis*, 8 ORGANIZATIONAL RES. METHODS 429, 435, 437 (2005) (noting that self-report methods are subject to distortions such as producing socially desirable (rather than accurate) answers, forgetting, telescoping, differing interpretations of the questions asked, etc.).

8. *See* ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" (paperback ed. 2007); *see also* Elizabeth Mertz, Wamucii Njogu & Susan Gooding, *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1 (1998).

9. As with any study of this scope, the research was conducted by a team that worked to tape and code classrooms, create and code transcripts, and help in phases of data analysis. I am most fortunate to have worked with a very gifted team in this study, including the two Project Managers, Susan Gooding and Nancy Mattbews, and Wamucii Njogu, who oversaw the quantitative analysis.

10. Anthropological linguistics and sociolinguistics focus on the details of linguistic interchanges, tracing how language interacts with its social context to convey meaning and impact social events. *See generally* ALESSANDRO DURANTI, LINGUISTIC ANTHROPOLOGY (1997);

published by the Carnegie Foundation reached very similar conclusions, based on a somewhat different methodology.[11]

For the study, I selected schools from across the "indigenous" U.S. status hierarchy of law schools, with three from the "elite/prestige" category, two from the "regional" category, and three from the "local" category.[12] I also varied the gender and race of the professors studied. The result was a comparative set of in-depth case studies.[13] The entire first semester of classes in each school was tape-recorded, while in-class observers also coded aspects of the classroom interactions. The tapes were then transcribed. Transcripts, tapes, and in-class coding sheets formed the basis for a new coding process, tracking aspects of each in-class turn (such as length of turn, gender/race of speakers, and whether the turn was volunteered or called-on). Coders also generated an ethnographic account of each class meeting, noting aspects of the developing classroom culture, such as the use of humor and how social context was discussed. These were used to create overall ethnographic summaries for each classroom in the study. I personally performed the in-class coding and taping of one

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PETER TRUDGILL, SOCIOLINGUISTICS: AN INTRODUCTION TO LANGUAGE AND SOCIETY (4th ed., Penguin Books 2000) (1974). For discussions of how these techniques are used to study education, see LINGUISTIC ANTHROPOLOGY OF EDUCATION (Stanton Wortham & Betsy Rymes eds., 2002); THE SOCIAL CONSTRUCTION OF LITERACY (Jenny Cook-Gumperz ed., 2006).

11. THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (forthcoming 2007) (draft report manuscript, on file with the author). I thank the Carnegie researchers for sharing their results with me prior to official publication. Their study of law school education was conducted under the aegis of their "Preparation for the Professions Program," which also sponsored studies of clergy, engineering, medical, and nursing training. *See* The Carnegie Foundation for the Advancement of Teaching, Program Areas, http://www.carnegiefoundation.org/programs (last visited January 6, 2007). A team of typically four researchers from the Carnegie Foundation visited sixteen law schools in the United States and Canada. The schools were diverse along a number of dimensions: public versus private, geographical region, selectivity or status ranking, freestanding versus part of a university, historically devoted to black or Native American people, or noted for educational innovation. The research team spoke with personnel, and visited classes of every type; they also examined assessment methods, and interviewed students in each school. In addition, they consulted with well-known scholars of law and of legal education. EDUCATING LAWYERS, *supra* (manuscript at xxi-xxii (Introduction)). The Carnegie report will be published by Jossey-Bass in 2007 as a book co-authored by William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, and Lee S. Shulman.

12. I here treat the indigenous status hierarchy as the equivalent of any social caste system: it is a system-internal way of differentiating among members, and socially constructed. By contrast, people inside these hierarchical systems understand the status categories as "natural" or as tracking inherent worth.

13. Because of the intensive nature of this research, the usual practice in classroom ethnographies of this kind is to study only one or two classrooms. By expanding to classrooms in eight different schools, we created a larger range of comparative cases than has been generally obtained in this sort of research. The result is obviously not a random sample of the kind used by sociologists as a basis for standard statistical analyses, but rather a rich comparative data set. On the other hand, because we coded each turn, we can analyze the interactions quantitatively, in general using descriptive statistics.

of the schools, and interviewed six of the eight professors who participated in the overall study. In schools where students were willing to participate, we conducted small-group interviews as well. The study combined qualitative and quantitative analyses to produce a more accurate understanding of law school classroom dynamics.[14]

Attention to the details of language and the context in which they are used are hallmarks of a longstanding empirical tradition emerging from anthropological linguistics, sociolinguistics, conversation analysis, and other similar fields. Many standard approaches to language analysis—both outside and within legal scholarship—have generally stressed the "semantic" or decontextual

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14. One of the many enjoyable aspects of doing this kind of research is that it has inadvertently put me into a kind of tacit conversation with law students at a number of law schools, who thus far seem to be the only other source of extensive observational reporting on law school classroom dynamics. Enterprising law students at Yale, Harvard, and the University of Chicago have organized to track gender dynamics at their law schools. The Yale students have now in fact performed a second wave of the research. *See* YALE LAW WOMEN, YALE LAW SCHOOL FACULTY AND STUDENTS SPEAK ABOUT GENDER: A REPORT ON FACULTY-STUDENT RELATIONS AT YALE LAW SCHOOL (2002), *available at* http://www.yale.edu/ylw/YLW%20Gender%20Report.pdf (last visited January 6, 2007); Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13. AM. U. J. GENDER SOC. POL'Y & L. 511 (2005) (detailing a study of how female and male experiences at Harvard Law differ and exploring what factors play a role in these differences); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988) (describing both anecdotally and statistically the experiences of twenty female Yale Law students and offering suggestions to improve legal education); Karen Wilson & Sharon Levin, *The Sex-Based Disparity in Classroom Participation*, THE PHOENIX, Nov. 26, 1991, at 3 (reporting, in a University of Chicago Law School student newspaper, that men speak in class about twice as often as women).

Although student-run efforts generally do not cover large numbers of class sessions for any individual class (nor can they perform more complex research tasks such as tracking timing of turns, etc.), they do manage to report on a wide variety of classes within each school. Later studies have added innovations such as having a male and female coder simultaneous code in any class session that is being observed, tracking whether turns were volunteered or called-on, and reporting outcomes as ratios rather than as raw numbers. I have very much enjoyed following the growing conversation among law students as to how best to study and track classroom dynamics, which I view as one hopeful avenue for encouraging an engaged and more sophisticated exposure to empiricism for law students:

> As an anthropologist who is also participating in the research in this area, I have watched with great interest a process by which student-run observational work appears to have built on itself over the years, with each new study incorporating and improving on innovations from prior efforts (as well as from other sources). At a time when there is a great deal of discussion of how best to encourage empirical work in the legal academy, I think we should take note of this kind of process; it is tempting for trained social scientists to express only skepticism about efforts by legal professionals in this regard, but absent formal graduate social science training for everyone involved, it might be important to view the public discussion itself as a forum for genuine interdisciplinary communication and advancement.

MERTZ, *supra* note 8, at 266 n.84. In this regard, some of the students may be ahead of their professors in coming to understand some of the real difficulties and intricacies of using empirical research to address policy issues.

aspects of language meaning.[15] However, recent research has uncovered the crucial role played by "pragmatic," or contextually dependent, aspects of language structure.[16] It turns out that pragmatic meaning is crucial to the process by which language becomes a vehicle for conveying meaning, communicating feelings, building relationships, resolving disputes, and so forth. It is through these myriad functions that language becomes an important avenue for creating and imposing social structure. Inevitably this brings with it implications for power dynamics, in addition to the place of language in conveying meaning that does not necessarily implicate power.[17] This study tracks the details of language pragmatics (as well as semantics) across a full semester in eight different first-year Contracts classrooms, located in a broad range of different law schools.[18]

II. SIMILARITIES AND DIFFERENCES ACROSS LAW SCHOOL CLASSROOMS

As noted, the study on which this Article is based tracked two basic kinds of patterns in law school classrooms. Both are patterns of speech, discernable through careful analysis of linguistic interchanges. First, I looked for any commonalities that might exist in the way classroom discourse was structured, despite the many differences that divide the classes, schools, students, and professors of this study. Linguistic anthropologists have found that subtle cultural messages

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15. *See* Elizabeth Mertz & Bernard Weissbourd, *Legal Ideology and Linguistic Theory: Variability and its Limits*, *in* SEMIOTIC MEDIATION: SOCIOCULTURAL AND PSYCHOLOGICAL PERSPECTIVES 261, 265 (Elizabeth Mertz & Richard Parmentier eds., 1985); Elizabeth Mertz, *Tapping the Promise of Relational Contract Theory: "Real" Legal Language and a New Legal Realism*, 94 NW. U. L. REV. 909, 922 (2000).

16. Examples of pragmatic anchoring of speech include what linguists call "deictics," which locate us in time and space as we communicate. Thus, locatives such as "here" and "there," personal pronouns such as "I" and "you," and verb tense ("I will tell him" versus "I told him") depend on their contexts of use for important parts of their meaning.

17. There is an interesting debate over the issue of how or whether to analyze power dynamics when looking at language. *See* MARIANNE CONSTABLE, JUST SILENCES 45-56 (2006). My book on the language of law school notes that:

> Of course, where law intercedes, issues of power are never very far away. But it is important to recognize as well how linguistic mediation introduces an irreducible dynamic of its own, imbued with cultural creativity and responsive to particular contexts and people. In this sense, I take seriously Constable's admonition against reducing our understanding of law and justice to a monolithic focus on power.

MERTZ, *supra* note 8, at 217.

18. The Carnegie Foundation team visited sixteen different law schools, which permitted observation of classes across a still wider variety of schools and topics (although for shorter periods of time), and, as noted above, came to some quite similar conclusions. EDUCATING LAWYERS, *supra* note 11 (manuscript at xxi (Introduction)).

can be encoded in discourse structure, so that any shared features of law school classroom language are potential keys to a commonly-held, distinctive legal worldview. Second, this study examined any differences in linguistic patterning that emerged from observational data obtained in the classrooms.

A. Shared Message: Learning to Speak, Read, and Think Like a Lawyer

We found a great deal of variation, at the surface level, in the linguistic patterning of the classrooms of this study. At the same time, analysis at a deeper level shows that an identical message about language is conveyed in all of these classrooms, and that message is simultaneously *about* pragmatic or contextual structure and conveyed *through* language pragmatics in the classroom.[19]

I chose to hold the content of the teaching as constant as possible, by taping only first-semester, first-year Contracts classrooms. This eliminated the possibility that any differences found among the classes were due to divergences among first-year subjects. We selected first-year, first-semester classes because this is the time period during which students experience their first re-orientation to language as they enter their new chosen profession. It is the time period that most closely approximates the first days of an initiation rite, a time when entrants to a new social status are taught to shift old patterns in favor of new ones.[20] In the first year of medical school, for example, medical students must undergo a change in their orientation to the body, a shift seen most dramatically through the first semester of gross anatomy lab. As they dissect human cadavers, students take their first step into a new profession in which they must develop a more removed and dispassionate approach often referred to as "the clinical attitude."[21] If we look now to the first-year law school experience, we find a similar emphasis on learning to "think like a lawyer."

What core re-orientation is required if a first-year student is to "think like a lawyer"? In the gross anatomy lab, cultural norms

19. *See* Elizabeth Mertz, *Recontextualization as Socialization: Text and Pragmatics in the Law School Classroom*, *in* NATURAL HISTORIES OF DISCOURSE 229, 245-46 (Michael Silverstein & Greg Urban eds., 1996); Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91, 101-02 (2000).

20. For a discussion of the concept of "liminal" states, which characterize the period of initiation into a new social status, see ARNOLD VON GENNEP, THE RITES OF PASSAGE (1960), and also VICTOR TURNER, DRAMAS, FIELDS, AND METAPHORS (1974).

21. *See* Peter Finkelstein, *Studies in the Anatomy Laboratory: A Portrait of Individual and Collective Defense*, *in* INSIDE DOCTORING 22, 22-23 (Robert H. Coombs et al. eds., 1986).

around reverence for the body and death are routinely violated, subtly pushing students to give up old attitudes and adopt new ones.[22] What we found in the law school classroom was that linguistic norms are ruptured as law students are urged to give up old approaches to language and conflict and adopt new ones. "Thinking" like a lawyer turns out to depend in important ways on speaking (and reading, and writing) like a lawyer. This change is largely a matter of a shift in language pragmatics, one that we can trace in different forms through all of the classrooms examined in the study.

1. The Importance of Being Pragmatic[23]

Researchers studying the interface of language and society have found that it can be very useful to track the contextual structuring of language. For example, anthropologists studying political oratory have found that the contextual or pragmatic structure of powerful political speech often subtly mirrors the very model of the polity that the politician seeks to convey.[24] In other words, subtle aspects of language work to reinforce or even create an underlying orientation in the world. Ethnographers studying children in classrooms have found that teachers working with students perceived to be low status (whether because they are labeled "low ability" or because of class or racial bias) send very different pragmatic cues than do teachers working with children perceived to be higher status.[25] In everything from interruption patterns to how they cue children to speak, teachers can convey very different messages.

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22. *Id.*

23. Actually, more accurately, I should say "metapragmatic" here, but I have found that this particular technical word has a very adverse affect on many legal audiences. (Something I have trouble understanding, given that legal professionals deal with all manner of arcane technical vocabulary.) By "metapragmatic," anthropological linguists mean to indicate the way language functions at a "meta" level to monitor and transmit information *about* the pragmatic meaning that we convey continually when we communicate. For example, if I say, "I don't want to fight with you, I'm just trying to explain," I am attempting to use the metapragmatic level to reorient your understanding of the ongoing flow of our speech. I am saying, "Don't interpret the contextual signals I am sending as angry, please, interpret them as a mere attempt to explain." This is a meta-level linguistic signal (language referring to itself).

24. Richard Parmentier describes this pbenomenon in Belauan political oratory. *See* Richard Parmentier, *The Political Function of Reported Speech: A Belauan Example, in* REFLEXIVE LANGUAGE 261, 284 (John Lucy ed., 1993). Michael Silverstein, from whose work many of these ideas originally developed, discusses the issue in his early paper. *See* Michael Silverstein, Metaforces of Power in Traditional Oratory, Lecture to the Yale University Anthropology Department (Feb. 1981) (transcript on file with the author).

25. *See, e.g.*, James Collins, *Differential Treatment and Reading Instruction, in* THE SOCIAL CONSTRUCTION OF LITERACY 138, 144 (Jenny Cook-Gumperz ed., 2d ed. 2006); James Collins, *Language and Class in Minority Education,* 14 ANTHROPOLOGY & EDUC. Q. 299, 315-17 (1988).

Low status children are sent the message that the text they are reading is simply something to be pronounced, and they are interrupted and corrected continually as to mechanics.[26] This prevents them from developing a sense of the text as something to be mined, interpreted, and mastered—a message commonly sent to higher status students. Of course, no one ever sits the children down and tells them, "Don't bother trying to understand this—just see if you can pronounce it properly." Indeed, a teacher might be shocked to hear that this is the message he has conveyed. Nonetheless, it is conveyed through a variety of subtle pragmatic cues, which speakers can mobilize without being aware of what they are doing.[27]

One linguistic measure that has been used in classroom studies of language is that of "uptake structure." Linguists tracking uptake look to see whether, once a student has responded to a teacher, the teacher then incorporates some aspect of what that student said in the next question. If the teacher takes up some part of the student's response in a subsequent question, then the student has had an impact on the classroom exchange (and vice versa). Perhaps not surprisingly, there is far more uptake in high-status elementary students' reading groups than in the low-status students' groups.[28]

It might, however, come as something of a surprise to hear that the most classic Socratic teaching resembles the low-status students' classrooms in terms of uptake structure. The classic style of Socratic questioning is characterized by low amounts of uptake.[29] However, when we examine how and when uptake happens, it becomes clear that this (pragmatic or contextual) way of shaping language's meaning is actually being used to refocus law students' attention on new aspects of the text.[30] Unlike the low-status students, law students are being taught to master the text, but in a new way. They are taught to read the text not only for its semantic content, but for the way it points to contexts of legal authority. What was the status of the authoring court in the hierarchy of courts? What was the procedural stance of the case? What doctrinal categories (given in precedent by

26. *See* James Collins, *Socialization to Text: Structure and Contradiction in Schooled Literacy*, *in* NATURAL HISTORIES OF DISCOURSE 203, 211 (Michael Silverstein & Greg Urban eds., 1996).

27. *See id.* at 207-08 (asserting that teacher and peer corrections, disruptions, and use of questions affect the way children orient to reading).

28. *Id.* at 221.

29. Mertz, *Recontextualization as Socialization*, *supra* note 19, at 242.

30. *Id.* at 240. The professor could rely on semantics—the content of what is said—to convey this message, simply lecturing and telling the students that they must now pay attention to different aspects of the texts that they are reading. But instead, when using uptake structure, the professor is using the pragmatics—the contextual structuring of talk—to focus students' attention on particular aspects of legal texts.

the appropriate courts) or statutory provisions (again, enacted correctly by authorized legal "agents") does the court discuss? Slowly but surely, law students learn to listen for new aspects of the "conflict stories" with which they are presented. They are taught to do this not primarily through semantics, but through the restructuring, in context, of the very language in which they discuss what they have read. This, then, is a very different use of uptake and other contextual features of language: one that pushes students into a new way of talking, reading, and "thinking." The language structure of the most canonical type of Socratic pedagogy provides the best example of mirroring—where the message's form echoes and reinforces the message's content. However, we find some form of contextual mirroring in all of the classrooms of the study, whether the overt discourse form is more or less Socratic, or even moves into primarily lecture (as it did in one of the classrooms of the study).[31] A ubiquitous question-answer format, even when enacted entirely by the professor in lectures (asking a question first and then answering it himself), is used throughout all of the classes in this study to refocus students' attention on layers of textual and legal authority.[32]

Whether in Belauan political oratory, elementary school classrooms, or law school classes, a great deal of quiet work is done through the pragmatic structure of language. Questions of what counts and what doesn't count, where to put our attention, and even a felt sense of what the "correct" structure of an argument or a polity should be can be shaped without our even realizing it, in the way our language points to and helps to create the contexts in which we live.

2. Legal Language, Legal Epistemology, and Getting Our "Footing"

What, then, is the distinctive shape of the worldview or epistemology conveyed in the law school classroom? Through careful analysis of the structure of discourse in each classroom of the study, we can find a distinctive legal approach. When students attempt to tell the stories of conflict embodied in the cases assigned for their

31. *See* MERTZ, *supra* note 8, at 84-140 (Chapters 5 and 6). Chapter 5 tracks the way a similar underlying message on textual authority is conveyed in classrooms with apparently quite different discourse structures (modified Socratic, short exchange, and predominantly lecture). In Chapter 6, I demonstrate how quite similar underlying dialogic or pair-part structures pervade professorial talk in all classrooms, whether enacted between professor and student in one ongoing exchange, between professor and students in multiple exchanges on the same case, or within professor turns during lectures.

32. *Id.* at 43-83 (Chapter 4).

courses, they typically start by focusing on the content of the story.[33] First-year law professors insistently refocus the telling of these stories on the sources of authority that give them power within a legal framework. What was the court authorized to decide? If it writes about hypothetical situations other than the one before it, students learn, this part of the story is to be separated from the "holding"—the authoritative part of the case. The holding is valid only if uttered by the correct authority, following the correct procedure, delivered in the correct form. This is a new and very different sense of where to look when we decide what counts as a "fact," how to construct valid accounts of events, and where to demand accuracy—as opposed to permitting unsupported suppositions.

Over and over again, the professors in this study demanded precision from their students on issues of legal-textual authority.[34] If students did not reproduce the precise words required for one prong of a legal test, the professor would continue to question the students until a student spoke those words.[35] Professors reviewed the procedural stance of cases, reminding students that on an appeal from a motion to dismiss, the facts as stated in the case did not have the same status as they would in an appeal from a jury trial. Regardless of the status of the school or the philosophy of the professor, law students were called to demonstrate increasing precision about the texts, their institutional histories, and their relationships with other texts (precedent, for example). At the same time, professors would

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33. For example, in the following transcript excerpt, the professor interrupts a student who is responding to a request that she state the facts of a case by trying to "tell the story" of the case in a more usual, layperson's narrative frame:

Transcript 4.6 (3/3/3)

Prof.: Hi. Um, can you start developing for us the arguments for the plaintiff and the defendant. (.) Um, Ms. N.?

Ms. N.: Um, that the plaintiff was a young, youthful man // with //

Prof.: // great // the plaintiff was a beautiful man ( ). [[class laughter]] Is that what you said?

Id. at 69 (use of //parallel lines// signals overlapping speech). It is quite usual to begin a story by introducing the characters, in part by describing details of their physical appearance. Tbe professor, however, interrupts and then directs the student to skip this kind of narrative introduction and move straight into a discussion of the legal issues:

> Okay, all right, so there's a lot at stake in the choice of which branch of this rule to apply in this particular fact situation. And all I'm interested in, Ms. N., is what the arguments are, um, for cost of completion, which is what the plaintiff wants in both cases, and wbat the arguments are for diminution in value, which is what the defendant wants in both cases, all right? I want the argument, okay? (3/3/4).

Id.

34. *Id.* at 43-96 (Chapters 4 and 5).

35. *Id.* at 65-66.

sometimes permit wide-ranging discussions of the social contexts within which the underlying disputes arose, after serious legal analysis had been performed. During these discussions, all manner of suppositions and hypothesized data about the social world were permitted, with very little consideration of how to achieve greater accuracy.[36] The move to focus on form, authority, and legal-linguistic contexts is thus accompanied by a shift away from precision or depth in discussions of content, morality, and social context.

Interestingly, the distinctive footnoting conventions used in law reviews and peer-reviewed journals provide a snapshot of this difference. Law reviews require a high degree of precision in the citation to authority. Student editors diligently check each footnote in an article to be sure that the citation's page number is correct and that the text of the citation actually says what the article claims it does. On the other hand, they usually cannot and do not check the validity of the texts being cited themselves.[37] If the methodology of a study being cited is faulty, the citation will still pass muster as long as the footnote accurately quotes what is said in the faulty study. By contrast, peer-reviewed journals rely on authors to be accurate about page numbers (which may indeed be a leap of faith!). It is quite possible to put the wrong page number into a footnote for a peer-reviewed journal and get away with it. On the other hand, if one cites a faulty study, ideally the peer reviewers will notice this. If the article author has relied in some crucial way on a study known to be unreliable, he or she will not be able to keep the citation; indeed, either a "revise and resubmit" or a rejection will likely result.

Thus, we see very different approaches to issues of accuracy and authority in the social sciences and the law. For the social scientist, it is often quite confusing to witness what amounts to almost a form of agnosticism on the part of many legal professionals: when reading legal texts, their core mission is not to determine "what actually happened," but rather to determine whether the legal-textual ordering of authority has been satisfied. The details of social context

36. *See id.* at 75-79; *see also* EDUCATING LAWYERS, *supra* note 11 (manuscript at 16-17 (Chapter 2)).

37. This is by no means to cast aspersions on the students' practices, but rather is simply an observation on the different kind of tradition of documentation and reasoning to which tbey are being trained. They are by now quite expert in the legal tradition that requires precise textual documentation. They have not been trained to assess, for example, the merits of one kind of social science methodology over anotber, and so are not (and should not be) expected to perform the role played by peer reviewers of social science journals (who are generally professors with many years of training and research experience with the methods in question). Those same peer reviewers, of course, would usually not be well-trained in assessing whether a legal citation is correct. Thus we are talking about different kinds of expertise in different professional traditions.

are important only as they fit into legal categories decreed by precedential tests or statutory requirements. After all, it is not generally up to an appellate judge to decide what happened, nor is it up to any particular attorney to decide whether a previously-decided case was fair. "Thinking like a lawyer" requires that an attorney be able to step nimbly among a variety of positions, and it is possible that none of them resembles the attorney's own personal stance.

Erving Goffman usefully introduced the concept of "footing," which helps distinguish the various positions that a person may occupy in any given segment of speech.[38] For example, Goffman delineates a number of distinct positions occupied by producers of language: the person who is speaking is the "animator," the person who composed the words spoken is the "author," and the person who is responsible for the position expressed by the utterance is the "principal."[39] This concept of "footing" allows us to analyze signals about speakers' positions, relationships, and social power—signals quietly conveyed in the micro-details of language. Goffman refers to a shift in footing as "a change in our frame for events."[40] Greg Matoesian has used detailed linguistic analysis to demonstrate how changes of footing in rape trials shift the frames within which defendants' actions are understood.[41]

What can we make of the way footing is used in law school teaching? Let us begin by examining a dialogue between professor and student:

TRANSCRIPT #1 [4/32/14-15][42]

Prof: /. . . / But of course it does put Ever-Tite Roofing in an excellent situation. They draft the terms of the offer and they decide whether to accept it or not, you know. They're like, "You want a deal? Sure. Maybe not." They—they're playing both sides. Now, um, how long after the offer is given from the Greens to Ever-Tite Roofing, uh, do we get the commencement of performance in the case? I think it's nine days, right?

Mr. M.: Right.

Prof: Then nine days later, Ever-Tite Roofing packs up the truck and heads for the Greens. But what happens when they get there?

Ms. L.: Someone else is there ( ).

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38. ERVING GOFFMAN, FORMS OF TALK 128 (1981).

39. *Id.* at 144-45.

40. *Id.* at 128.

41. GREGORY MATOESIAN, LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH RAPE TRIAL (2001).

42. MERTZ, *supra* note 8, at 102.

Prof.: Someone else is already on the job. Okay? The Greens' arguments are really two, it seems to me. One: "Our offer expired. It lapsed. There's nothing out there to accept anymore. You waited too long." The court doesn't buy that one. Uh, two: "The offer's still valid, but you haven't accepted yet." That second argument, Ms. L., was really an argument about what that phrase means in the offer, "commencement of performance," isn't it? According to the Greens, what would commencement of performance have been?

Ms. L.: Um, well, after showing up at the house, saying, "Okay, you can start"—

Prof: —and actually nailing some nails, you know, or pulling out some asbestos. Right? Actually commencing the roof. What they did looks an awful lot like what the carpenter, builder, did in the *White* case, White against Corlies. The owner in this case, the Greens, would certainly argue that's true. They argue that there's been no commencement of performance. But the court doesn't agree witb that, right? The court construes commencement of performance as including loading up the truck with the material and heading out there. Okay? *[. . .]*

In this classroom exchange, one could argue that both professor and student occupy the footing of animators: when using direct quotation, they appear to be merely speaking the words, which were actually authored by characters in the story. However, it is also clear that both professor and student are putting words into these characters' mouths, and thus stand in the footing of authors as well as animators. On the other hand, this authorship is hidden, albeit thinly, by the meta-linguistic signals that accompany direct quotation.[43] There are a number of subtle ideological messages conveyed by the frequent use of fictionalized reported speech in law school classrooms:

First, the use of reported speech blurs the boundaries between animator and author footings. This conveys a quiet message about the power of legal discourse to put words in people's mouths—indeed, to create reality through discourse. As we have seen, the translation of events into "facts" in legal narratives creates a legally authoritative account of truth. Under the linguistic ideology that anchors this translation process, it is the layers of legal-textual authority to which one should look in determining the "truth" of events, rather than to social context. In the law school classroom, use of imagined direct quotation has already begun to loosen the anchoring of reported speech from its "original" speaker and context, substituting instead the primacy of legally-relevant argument and strategy. In developing the background characterizations of the personae who make legal

43. Direct quotation in tbis instance retains the linguistic markers of an "original" speech setting: of a reported speech setting that is distinct from the current, reporting context. Therefore, when we directly quote someone (He said, "I'll go now"), we represent the speech that we are reporting using the same pronouns, tense, etc. as the supposed original utterance. If we were to indirectly quote someone (He said that he would go then), we alter these deictic markers ("I" to "he," "will go" to "would go," and "now" to "then"). For this reason, direct quotation gives the impression of reanimating an original utterance with greater accuracy.

arguments, it is strategic reasoning (locating them in terms of those legal arguments) that matters. The most important aspect of the parties in these stories is their position in legally-defined landscapes of argument: of legal speech and language.[44] In learning how to determine what this position is (or should be), law students are often taught to proceed as if strategic considerations were already part of the characters' internal or external dialogue throughout the entire story. When explicating the story through a legal lens, professors in essence move these characters around in a strategic landscape, placing them (and speaking for them) in one location or another to see how different positions might affect the shape of the arguments they can make.

Interestingly, this free attribution of fictionalized locutions to characters in the story can exist side-by-side with a demand for great precision about what was actually said. As Matoesian has pointed out, precise repetition of previous utterances is highly valued in a number of legal contexts: for example, in trials, as a means of impeaching witnesses who produce "inconsistent" renditions of the same events.[45] Similarly, law professors may sometimes insist that students repeat precise aspects of written or spoken language that are legally crucial (for example, to establishing whether there was "acceptance" of a contract, or what the court specifically said).[46] In fact, a hallmark of the legal reading taught to law students is this combination of blurred and precise boundaries: of obsessive attention to detail regarding some issues, and yet also a permission to generalize without systematic evidence about others.[47] Here we find a similar approach, bewildering to the layperson, but entirely explicable within the bounds of legal epistemology: if the precise wording of a document or utterance is doctrinally important, then a proficient legal reader will focus on the exact phrasing involved. However, when developing a legal characterization of the players in the story—moving them about in order to locate them strategically and in terms of possible arguments they might make—we can freely imagine what they might have said. This process teaches us that it is the strategies and arguments used

44. For an eloquent discussion of this issue that resonates with this view of "legal personae," see JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (Univ. of Cal. Press 2002) (1976).

45. MATOESIAN, *supra* note 41, at 105, 155-59.

46. *See, e.g.*, MERTZ, *supra* note 8, at 54 ("It was appealed, you say. Did you find that word anywhere . . . ?"); *id.* at 69 ("Does the court ever say . . . 'And then we know for a fact that Dr. McGee said, quote . . .' Does the court ever say that?"); *see also* EDUCATING LAWYERS, *supra* note 11 (manuscript at 26-28, 35 (Chapter 2)) (giving examples of law school dialogues centered on the precise wording in cases and on terms such as "firm offer" and "illusory promise").

47. MERTZ, *supra* note 8, at 84-96 (Chapter 5).

that centrally define the characters in this legal version of the narrative.[48]

Law professors are also conveying a second message through the ubiquitous use of reported speech, in that they are presenting the case through other people's voices, just as attorneys do in court (although courtroom attorneys use a somewhat different linguistic apparatus). In court, attorneys create an authoritative version of the "facts" by developing competing stories via the utterances of witnesses. Attorneys attempt to shape these utterances, selecting particular witnesses and coaching them to present the story that is most favorable to their side. The witnesses often give the appearance of being both authors and animators of the stories they tell, but the attorneys in fact share the author role, not only through coaching witnesses, but also because they actually co-produce the narrative as they elicit testimony from witnesses through questioning. However, this co-production remains somewhat covert, because overt meta-linguistic markers frequently signal that the witness is the main author of the narrative. Thus the attorney's questions often appear as mere prompts and the answers as the "real" narrative.[49] Just as with professors' use of direct quotation, lawyers' authorship is frequently hidden behind a thin meta-linguistic covering. In court, witnesses produce their own "direct" locutions, which the attorney may then repeat as direct quotations in subsequent questions—a process that conceals the role the attorney played in producing the witnesses' original utterance. Thus, there is a covert linguistic ideology at work in this deployment of direct quotation, one that foregrounds an inauthentic authorship and hides the complex play of social power and discursive maneuvering that really controls the utterance. Matoesian has pointed out that this legal-linguistic ideology plays a role in obscuring and naturalizing "how the law-in-action tacitly incorporates forms of social power, and how it constructs claims to knowledge, truth, and facticity in the details of discursive interaction."[50]

A third subtle message conveyed through use of direct quotation by professors is the primacy of the dialogic (and/or question-answer) form in legal discourse.[51] Dialogue is central in courtrooms.

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48. Note that it is the attorney's job to figure this out and put the appropriate words in the characters' mouths.

49. This is obviously much more the case with well-prepared direct examinations of "friendly" witnesses than with overtly hostile cross-examination of the opposing side's witnesses.

50. MATOESIAN, *supra* note 41, at 107.

51. There is a difference between two-part discourse structure in question-answer form and true dialogue. Dialogue, as delineated in seminal work by literary theorist Bakhtin, is typically understood to embody two distinct voices, whereas it is possible for two people to use question-answer structure to produce a story that is essentially told in a single voice. *See* MIKHAIL

Facts and truth emerge in legal discourse largely through the structure of two-part linguistic exchanges. Overall, the U.S. legal system relies on an adversarial process—a clash of opposing discursive positions—for its legitimacy. Two-part exchanges are also instrumental in arriving at legal truths during exchanges between attorneys and witnesses in direct- and cross-examination and between opposing attorneys as they make objections and tell competing stories in opening and closing arguments. We even find this format in written legal opinions, when judges create dialogues between two opposing positions as a way of explaining the steps that lead to their decisions. In law school classrooms, professors not only rely heavily on two-part exchanges with students, but they also create dialogues within their own speech through use of direct quotation:

TRANSCRIPT #2 [2/16/12][52]

Prof.: Okay, okay, or to put it more simply, the company in Indiana is saying, "Listen, we got this law in Indiana that is essentially for the benefit of the commonwealth of Indiana; it says that people who do business here can be made subject to Indiana's law." And, the plaintiff is saying, "This Florida company is doing business here in Indiana." Right? And the defendant Florida company is saying, "Forget that, I don't do business here in Indiana, I don't even have shop in Indiana." And it's a little bit unclear, actually, as to the way the court sort of smooshes together its statutory analysis and its constitutional analysis. What the court means to say is, "One. The statute does not seem to apply. Indiana says that companies that do business in Indiana are subject to Indiana's jurisdiction, but, it doesn't seem as though this statute applies given the facts of this case because this doesn't seem to be a company doing business in Indiana." The court then cites to a whole bunch of federal Supreme Court cases and uses the term "due process." And, what the court really means to say there is, "Even if a judge were to view Indiana's statute as giving jurisdiction to a court under these circumstances, that statute itself would be unconstitutional; it would be unfair to make this Florida cor( ) answer to tbis Indiana corporation in Indiana since this Florida corporation, you know, didn't have any- wasn't really doing business in Indiana." Okay. Let's just- okay. Then, after having discussed that stuff and again ( ) that's due- just a jurisdictional issue, statutory, constitutional. Then the court says, "But, that doesn't end the issue for us," right? There may be another basis on which- there may be another basis on which the court can exercise jurisdiction in this case, and what's that other basis? Yeah.

Student: Well, the plaintiff, the seller (con)tends that "because there is no contract, allow the personal jurisdiction because, there is a separate clause and additional term that says that in any dispute, that Indiana has jurisdiction over Florida."

This short excerpt contains a wealth of interesting linguistic detail. In the first part of this turn, the professor vividly summarizes

BAKHTIN, THE DIALOGIC IMAGINATION 284 (1981) ("In any actual dialogue the rejoinder also leads such a double life: it is structured and conceptualized in the context of the dialogue as a whole, which consists of its own utterances ['own' from the point of view of the speaker] and of alien utterances [those of the partner]."). I am indebted to Michael Silverstein for this observation.

52. MERTZ, *supra* note 8, at 106-07.

the primary arguments on each side using turn-internal dialogue. He glides easily between the opposing sides, demonstrating for students the art of moving between (and appropriating) different voices. The footing in this passage is complicated and difficult to parse. On the one hand, this is not wholly fictional dialogue, because the professor is purporting to translate arguments presented in the text of the opinion. The professor can therefore more credibly appear to be a mere (re)animator here than could the professor in the previous excerpt. On the other hand, this professor is clearly not attempting a precise or literal translation, and so a peculiar exactitude is given by use of direct quotation here to what is at best a very loose rendering of what was actually said or written. The footing becomes still more convoluted when a third interlocutor, the court, enters the discussion. The professor introduces the court's voice while also overtly indicating that he is clarifying a confusion in the court's own text: "And it's a little bit unclear, actually, as to the way the court sort of smooshes together its statutory analysis and its constitutional analysis. What the court means to say is . . . ." The apparent use of direct quotation following this meta-linguistic frame ("what the court means to say") can be understood as a signal that the professor is giving us the "real" message encoded in the confused language of the opinion. This reverses the typical metapragmatic convention under which direct quotation replicates the overt form of a message (the exact words) rather than conveying its gist (that is, its core semantic meaning). At the end of the exchange above, the student responds to the professor with a fabricated quotation that loosely represents the plaintiff's argument-based perspective.

Law professors, then, use direct quotation to create a form of dialogue within their own turns, at times creating imagined discussions between two different people. These professors might also speak to themselves within a single turn: first asking and then answering their own questions. Or, they might employ a mix of the two, asking themselves a question but answering using reported speech. The following excerpt contains examples of both of these alternatives:

TRANSCRIPT #3 [7/20/8][53]

Prof.: What's- what's a very reasonable alternative interpretation of the first term, "first come, first served"? "As the entire metropolitan area lines up to purchase coffee at 49 cents a tin, we will wait on you and take your money in the same order of which you appear." So that's why that's not going to—that's not going to change it. That's not an indication *[. . .]* Okay, how 'hout if it says, everything that we've suggested previously,

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53. *Id.* at 108.

> says "One per customer, one per customer"? Offer or no offer? Now, again, you cannot answer the question without measuring it against the legal rationale. Is there still a potential for theoretical unlimited demand in this type of problem? Yes. It's not as easy knowing you can come in there and start ordering it by the carload and trainload. *[. . .]*

In this turn, the professor initially asks himself a question about reasonable alternative interpretations of a directly quoted phrase.[54] He answers himself with an unframed quotation. Although there is no frame to indicate the use of direct quotation here, it is nonetheless clearly signaled through metapragmatic markers such as the shifts in pronouns and tense ("we will wait on you" rather than "they would wait on first-comers"). If we examine this direct quotation closely, we find that the professor seems to take on the voice of a business that may or may not have made an offer to customers. He addresses the entire metropolitan area, using the second person plural ("you"). Of course, we are clearly hearing another voice layered within this quotation as well, but it is not the professor's own. It is the voice of one possible interpreter of the written text, a person who does not necessarily understand the text as the author intended. Following this double-voiced quotation, the professor goes on to vary the facts, creating a small hypothetical ("how 'bout if it says . . . 'one per customer'?"). He then poses another question to himself, "Offer or no offer?" This question is followed by a brief meta-linguistic instruction regarding the proper approach to answering these kinds of questions ("Now, again, you cannot answer the question without measuring it against the legal rationale."). The excerpt concludes with another question to himself ("Is there potential . . . ?"), which he answers ("Yes.").

These transcript excerpts demonstrate how professors use classroom discourse to convey the primacy of dialogic and/or question-answer form in legal language and thought. Notice that thought and language, again, remain thoroughly intertwined in the indigenous, legal-linguistic ideology. The message is that both external and internal dialogues play an important role in the transformation to a new professional identity for law students. They must gain a new capacity, responding to and initiating argumentative dialogue with others and using internal dialogue structured around the posing of a series of questions to analyze legal texts. This is at once a structure of discourse and of thought. By mid-semester in these law school classrooms, the students have begun to adopt the format in their responses to professors' questions (initially using some creative variations, to be sure). Along with the new discourse format, a tacit epistemological lesson is conveyed: that legal truth emerges through

54. Note that this is one of the times when replicating the exact wording is important.

argumentative dialogue, the privileged discursive form in this legal domain. The students are taught again and again to first position themselves on one side, pose the appropriate questions, then to take the other side of the argument. From engaging in this ongoing debate, students will learn to internalize a new form of reasoning—"thinking like a lawyer"—as they also learn to perform externally (that is, to speak) the parts required by their new identities as lawyers. At a larger level, this adversarial process is the means by which legal truths and facts are ascertained, and it is the means by which law obtains legitimacy in the wider society, by ensuring that both sides are represented, using seemingly neutral legal categories. Thought, identity, truth, and legitimacy are packaged powerfully together through meta-linguistic structure.

On the other hand, this very focus on language form creates a closed linguistic system that is capable of devouring all manner of social detail, but without budging in its core assumptions. This creates a vivid contrast between the law and the social sciences, which often demand that researchers remain open to revising core assumptions. If the data are in conflict with your pet theory, unfortunately, in the long run, it is probably your theory and not the data that will have to go. By contrast, an attorney is required to hold onto his or her client's interests and to contest any data that might get in the way. As Professor Epstein and Professor King have noted, "An attorney who treats a client like a hypothesis would be disbarred; a Ph.D. who advocates a hypothesis like a client would be ignored."[55] This means that there is a fundamental difficulty in introducing forms of epistemological humility into legal thinking. The ubiquitous hedging and modesty with which well-regarded social scientists present their conclusions frequently seem like a dangerous luxury to those engaged in legal pursuits. Yet, a more subtle and sophisticated understanding of the social world could arguably contribute to better legal outcomes, if we could only find a good bridge between the two discourses and worlds.

3. The Carnegie Foundation Report on Law School Education

Although a detailed discussion of the forthcoming Carnegie Foundation report must await its publication, I pause here to note some strong similarities between that report's conclusions and the findings of my study.[56] The Carnegie Foundation's report, too, found a

55. Lee Epstein and Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 9 (2002).

56. See *supra* notes 11 & 18 for descriptions of the Carnegie Report's approach to gathering information.

distinctive style of law school pedagogy, with clear roots in Socratic teaching, across the sixteen law schools that they studied. They identified this "signature pedagogy" of legal education as the "case-dialogue method," and noted that "nearly all of the law faculty with whom we spoke [were] proponents" of this approach.[57]

The Carnegie team analyzed four dimensions of this signature pedagogy: its surface structure (observable behavioral features), its deep structure (underlying ideas modeled by this behavior), its tacit structure (values it implicitly conveys), and its shadow structure (the pedagogy that is missing or weakly conveyed).[58] Just as in my own study, they found that the surface structure was characterized by dialogic verbal exchanges (or sometimes duels), centered primarily on a new reading of legal texts. The deep structure of law school pedagogy links this dialogic process to a core analytic ability which is deemed central to lawyers' professional identity. And, again paralleling my results, the Carnegie team identified a tacit message in legal education's signature pedagogy: that law's key task is effective translation of the "human world" using legal categories.[59]

As a result of this focus on legal categorization and reasoning in law school, the law students who spoke with the Carnegie researchers reported that they experienced several gaps—several missing pieces in current legal pedagogy. One is substantive ethical teaching, and the other is a strong preparation for the realities of legal practice (generally conveyed only to those students who take clinical courses). The Carnegie team notes:

> Professional education is . . . inherently ethical education in the deep and hroad sense. . . . Even to disparage any ethical intent is to declare one: the purely instrumental view of education as the acquisition of a set of tools by means of which to enhance one's competitive advantage in life. Ethics in a professional curriculum ought to provide a context in which students and faculty ahke can grasp and discuss, as well as practice, the core commitments that define the profession. It can also be a place where the alternative, instrumental view just described can be squarely reckoned with. For lawyers, just as for other professionals, the practices they learn give them extraordinary powers. But the meaning of the practices, and, so, the object to which the powers are directed, is never morally neutral.[60]

It is heartening, as an empirical researcher, to find that others who are observing the same phenomenon have come to some very similar results. First, I share with the Carnegie researchers the conclusion that there is a shared epistemology under-girding legal education, at least in the United States. This in no way denies the

57. EDUCATING LAWYERS, *supra* note 11 (manuscript at 3-6 (Chapter 1), 29 (Chapter 2)).

58. *Id.* (manuscript at 5 (Chapter 1)).

59. *Id.* (manuscript at 29 (Chapter 2)).

60. *Id.* (manuscript at 14 (Chapter 1)).

vast array of variations and differences that we can also track in today's law school classrooms. But both research teams located a central pedagogical set of messages conveyed to law students, messages that direct their attention to technical aspects of legal reading and categorization. We also both agree that this approach is not entirely neutral, and that this lack of neutrality remains largely tacit in U.S. law schools' standard pedagogical practices.

However, I share the Carnegie group's conclusion that there is something of value that can be found alongside the tacit problems involved in law's "signal pedagogy." Like pedagogical practices in other professional schools, the "case-dialogue method" captures some key aspects of the profession's culture, and conveys them using a powerful mirroring (the form of the pedagogy in some way echoing the message it seeks to convey).[61] Arguably there is a tension, at least in the Anglo-American system of justice, between a push toward abstraction (an attempt to limit discretion, and to provide a metric for consistent decisions that in their best moments rise above local prejudice) and the need to contextualize (so that the equities of individual cases can be considered, and justice achieved). The Carnegie report characterizes this tension as a conflict between analytical and narrative modes.[62] It recognizes the need to train law students in the analytical mode:

> Legal education . . . needs to train students in the analytical mode of thought, with its reliance upon formal procedures and general theories and ideas. Like engineering or medicine, facility in the law requires an ability to distance oneself from everyday contexts and meanings, and to concentrate upon abstract cognitive features of the environment . . . .[63]

On the other hand, the Carnegie researchers also point out that law operates as a "normative lattice" in U.S. society.[64] When lawyers play their roles in sustaining this lattice, they of necessity

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61. Linguistic anthropologists would speak of this as an "indexical icon"; that is, the speech at once points to and mirrors ("iconism") what it seeks to convey. *See* MERTZ, *supra* note 8, at 58, 245 n.38; Mertz, *Recontextualization as Socialization*, *supra* note 19, at 231; Parmentier, *supra* note 24, at 281, 284; Silverstein, *supra* note 24, at 9; *see also supra* text accompanying note 24. The core terminology derives from the work of Charles Sanders Peirce. CHARLES S. PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE (Charles Hartshorne & Paul Weiss eds., vols. I-VI, Belknap Press of Havard University Press 1974) (1931-1935). For more technical discussions, see Michael Silverstein, *Indexical Order and the Dialectics of Sociolinguistic Life*, 23 LANGUAGE & COMM. 193, 203 (2003); Michael Silverstein, *The Poetics of Politics: "Theirs" and "Ours"*, 61 J. ANTHROPOLOGICAL RES. 1, 3 (2005).

62. EDUCATING LAWYERS, *supra* note 11 (manuscript at 53-54 (Chapter 2)). Robert Burns gives a powerful analysis of how the trial can function to balance competing demands in the U.S. system of justice, and of the role of narrative in this balancing. ROBERT BURNS, A THEORY OF THE TRIAL 35-72 (2001).

63. EDUCATING LAWYERS, *supra* note 11 (manuscript at 53-54 (Chapter 2)).

64. *Id.* (manuscript at 54 (Chapter 2)).

deal with narrative, with context, with equities and justice. Not only does the signal pedagogy of U.S. law fail to deal systematically with these issues, but instead, as the Carnegie report points out, "the case dialogue's emphasis on formal and procedural issues" tends to convey a contrary message: that questions of policy and justice are peripheral to the central business of law.[65] As I have noted, balancing the difficult demands of this ongoing tension is a key question facing any current efforts at legal educational reform:

> At a very broad level, this study has outlined a tension between abstract categories and conceptions of justice, on the one hand, and, on the otber hand, the democratic ideals of inclusion that require social, contextual, and grounded moral reasoning. . . . There is without question a certain genius to a linguistic-legal framework tbat [appears to] treat[ ] all individuals the same, in safely abstract layers of legal categories and authorities, regardless of social identity or context. . . . At the same time, this process conceals the ways legal results are often quite reflective of existing power dynamics, while simultaneously pulling lawyers away from grounded moral judgment and fully contextualized consideration of human conflict.[66]

One of the reasons that this remains a daunting challenge is that the system of reasoning is itself linguistically closed in a curious way, as we have seen. On the one hand, it seems open to almost everything. There is no event, no corner of society, it seems, that cannot be translated into legal categories. And yet, the pragmatic system that we find in law school pedagogy closes in on itself at the point where any challenge to its underlying system of reasoning arises. Sources of authority outside of the layered legal-textual system can only enter through the backdoor of jury nullification; standards of proof that might actually map social reality more accurately can be heard only in pitched adversarial formats (which then by definition neutralize alternative metrics of truth in favor of the more powerful *legal* advocate). It is very difficult to question the epistemology set in motion by fluid and strategic legal approaches to footing, identity, and value: for Native Americans, for example, to assert different legal epistemologies regarding land or identity, or to convey differing values such as incommensurability, or to maintain alternative tribal ways of resolving disputes.[67]

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65. *Id.*

66. MERTZ, *supra* note 8, at 220.

67. *See, e.g.*, Wendy Espeland, *Legally Mediated Identity: The National Environmental Policy Act and the Bureaucratic Construction of Interests*, 28 LAW & SOC'Y REV. 1149 (1994); Susan Staiger Gooding, *Place, Race, and Names: Layered Identities in* United States v. Oregon, *Confederated Tribes of the Colville Reservation, Plaintiff-Intervenor*, 28 LAW & SOC'Y REV. 1181 (1994). Anthropologists have made similar points about the way that the importation of Western legal norms has at times erased alternative legal measures and epistemologies abroad. *See, e.g.*, LAURA NADER, THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS (2002); Mark Goodale, *The Globalization of Sympathetic Law and Its Consequences*, 27 LAW & SOC. INQUIRY 595 (2002).

Similarly, students who attempt to raise issues of fixed values or non-legal morality do not generally get very far in the classroom exchanges that my research team recorded.[68] The beauty of the system is also its greatest weakness: once trained, law students can pick up almost any situation you bring to them and translate it into legal categories in the same way that their professors do. Discerning the limits of this translation, however, is quite difficult from within this incredibly catholic, almost omnivorous system. This is only exacerbated by the simultaneous demand in legal training that students learn a kind of assurance—an unflappability, an ability to think on their feet and to quickly respond to any challenge. Unlike scholars in some other fields, law professors have not been trained to ask themselves systematically what their method cannot do, or where the limits of their approach lie.[69] Indeed, the tacit character of the closure produced by the pragmatic structuring of legal language and pedagogy only complicates the problem further.

B. Different Classroom Patterns: Whose Voices Are Heard?

We have thus far focused on the way the pragmatics of legal language, at least as taught in first-year law school classrooms, can convey a somewhat closed epistemology in and through language. However, we can also find another kind of premature closure in the discussions held in law school classrooms: a closing-off in the structure or form of the classroom discussion itself. In most of the classrooms of the study, we found that female law students spoke less frequently than did male students, and we found an even clearer silencing of minority students.[70] This finding seems to be consistent across most of the research done to date in law schools, and this is particularly the case in terms of observational studies.[71]

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68. MERTZ, *supra* note 8, at 97-137 (Chapter 6).

69. Of course, individual law professors may be quite modest and careful about the limits of legal training in preparing them to pick up and appropriately use information from other fields or areas. But when this occurs, it is not because they are employing a systematic method to which their profession trained them. Nor does law school teach legal professionals to think about how what they are learning might actually impair their ability to comprehend alternative epistemologies or approaches. Anthropologists, by contrast, are trained specifically to think about how working unquestioningly through their own cultural or professional categories could impair their ability to achieve top-notch analyses of other cultures (or systems of ideas of whatever kind).

70. *See* Mertz, Njogu & Gooding, *supra* note 8, at 45, 62. We use the term "minority" here to reference a literature that deals with students of color, noting however that the term itself has limitations; obviously people of color are in a "minority" only in certain societies and settings (particularly elite settings in the United States). On a world-wide level, the picture is quite different.

71. *See infra* notes 72-79 and accompanying text.

Thus, in examining gender dynamics in these classrooms, we found that men spoke more frequently and for disproportionately more time than did women in six of the eight classes.[72] Included in the group of six were all of the classes in the study taught by men, as well as the only class taught by a female professor in an elite/prestige law school. The other two classes were both taught by female professors, but in "local" law schools. Looking to other studies of law school education, we see that the overwhelming majority of the results similarly found skewing toward male students in class participation rates. This is quite clear in the self-report (survey) studies, in which women students have repeatedly reported lower rates of participation and self-confidence, along with higher levels of distress.[73] There have only been a few observational studies of law school training, and these have generally been conducted by the students themselves. Student-led observational efforts at the law schools of Yale, Harvard, and the University of Chicago in recent years still found differential participation by male and female students, although faculty members at Yale report improvements in classroom gender balancing over time.[74]

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72. For detailed tables and discussion, see Mertz, Njogu & Gooding, *supra* note 8, at 45-56. Male students in these six classrooms took proportionately from 10% to 54% more turns than did female students, and from 12% to 38% more time speaking. *Id.*

73. This result has been largely consistent in self-report studies from 1986 through the present. *See* LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 27-84 (1997); YALE LAW WOMEN, *supra* note 14, at 13-19, 29-33, 81; Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 141-44 (1988); Taunya Lovell Banks, *Gender Bias in the Classroom*, 14 S. ILL. U. L.J. 527, 540 (1990) [hereinafter Banks 2]; Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1, 50 (1990); Joan Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 314, 325-326 (1994); Neufeld, *supra* note 14, at 540-41, 548-50; Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1239 (1988); *see also* LINDA WIGHTMAN, WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN 54-59 (1996); Marsha Garrison et al., *Succeeding in Law School: A Comparison of Women's Experiences at Brooklyn Law School and the University of Pennsylvania*, 3 MICH. J. GENDER & L. 515, 520, 525 (1996); Roseanna McCleary & Evan Zucker, *Higher Trait- and State-Anxiety in Female Law Students than Male Law Students*, 68 PSYCHOL. REP. 1075, 1075-77 (1991); Daniel McIntosh et al., *Stress and Health in First-Year Law Students: Women Fare Worse*, 24 J. APPLIED SOC. PSYCHOL. 1474, 1483-90 (1994); James Ogloff et al., *More Than 'Learning to Think Like a Lawyer': The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73, 195 (2000); E.R. Robert & M.F. Winter, *Sex-Role and Success in Law School*, 29 J. LEGAL EDUC. 449, 450, 452-54 (1978). But see Mitu Gulati, Richard Sander & Robert Sockloskie, *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 251-54 (2001) for a study that found diminution of student distress generally by the tbird year. On Yale faculty comments regarding an improving situation for women, see YALE LAW WOMEN, *supra* note 14, at 13, 15.

74. There have been very few efforts at observational research. *See* YALE LAW WOMEN, *supra* note 14, at 6; Alice Jacobs, *Women in Law School: Struetural Constraint and Personal*

In terms of race, we found some dramatic relative disproportions in favor of white students, ranging as high as 289%.[75] Interestingly, students of color took more turns, proportionate to their numbers in class, in the two classes taught by professors of color.[76] These were also classes in which there were substantial cohorts of minority students. There was one other classroom in which students of color participated at rates greater than would be expected, given their relative proportion in the class: this class was taught by a white male professor in a "regional" law school using a modified Socratic teaching style.[77] Just as with studies of gender in law schools, previous studies that examined race have raised concerns about inclusiveness in legal education. Self-report studies have generally painted a picture of lower in-class participation by students of color than by white students, coupled with more negative reactions to law school and lower self-esteem.[78] A number of reports indicate the likelihood, however, that African-American students who attended historically black law schools have had a different experience.[79] This finding and

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Choice in the Formation of Professional Identity, 24 J. LEGAL EDUC. 462, 462-63 (1972); Neufeld, *supra* note 14, at 522; Weiss & Melling, *supra* note 14, at 1299; Wilson & Levin, *supra* note 14, at 3; Mary Becker, How to Do a Gender Study at Your Law School (And Why It Might Be a Good Idea) 14-15 (1999) (unpuhlished manuscript, on file with author) (reporting results of study at University of Chicago Law School). For an overview of the relevant literature on women's experiences in law school, see MERTZ, *supra* note 8, at 185-95.

75. Mertz, Njogu & Gooding, *supra* note 8, at 62. For a more detailed overall analysis of race and classroom participation, see *id.* at 61-75.

76. *Id.* at 62.

77. *Id.* at 67. I analyze the classroom dynamics in this particular class in great detail in MERTZ, *supra* note 8, at 141-73 (Chapter 7). The participation profile in this course stands as a useful reminder of the complexities involved in analyzing classroom dynamics; this professor is particularly expert in providing facilitating frameworks for students (aspects of which would, in the Carnegie report's language, he termed "scaffolding" and "coaching"). Our results suggest that a number of factors are likely at work in creating encouraging environments for students of color; the presence of professors of color provides a source of role modeling that may help redefine "outsider" status, while the skillful use of pedagogical tools, even in combination with Socratic dialogue, may also be useful. This only underscores a general point made in the literature, which is that the very same steps that build a better learning environment for women and students of color will often benefit all students.

78. *See, e.g.*, Banks 2, *supra* note 73, at 535-36 (finding students of color more likely to report lack of respect and offensive humor by professors); GUINIER ET AL., *supra* note 73, at 135 n.114 (explaining that students of color report racially intimidating language in law school classrooms); Homer & Schwartz, *supra* note 73, at 47-55 (stating that white male students report higher levels of classroom participation, self-esteem, and positive reactions to law school pedagogy than other students); Krauskopf, *supra* note 73, at 314 (concluding that students of color differentially report harassment and silencing). Mitu Gulati, Richard Sander, and Rohert Sockloskie found that students of color were generally satisfied with their law school experiences, but that minority students were overrepresented among the small pockets of students who reported deep dissatisfaction. Gulati, Sander & Sockloski, *supra* note 73, at 255.

79. *See, e.g.*, William Boyd, *Legal Education: A Nationwide Study of Minority Law Students 1974*, 4 BLACK L.J. 527, 539, 542 (1975) (noting that law schools "which have more experience with minority students have learned how to provide effective academic assistance where it is

the results of my research together support the hypothesis that black students talk more freely and contribute more substantially when they have both cohorts and professors of color available to them for support.

Thus, both in terms of race and gender, existing empirical research indicates that law schools are not yet even playing fields for all students. On the other hand, there are some interesting variations. As noted, in my study, female students spoke as much or more than would be predicted by their share of the class size in the two classes taught by female professors in non-elite schools.[80] Along with other researchers, we did not find that the encouraging effect of female law professors was as great in more elite schools, leaving us with a question about the interaction of school status with gender.[81] By contrast, students of color spoke more in classes taught by professors of color even in elite schools.[82] They emerged as the leading speakers only in classes where there were professors of color and substantial

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needed, but less experienced institutions have not," and also that the "lack of minority presence fosters the sense of being unwanted and isolated"); Timothy Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY 711, 744 (2004) (finding that key factors influencing final law student GPAs include "quality instruction, faculty race diversity, and faculty gender diversity"); Portia Y.T. Hamlar, *Minority Tokenism in American Law Schools*, 26 HOW. L.J. 443, 532-54, 576 (1983) (explaining that minority students who are tokens experience differential stress and silencing in law school, and citing a MALDEF study that discusses need for "critical mass" in order for minority law students to feel comfortable); Cathaleen Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 675 (1994) ("Minority law students [in predominantly white law schools] experience acute isolation, which in turn, produces serious psychological and academic ramifications."); Kenneth Tollett, *Black Institutions of Higher Learning: Inadvertent Victims or Necessary Sacrifices?*, 3 BLACK L.J. 162, 165-167 (1973) (finding that Black higher educational institutions provide uniquely supportive environments for African-American students, including better role models, superior cultural and psycho-social settings, and "educational enclaves" that help them transition to the largely white professional mainstream).

In his article, Professor Clydesdale further wrote:

> Those students with higher final GPAs were more likely to report better instructional quality, more minority instructors, and more women instructors. . . . Faculty at most law schools must follow standardized grading distributions; thus, one can reasonably infer that students who have race and gender diverse instructors actually perform better academically. This is an important finding, as it supports tbe 'critical mass' argument in the *Grutter* decision and deserves thoughtful attention by legal educators and social scientists alike.

Clydesdale, *supra*, at 744.

In other higher educational settings, studies have shown that African-American students who attended black colleges are more successful. JACQUELINE FLEMING, BLACKS IN COLLEGE: A COMPARATIVE STUDY OF STUDENTS' SUCCESS IN BLACK AND IN WHITE INSTITUTIONS (1984).

80. Mertz, Njogu & Gooding, *supra* note 8, at 46.

81. *Id.* at 48-49; MERTZ, *supra* note 8, at 190-96.

82. Mertz, Njogu & Gooding, *supra* note 8, at 65.

cohorts of students of color.[83] This should raise some cautionary concerns about how important substantial cohorts and role models are for students of color attending elite law schools (from whose ranks future law professors at all kinds of law schools are most likely to emerge).[84] In general, this study points to the importance of fine-grained attention to aspects of context, from the differences among kinds of law schools through the quite different atmospheres created by the divergent discourse styles used by the professors we observed.[85]

Looking at both the qualitative and quantitative results of this study, we can see that the backbone of legal language sends powerful messages to law students, along a number of different dimensions. Starting with an examination of formative experiences in law school, we can use a better-informed understanding of the messages conveyed in language structure to open up legal discourse—both in form and content—to more voices and perspectives. This should have obvious benefits for the legal system in a nominally democratic society.[86]

III. LAW, TRANSLATION, AND HUMILITY: TOWARD A NEW LEGAL REALIST PEDAGOGY

In summary, detailed linguistic analysis permits us to specify a shared message that is found across a number of apparent differences in law school classrooms. This message is all the more powerful because it is frequently conveyed tacitly, in a subtle process of meta-linguistic reorientation. This linguistically-circumscribed system of legal knowledge turns students' attention toward technical and textual concerns, quietly deflecting or suspending questions of substantive justice. Despite its façade, the law school classroom is the site of more than lessons about technical law. Educational research in other settings has demonstrated that the structure of classroom interactions affects how we "create settings in which students can learn lessons of caring, justice, and self-worth."[87] Clearly, in a field such as law, these lessons are even more obviously part of what students will carry away with them.

In today's law school, there is no systematic analysis or teaching of the limitations that are tacitly built into the very

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83. *Id.* at 66-67.

84. For a more extended discussion of this issue, see MERTZ, *supra* note 8, at 220-22.

85. Mertz, Njogu & Gooding, *supra* note 8, at 77-86.

86. See SUSAN DAICOFF, LAWYER, KNOW THYSELF 24-50 (2004) for a discussion of the arguable gap that exists between lawyers' understandings and those of the laypeople they purport to serve.

87. Carol Weinstein, *The Classroom as a Social Context for Learning*, 42 ANN. REV. PSYCHOL. 493, 519 (1991).

framework of legal language. As we have seen, by taking an empirically formed perspective, we can begin the process of developing that analysis and pedagogy. In so doing, we can shake up conventional understandings of legal language, and of the law itself. Like all human language, legal language is embedded in a particular setting, shaped by the social contexts and institutions surrounding it. It does not convey abstract meaning in a legally-created vacuum, and thus cannot be understood without systematic study of the contextual molding that gives it foundation in particular cultures and societies. Here social science can be of help to the law, because it specializes in just this kind of systematic study. No profession can do everything; no scholarly discipline can cover all facets of human life. When we cross disciplines in an effort to enlarge our understanding, we also have to recognize the limitations of the methods in which we have been trained. If we can achieve this recognition, we will begin to develop an important antidote to the hubris that inheres in standard legal meta-linguistic assumptions.

Excellent translation, whether across disciplines or among people, begins with a form of humility: it is only when we recognize that we do not currently grasp others' perspectives that we can start to comprehend them. The arrogance that accompanies the closed linguistic system of law can contribute to the alienation of lawyers and the legal system from the people they are supposed to serve. Ironically, learning the apparently universalizing language of law may actually block those speaking the language of law from truly hearing alternative points of view. We can trace in legal language a meta-linguistic structure that is at once powerful and problematic. Understanding the limitations alongside the power can help law students be careful about the intoxicating appeal of their new language. This kind of attention to the translation process itself is the goal of the New Legal Realism Project.

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