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Speaking Differences: The Rules and Relationships of Litigants' Discourses

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SPEAKING DIFFERENCES: THE RULES AND RELATIONSHIPS OF LITIGANTS' DISCOURSES

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RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE. By *John M. Conley* and *William M. O'Barr.* Chicago: University of Chicago Press. 1990. Pp. xiv, 222. Cloth, $34; paper, $14.95.

Within the past decade, there has been a call to stories, to the use of narrative in understanding voices that have been silenced, or submerged, in traditional legal practice.[1] Telling new stories has been particularly important for feminists and critical race theorists, but it has also proved extremely useful for the theoretics of practice, an emerging movement in which lawyers (and scholars) seek to uncover the experiences of clients within the legal system, and to critique underlying power relations which produce these experiences.[2] Practice theorists painstakingly reconstruct what happens to clients as they are subjected to the legal system. These scholars look at the social, legal, and other contexts in which the client seeks legal help; they also look at what the lawyer brings to her practice, at how the lawyer understands her client, and how the lawyer can empower or do violence to her client. Much of this analysis is based on the writer's experience with real clients. It often takes the form of narrative, of telling the client's or lawyer's story, and struggles with the limits of translating both stories into legal fora.[3]

This scholarship recognizes the difficulties for lawyers in constructing the client's narrative within the courtroom or within legal texts.[4] Regardless of how the client understands the different forms of

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1. For discussion and examples of this phenomenon, see PATRICIA L. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR (1991) (reviewed in this issue by Professor Robin L. West. — Ed.); Kathryn Abrams, *Hearing the Call of Stories,* 79 CAL. L. REV. 971 (1991); Symposium, *Legal Storytelling,* 87 MICH. L. REV. 2073 (1989).

2. *See, e.g.,* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative,* 100 YALE L.J. 2107 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.,* 38 BUFFALO L. REV. 1 (1990).

3. *E.g.,* Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language,* 87 MICH. L. REV. 2459 (1989).

4. Alfieri, *supra* note 2, at 2118.

power inherent in the structure of attorney-client relationships, that power distorts conversation and understanding. Even when the lawyer attempts to decenter herself and focus on the client, what emerges is still the lawyer's understanding of how the client perceives the law, and the lawyer's critique of her own incomplete understanding.[5] This inquiry into the nature of our understanding — which results in a recognition of the impact of our perspectives on our perceptions — is a valuable undertaking. Nonetheless, the lawyer remains central to this interpretive process. (Given that those of us who write these accounts are lawyers, it is understandably difficult to decenter ourselves.)

There are, however, alternative methods of understanding the legal process from the perspective of other participants.[6] In an attempt to understand how lay people view the legal system, lawyer-anthropologist John Conley and anthropologist William O'Barr observed 466 cases in informal courts (small claims, pro se, and similar courts). By focusing not on the disputes themselves, but on the actual storytelling language of the litigants in and out of court (p. 35), Conley and O'Barr seek to expand the ethnography of law[7] to include study of litigant discourse (p. xi).

As legal anthropology, this study of small claims court participants provides much-needed detail about how litigants perceive the American court system and about their storytelling styles. The book allows us to hear litigants' voices, unmediated by lawyers. It persuasively shows how the stories focus on either the rules or relationships underlying the disputes, and it presents the stories as illustrative of the discord between the promises of the legal system and the litigants' actual experiences. We see how individual judges react differently to what Conley and O'Barr label as the *rule-oriented* and the *relational* storytelling modes (p. ix) and how some ways of telling stories are more "powerful" than others in eliciting the response a litigant wants from the court.

The goal of the book is to investigate litigants' discourse. Because this goal is so successfully achieved, it is hard to criticize the book. The book falls short, however, in two other areas: it poses too few

5. This analysis of how method structures the relationship between the researcher-lawyer and the subject-client helps question the privileged status of the lawyer. *See* Andrew D. Gitlin, *Educative Research, Voice, and Social Change*, 60 HARV. EDUC. REV. 443 (1990).

6. Large-scale surveys have often been used to research litigant understanding. *See* SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 5-6 (1990). Others have spoken to individual poverty law clients to determine their views of the law. *See, e.g.*, Austin Sarat, *". . . The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990).

7. The "ethnography of law" is an attempt by an ethnographer (someone concerned with the study of individual cultures) "to learn about and describe whatever behavior, if any, is found to fall within what people conceive 'law' to be in the culture he is studying." Mary Black & Duane Metzger, *Ethnographic Description and the Study of Law*, 67 AM. ANTHROPOLOGIST 141, 141 (1965), *reprinted in* THE ETHNOGRAPHY OF LAW 141 (Laura Nader ed., 1965).

questions about the meaning of the different styles of discourse, and it does not sufficiently address critical awareness of the politics of method. First, this study, like those by public interest lawyers of their clients, is necessarily limited by the authors' positions. While we hear the actual voices of litigants, the voices are still filtered through the researchers' perceptions. Even though the authors set up the categories "rules" and "relationships," much of the discourse could fit into either category.[8] As recent feminist scholarship recognizes, defining categories is necessary so that we can organize our perceptions, but it is a dangerous necessity because it privileges the researcher's perspective, thereby precluding alternative methods of understanding.[9] Second, Conley and O'Barr do not adequately explore the social and legal contexts in which the rule-oriented and relational styles develop and are valued.[10] Such an inquiry might lead them to recognize the uses of alternative styles of speaking, and to develop more concrete suggestions for reform (either in the manner of presenting discourse or in the legal system itself).

In this review, I will first explore the ways *Rules Versus Relationships* helps us understand how litigants approach the law and how language of litigants (and judges) affects results in the legal system. The authors' method of listening to litigants, of letting the litigants set the agenda for research, indeed results in a valuable source of information.

Through its illuminating descriptions, the study may lead us to a new stage in the examination of the relationship between the legal system and litigants' hopes, in which we explore the potential value of differences in litigants' discourses and seek to change existing structures to recognize the value in alternative approaches.[11] The study shows us one perspective on differences in discourses; it does not help us decide how the legal system should respond to these differing discourses (other than by courthouse door tests that route particular litigants to judges with similar styles). Instead, the study raises interesting questions concerning why the legal system responds as it does to the differences they have described, how we can change the

8. *See* Peter Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients,* 68 N.C. L. REV. 213, 225 (1990) (discussing ways "rules" and "relationships" interact when an attorney counsels a client).

9. *See, e.g.,* Katharine T. Bartlett, *Feminist Legal Methods,* 103 HARV. L. REV. 829, 872-77, 880-87 (1990) (critiquing "standpoint epistemology" for its essentialist nature, and advocating "positionality"); Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce,* 1987 WIS. L. REV. 107 (critiquing the "objectivity" of empirical research).

10. Discourses that are dominant not only represent, but also produce, power. *See* Irene Diamond & Lee Quinby, *Introduction, in* FEMINISM & FOUCAULT: REFLECTIONS ON RESISTANCE ix, x (Irene Diamond & Lee Quinby eds., 1988).

11. *See* Naomi R. Cahn, *Styles of Lawyering,* 43 HASTINGS L.J. (forthcoming 1992); Ann C. Shalleck, *The Feminist Transformation of Lawyering: A Response to Naomi Cahn,* 43 HASTINGS L.J. (forthcoming 1992).

legal system to recognize the values of differing approaches, and what other differences we can observe (and encourage) in litigants' discourse.

I. WHY THE BOOK IS SO VALUABLE

Conley and O'Barr study people who bring disputes to "informal" courts — courts that are designed to resolve, simply and efficiently, cases involving limited amounts of money (p. 24). They chose informal courts because they wanted to study how lay people — unrepresented by lawyers — view the legal system.[12] Unlike those legal anthropologists who focus on the case as the unit of analysis in order to study principles of dispute resolution,[13] Conley and O'Barr used "the encounter of the litigant with the legal system," and their data consists of litigants' pre- and post-trial accounts, together with the actual court appearances.[14]

The method used in this book, which the authors termed the "ethnography of discourse" (p. xi), is a valuable tool for people who study legal culture. Their data show the richness of cases before they are interpreted by judges in their decisions, and thus show not only how litigants understand the legal system but also how the legal system functions.

The authors' conclusions are firmly grounded in what happens in court. For example, to prove that judges are not impartial, Conley and O'Barr study the fairly spontaneous judgments made in informal courts. Their conclusion is drawn from first-hand observations of the actual experiences of litigants and judges, not from reading opinions which reduce these experiences and put more distance between the observer and the observed.[15] Moreover, they are quite open about

12. Their study was conducted in six cities, which ranged in size from 10,000 people to major metropolitan areas. The informal courts varied in several ways, including jurisdictional limits ($1000-$5000) and the qualification of judges (in three cities, none of the judges were lawyers, while two cities required the judges to be lawyers).

In all, Conley and O'Barr observed 466 cases in court, transcribed 156 of those cases, and talked with 29 litigants. Pp. 26-33.

13. See June Starr & Jane F. Collier, *Introduction: Dialogues in Legal Anthropology, in* HISTORY AND POWER IN THE STUDY OF LAW 1, 4-5 (June Starr & Jane F. Collier eds., 1989) for their critique of dispute processing. *See also* Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Judicial Subject,* 66 DENV. U. L. REV. 437 (1989) (discussing and assessing struggles over disputing and dispute processing within the legal field); Jean G. Zorn, *Lawyers, Anthropologists, and the Study of Law: Encounters in the New Guinea Highlands,* 15 LAW & SOC. INQUIRY 271 (1990) (book review) (tracing the evolution of the anthropology of law).

14. P. 29. For an example of the more traditional method, see *The Iowa Small Claims Court: An Empirical Analysis,* 75 IOWA L. REV. 433 (1990) (summarizing thoroughly the results from survey of litigants, judges, and clerks on the utility of small claims court, but without using the actual words of the participants).

15. Because the book is not a scholarly tome, Conley and O'Barr do not place their conclusions in the context of other scholars who have argued about the partiality of judges.

"the subjective element" in their analysis, and disarmingly point out that "the reader is given the resources to question our interpretations" (pp. xii-xiii). The speech of the litigants and the judges helps to structure the book. In most chapters, the authors weave the litigants' stories into the text as illustrations of the points they are making.

How do litigants talk about their problems when they are not coached by lawyers? Conley and O'Barr find that many litigants tend to describe their cases in narratives that probably would not be admissible in more formal courts (pp. 36-37). Beyond violating evidentiary standards, the narratives proceed sequentially, rather than focusing on explicitly legal issues such as responsibility and blame. Conley and O'Barr find that litigants actually describe their disputes in either a relational or a rule-oriented style. Relational litigants "focus heavily on status and social relationships. They believe that the law is empowered to assign rewards and punishments according to broad notions of social need and entitlement. This belief appears to be associated with a general social experience in which the individual lacks autonomy . . ." (p. 58). By contrast, rule-oriented litigants "interpret disputes in terms of rules and principles that apply irrespective of social status" (p. 58). While the authors recognize that both approaches are oriented to rules, a relational litigant uses "social rules" and a rule-oriented litigant uses "specific legal rules" (p. 59). Relational litigants tend to see the legal system as enabling them to vindicate their interests; rule-oriented litigants tend to see the legal system as limited to providing specific remedies for certain types of problems. Conley and O'Barr observe that these perspectives may also be affected by gender, race, and class (pp. 79-81).

As an example of a relational litigant, consider the following woman who has sued her neighbor because of weed encroachment and general harassment. When the judge asks how removal of various trees and shrubs occurred, she explains:

> Well I can, well, well I have to jump back because, uh, for three years when Mr. Bennett moved back — because he was there once before and then he moved and then he come back into that house — and all the time before — I have to say this though Judge — because all the time before everybody took care of that hedge and they wouldn't let me take care of it. [p. 61]

In her response, we can see that the historical relationship with her neighbor is more significant than the legal rules concerning who is obligated to maintain the hedge: she does not respond directly to the judge's question, but adds information that shows how she frames the dispute.

By contrast, in another case, a rule-oriented litigant explains why she is in court: "Okay, Your Honor, on September 6, 1987, Carlton M. Webb was admitted to the hospital for services, received services in the amount of $4268.05. His insurance paid all but $940.60. We've

had no payment from Mr. Webb. We request judgment in the amount of $940.60 principal . . ." (p. 114). This is a no-nonsense explanation that accords with how the dispute is defined in the legal system: there was an implicit contract for services, the services were provided, but full payment was not made.

Because litigants present these conflicting narrative methods to judges, the authors also analyze judicial responses; they observed fourteen judges and they identify five different judicial styles: the strict adherent to law (pp. 85-87), the lawmaker (pp. 87-90), the mediator (pp. 90-96), the authoritative decision maker (pp. 96-101), and the proceduralist (pp. 101-06). While the authors are cautious about generalizing from so small a sample, they suggest that the approaches may be related to gender and legal background — judges who mediate are far more likely to be women (pp. 110-11). These styles can lead to different results based on substantially similar facts; like the accounts of litigants, these judicial approaches can also be placed along the rules-relationship continuum.

In some cases, the judge and litigants adopt "concordant" approaches; this occurs most often when both are rule-oriented, simply because most judges are rule-oriented (p. 123). In many cases, however, judges and litigants do not share the same view of the legal system. Conley and O'Barr explore the assumptions about what litigants want, and the assumptions that litigants make about what they can get in court, finding substantial discord. While judges often assume that litigants are result-oriented, litigants often want benefits that cannot be realized through mere application of legal rules under which they "win." Here, as elsewhere, the authors use the stories of specific litigants to illustrate their conclusions. For example, one litigant received a default judgment, and "won" in a legal sense, but was furious that she did not get to tell the story that she had prepared.[16] Another pair of litigants was dissatisfied because the judge failed to understand fully the issues underlying their dispute. A male plaintiff sued a woman, seeking return of furniture because he cosigned the note for the furniture and was unhappy that he was making most of the payments. The judge resolved the situation by asking the defendant to pay to the plaintiff the money that she owed for the furniture:

16. P. 129. In fact, psychological analysis of defendants' courtroom experiences indicates that, despite the lawyer's tendency to judge client satisfaction by results, litigants are more concerned with achieving procedural fairness than a favorable outcome or fair settlement. Tom Tyler, *Client Perceptions of Litigation,* TRIAL, July 1988, at 40, 40 (1988).

See also Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience,* 18 LAW & SOCY. REV. 51 (1984). Results of Tyler's study of traffic violators and other petty offenders "point to procedural justice as a key element in explaining support for legal authorities." *Id.* at 63-64, 70. Twenty-six percent of defendants responding to Tyler's open-ended question, "What about the way your case was handled was fair (or unfair)?" mentioned the opportunity to present evidence, 12% the outcome, and 12% the judge's "manner." *Id.* at 67.

JUDGE: Then Mr., uh, sir, would you be willing to accept the payments that are due at this particular point from Ms. Newell?

MOTTLEY: Um, sir, to, to, to ease her problem, I would, I would, I wouldn't regret past payment. I would just like to possess the furniture. Then, I don't have to be bothered with nobody at this point of time. [p. 137]

In interviews after the court hearing, the defendant explained what really happened: "And I started to tell the judge the exact truth as to why he decided to come to court . . . but I felt that it was like personal. . . . I turned him down. . . . And that stuff was bought as a gift, alright."[17]

Conley and O'Barr believe that litigants subtly rationalize their discontent with the system, and that this allows the legal system to continue. Litigants separate their actual experiences in court, which may leave them very disappointed in both the process and the result, from their abstract idealizations of how an impartial legal system should respond to their problems. Consequently, they maintain their belief in the abstract system, although their personal experience alienates them from the actual process and its participants (p. 154).

Conley and O'Barr point out the importance of listening to the voices virtually silenced by case reports and traditional legal discourse — those of the litigants themselves.[18] The authors offer several general suggestions for law reform that would make litigants more comfortable within the legal system, such as improved communication, sympathetic listening in settlement, and more opportunities for litigants to tell their stories in their own words (p. 177). But the authors admit that, although these suggestions might improve litigants' "comfort level," they are unlikely to solve litigants' problems (p. 178). While Conley and O'Barr conclude that "the law would best use our findings not to deny people the opportunity to achieve change through confrontation, but to enable more people to make better use of that opportunity,"[19] they fail to offer substantive suggestions on how to achieve these more ambitious goals. Instead, this book identifies the different styles of litigants and judges, suggests how these styles lead to harmony or discord within their legal interactions, and observes how litigants manage the tension between what they believe the law promises and what the law actually delivers (the difference between the theory of law and its actual practice).

17. P. 140. For further discussion of this story, see *infra* notes 26-27 and accompanying text.

18. They note that only recently has the "more abstract discourse of jurisprudence" begun to recognize the significance of litigants' discourses. P. 168.

19. P. 178. A similar conclusion is reached by Lucie White, who believes that removing formal barriers to speech is insufficient to ensure full participation. White, *supra* note 2, at 52. Unlike Conley and O'Barr, however, White believes that until conditions of social inequality are changed, poor people (at least) will be unable to participate meaningfully.

Finally, Conley and O'Barr pose four questions for future research: What are the demographics of distribution for rule and relational orientations? How does the speaker's orientation affect the listener?[20] Does the rules-relationship continuum describe other aspects of the legal system? How do nonlawyers develop their perspective on the law (pp. 178-79)?

Conley and O'Barr belong to a growing body of legal scholars who are turning to the voices of litigants in order to understand better the effects of the legal system on their problems and to develop improved methods of making the system more responsive.[21] Listening to the litigants enables us to see how language is "a cultural artifact that subtly channels."[22] Efforts to listen to litigants, to see how they frame their speech about legal problems and the courts, indicate the developing self-awareness among lawyers about the violence inflicted by and through the legal system on participants. This self-awareness draws its strength from new movements within legal thinking. In the past twenty years, feminists and critical race theorists have criticized as the product of white males many of the assumptions underlying the legal system, and have questioned what has been excluded from these assumptions. Theorists of practice, and here I include some ethnographers, study the actual experiences of litigants, looking at the disempowered and suggesting how they can develop (and have developed) their own resistance to dominant legal structures.[23]

II. Beyond Definition: The Power To Question Categories

The categories of rules and relationships immediately recall the writing of Carol Gilligan, which suggests that women are oriented toward an ethic of care and men toward an ethic of rights.[24] Indeed,

20. *See* Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989) (concluding from observation and tape recordings of 115 lawyer-client conferences in divorce cases that a lawyer typically describes the legal system to the client as an arbitrary and idiosyncratic "game," in which the client can only be successful with the benefit of the lawyer's local knowledge and reputation).

21. Indeed, this developing body of scholarship is indebted to earlier work of Conley and O'Barr. *See, e.g.*, Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. (forthcoming 1992) (manuscript on file with author); White, *supra* note 2.

22. Lawrence Rosen, *A Consumer's Guide to Law and the Social Sciences*, 100 YALE L.J. 531, 537-38 (1990) (book review).

23. *See, e.g.*, Regina Austin & Sharon Dietrich, *Employer Abuse of Low-Status Workers: The Possibility of Uncommon Relief from the Common Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 350 (David Kairys ed., 2d ed. 1990); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989). *See also* Alfieri, *supra* note 2; Sarat, *supra* note 6; White, *supra* note 2; Naomi R. Cahn, *The Reasonable Woman*, 77 CORNELL L. REV. (forthcoming 1992).

24. *E.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); *see also* DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1990) (sociolinguist who makes comparable observations about how men and women speak).

Conley and O'Barr note that "the parallels between our observations and the work of Gilligan . . . are significant" (p. 79). By suggesting here that relational thinking is characteristic of the powerless, they tentatively propose that the social culture influences litigants' attitudes and interactions with the law. They do not, however, explore this proposal in depth by questioning the descriptiveness of the "relational" and "rule-oriented" categories, exploring the meaning and validity of the two voices they have identified, or examining the relevant power relations before litigants reach court, in the courtroom, and post-trial.

Conley and O'Barr acknowledge that few of the litigants they studied are always rule- or relation-oriented, and they do not want to "creat[e] a misleading aura of precision."[25] At one point, they even show how the same dispute, the one about furniture discussed earlier,[26] can be seen as either relational or rule-oriented: from one perspective, the judge has failed to see that this is a relational dispute concerning a failed seduction; while from another perspective, the parties want a rule-oriented resolution of their problem that does not require further contact between them (p. 141). This interchangeability illustrates one of the problems with labeling.[27]

Of course, as individuals we understand the world by identifying and organizing, so labeling is inevitable. But our method of organizing can prevent us from making alternative observations which may be as significant, if not more so.[28] Consequently, it is critical that even as we categorize, we acknowledge our own limited perspective, and then seek to expand it.[29]

I do not mean to suggest that Conley and O'Barr have developed an inaccurate classification scheme that does not describe the discourses they heard. Indeed, as someone who has represented many disempowered clients, and observed proceedings in landlord-tenant, small claims, and domestic relations courts, I find their observations about different narrative styles credible.

Nonetheless, in an effort to critique these observations, several issues could have been explored further: Why are rules dominant?[30] Does mere familiarity with the legal system promote "rules" talk?

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25. The authors explain that they have not quantified their data because most litigants use both orientations. P. xiii and app. I.

26. *See supra* text following note 16.

27. Notwithstanding the authors' awareness of the problems with categorization, p. xii, the focus of their book is descriptive labeling. Indeed, in their chapter on the jurisprudence of judges, they develop a five-category scheme based on observation of only fourteen judges. P. 82.

28. John P. Esser, *Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know*, 66 DENV. U. L. REV. 499, 501 (1989).

29. *See* Bartlett, *supra* note 9, at 882.

30. *See* Sarat & Felstiner, *supra* note 20, at 1671-76 (arguing that although lawyers refer to rules — without ensuring that their clients understand them — lawyers disparage the efficacy of rules while promoting the efficacy of their personal relationships within the legal system).

What social stereotypes do we support when we label a dominant style as rule-oriented, and a subordinate style as relational? Why does a concern for "social" rules, rather than "legal" rules, mean that the litigant has a relational orientation?[31]

A more radical approach would question Conley and O'Barr's very methodology of study and categorization. They structured and interpreted the accounts of the litigants; instead, they could have printed full transcripts of selected disputes, explored the disputants' interpretations, the judge's interpretation, and the authors' analysis.[32] This method would make more explicit the politics of interpretation. In the future, "law as practice" scholars could print transcripts of all stages of representation, from initial client interviews through trial transcripts and post-trial debriefing. Such an approach would contrast how litigants perceive problems with how lawyers shape stories.

All of this would help us to understand the significance of Conley and O'Barr's findings that there are two types of speech, and that one is dominant.[33] Conley and O'Barr interpret the meaning of different litigation styles rather than asking the litigants themselves to explain their meaning.[34] The terms, then, use a single attribute of each approach to describe the entire style, thereby forfeiting most hope of capturing the complexities in a litigant's individual approach.[35] It is important to focus on the many different thoughts underlying the way a litigant structures her case to the court, and on the value of these alternative structures.

III. BEYOND DEFINITION: POWER ISSUES ACROSS CATEGORIES

The recognition and validation of alternative voices that challenge

31. Sallyanne Payton has described a contrasting view of the legal system in which lawyers argue, and judges decide, cases not just through legal rational thinking but also through the use of context and community. Sallyanne Payton, *Releasing Excellence: Erasing Gender Zoning From The Legal Mind,* 18 IND. L. REV. 629 (1985). *See* Judith Leonie Miller, *Making Change: Women and Ethics in the Practice of Law,* 2 YALE J.L. & FEMINISM 453, 463-64 (1990). Miller shows how the actions of Sophocles' Antigone can be interpreted both under a rights and a care orientation.

32. As an example of some aspects of this approach, see Cunningham, *supra* note 21; Patricia Brown & Jay Feinman, *Economic Loss, Commercial Practices, and Legal Process:* Spring Motors Distributors, Inc. v. Ford Motor Co., 22 RUTGERS L.J. 301 (1991).

33. *See* Jana Sawicki, *Foucault and Feminism: Toward a Politics of Difference, in* FEMINIST INTERPRETATIONS AND POLITICAL THEORY 217, 228 (Mary Lyndon Shanley & Carole Pateman eds., 1991) ("Rather than generalize on the basis of the stereotypes [of sexual practice] provided by 'dominant culture,' feminists must explore the meaning of the diversity of sexual practices to those who practice them . . . .").

34. *See* Cunningham, *supra* note 21, manuscript at 84 (making similar observation with respect to Conley and O'Barr); *see also* Judith Stacey, *Can There Be a Feminist Ethnography?,* 11 WOMEN'S STUD. INTL. F. 21 (1988) (exploring possibility of collaboration between ethnographer and studied subject).

35. See Kathryn Abrams, *Ideology and Women's Choices,* 24 GA. L. REV. 761 (1990), and Frances Olsen, *Feminist Theory in Grand Style,* 89 COLUM. L. REV. 1147 (1989) (book review) about the dangers and benefits of simplification through grand theories.

existing perspectives are two tasks critical to many feminists and theorists of practice.[36] Conley and O'Barr have taken the first step by identifying relational and rule-oriented voices in the legal system, but this book does not go on to explore the intrinsic values of these (or other) voices. In an earlier work, Conley and O'Barr found that different styles of speaking influenced outcomes of cases. They identified a speech that characterized powerless speakers, in which the speakers "[use] words and expressions that convey a lack of forcefulness in speaking," and they contrasted this with a more powerful style of testimony, characterized by absence of those expressions found in the speech of the powerless.[37] Similarly, in this book, they ascribe the different forms of talk to the relatively powerful and powerless, and to those with more or less exposure to the legal system.[38] They do not say that all women, or all minorities, or all working-class people use powerless speech; they recognize the complex interaction of class, race, and sex in determining the style of the speaker.

But once these forms of speech are uncovered, we want to know the values of the different styles. Why is rules talk dominant, and why is relational talk subordinate? Why do most white male judges use rules talk? Is it only because they are white men, or is it because they are judges? Should the legal system respect both types of talking? What are the values of each type? Do people choose relational or rules talk, or is the style predetermined by external factors? Is one more suited to particular types of disputes than the other?

By focusing just on litigants' and judges' talk, it is easy to miss the underlying issues of power and politics. Power issues in the legal system affect lawyer-client interaction as well as a litigant's interaction with the opposing party, the judge, and the court clerks,[39] while the politics of interpretation affect whether and how these power issues are

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36. *But see James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law — A Conversation,* 34 BUFFALO L. REV. 11, 73-75 (1985) (conversation between Carol Gilligan and Catharine A. MacKinnon); Joan C. Williams, *Deconstructing Gender,* 87 MICH. L. REV. 797, 805-06 (1989) (discussing "the new epistemology's views of truths as necessarily partial and contextual," but not as feminist or feminine).

37. John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom,* 1978 DUKE L.J. 1375, 1380-81. Among other features, powerless speakers used "*hedges* (prefatory remarks such as 'I think' and 'It seems like'; appended remarks like 'you know'; and modifiers such as 'kinda' and 'sort of'); *hesitation forms* . . . and *question intonation.*" *Id.* at 1380. Others have, of course, studied different forms of speech. For a summary, see Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process,* HOFSTRA L. REV. (forthcoming 1992) (manuscript at notes 155-60, on file with author).

38. Their conclusions, based on the actual study of litigant discourse, parallel those of Marc Galanter, who hypothesized that the "repeat players" in the legal system are more likely to succeed. Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change,* 9 LAW & SOCY. REV. 95 (1974).

39. For court clerks, see Barbara Yngvesson, *Making Law at the Doorway: The Clerk, the Court, and the Construction of Community in a New England Town,* 22 LAW. & SOCY. REV. 409, 444-46 (1988).

seen.[40] Surely, all relational litigants are not powerless unless they find a relational judge. Without a focus on power, it is hard to think of litigants as actors — instead, they are passive recipients of judges' rulings, caught within their own linguistic approach.

While anthropological analysis of domination by and resistance to the legal system is just beginning,[41] it does appear that litigants may have some limited power within the law. Austin Sarat interviewed legal services clients and found that welfare recipients are "able, when the need arises, to respond strategically, to maneuver and to resist the 'they say(s)' and 'supposed to(s)' of the welfare bureaucracy. Resistance exists side-by-side with power and domination."[42] Sarat describes how one client appealed to "human decency" rather than using a more formal parlance of rights in order to restore her terminated food stamps.[43] Her invocation of the common humanity between herself and the welfare bureaucracy could be termed a relational approach. The approach succeeded, and her food stamps were restored. Even though she did not use the dominant discourse, and, in fact, resisted doing so, she attained a minimal amount of power. Similarly, there are other stories of resistance to the legal system which show the agency of litigants.[44]

Litigants who use a relational style appear to do so because they conceive of their problems in relational terms; but, by going to court, they avail themselves of a rule-oriented forum, taking risks within a system that may be alien to them. They define their problems as legal and, even within their relational orientation, they want help from the law.[45] The language they use can be seen as a critique of the dominant rule orientation because it clearly shows what is excluded by that orientation, and what is important to people who use the legal system. Left out, of course, are the relationships underlying a dispute that may have brought the problem to court. A relational orientation shows that the supposed neutrality of rules and judges is a studied ignorance of facts that are defined (either by the individual judge or by the particular evidentiary or substantive rule) as irrelevant, even though they

40. *See supra* note 5 and accompanying text; *see also* MERRY, *supra* note 6, at 133.

41. Sally Engle Merry, *The Culture of Judging*, 90 COLUM. L. REV. 2311, 2321 n.18 (1990) (book review).

42. Sarat, *supra* note 6, at 346.

43. *Id.* at 369-72.

44. *See* Austin & Dietrich, *supra* note 23, at 352 ("Those whose lives are circumscribed by racism, ethnocentricity, and sexism develop mechanisms by which they defend and maintain their pride in a range of hostile situations . . . ."). *See also* Alfieri, *supra* note 2; White, *supra* note 2.

45. *See* Christine B. Harrington & Barbara Yngvesson, *Interpretive Sociolegal Research*, 15 LAW & SOC. INQUIRY 135, 142 (1990) (observing that the relationship between court clerks who screen criminal complaints and people bringing complaints creates "the dependence of citizens on the court . . . (and [on] the status of the clerk . . .), even as it empowers citizens as agents who 'choose,' and empowers the clerk as an official who maintains the boundaries of law").

may be highly relevant to an effective resolution of the dispute from the plaintiff's perspective.[46]

The choice as to which facts are relevant is highly subjective, notwithstanding seemingly neutral evidentiary rules.[47] For example, a judge's knowledge of the underlying relationship between the parties in a custody dispute may lead her to order the parents to cooperate with one another in caring for the child, or it may lead her to order no contact between the parents.[48] If, notwithstanding the domestic violence, the court orders joint custody and requires the parents to cooperate, then the parents may be before the court again — soon.[49] The law actually regulates many aspects of daily life and, in order to take their responsibility seriously, judges need to hear about and understand these other aspects.[50]

Conley and O'Barr address only briefly how a relational orientation articulates significant values and can serve as an effective critique of the dominant orientation. One suggestion has already been discussed: a relational view emphasizes aspects of stories that are too often omitted from formal court proceedings and, consequently, from judicial decisionmaking, because they are deemed "irrelevant."

In addition, a fuller incorporation of relational concerns into the courts might lead litigants to feel empowered after their hearings. When they believe that their full stories have not been treated with dignity and respect, even successful litigants feel dissatisfied with having gone to court.[51] Small-claims litigants may desire both procedural and substantive justice; a focus only on the substantive outcome not only overlooks the importance of process, but it also distorts the relationship between process and substance. Litigants need to tell those parts of their stories that are significant to them, and they need to feel respected for having done so.[52]

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46. *See* Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges,* 61 S. CAL. L. REV. 1877 (1988) (questioning both the myth of judicial neutrality and whether judicial neutrality is desirable).

47. *See* Kit Kinports, *Evidence Engendered,* 1991 U. ILL. L. REV. 413.

48. In domestic violence cases, it is rarely appropriate to order continuing contact between the parties in order to facilitate visitation. *See* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions,* 44 VAND. L. REV. 1041 (1991).

49. *See id.*

50. *See* Resnik, *supra* note 46; Patricia M. Wald, *Disembodied Voices — An Appellate Judge's Response,* 66 TEXAS L. REV. 623 (1988). Professor Barbara Bezdek shows how judges seemingly initiate, and then discourage, tenants' relational accounts. Bezdek, *supra* note 37, at 46-51.

51. *See* Lucie E. White, Goldberg v. Kelly *on the Paradox of Lawyering for the Poor,* 56 BROOK. L. REV. 861, 874-75 (1990) (discussing demands of welfare clients for dignity).

52. *See* Alfieri, *supra* note 2, at 2119; White, *supra* note 2, at 50. *See also* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988). Extensive litigant interviews by Lind and Tyler confirm earlier findings that perceived procedural fairness, in the sense of "process-control" by the litigant, and *not* a personally favorable outcome, is the major determinant of the litigant's attitude toward the legal system. *But see* Paul G. Chevigny, *Fairness and Participation,* 64 N.Y.U. L. REV. 1211, 1218 (1989) (reviewing LIND & TYLER, *supra*) (criti-

Finally, by their focus on process issues, Conley and O'Barr appear to suggest that fair processes can produce fair results: if only the legal system responded to relational litigants, then this would help them achieve the outcomes they sought. However, fair and more inclusive processes will not solve the underlying political problems of powerlessness.[53] A legal process approach overlooks fundamental moral and political concerns.[54] In addition to an opportunity to be heard, a litigant needs rights that will be enforced by the legal system.[55] To understand why subordinated peoples are more likely to use relational language, we need to know more about the influence of race, class, and gender on law consciousness.

CONCLUSION

By listening to the litigants themselves, the authors have been able to provide a valuable look at the discourses of the law. This book shows who courts actually listen to, why these parties win, what happens to the stories of litigants, and how courts can inflict violence on litigants. While the litigants studied here are unrepresented, their voices have implications for the attorney-client relationship. Lawyers need to listen to the stories that their clients tell[56] and respect their narrative structures. If we do so, then this book and the literature it represents may help us resolve some of the violence that litigation imposes.

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cizing Lind and Tyler's adoption of the traditional dichotomy between "fairness" of process and "accuracy," in the sense of "objective" truth, of outcome, thus ignoring litigants' perception "that the power to answer, to put the facts and the values as they understand them, affects the accuracy of the outcome").

53. *See* William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 747 (1991).

54. The move to mediation shows some of the dangers of focusing solely on process. *See* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984).

55. On the importance of rights, see WILLIAMS, *supra* note 1; Matsuda, *supra* note 23. *See also* Bezdek, *supra* note 37, manuscript at 62-66 (arguing that landlord-tenant "hearings" silence tenants and prevent them from asserting their rights).

56. *See* Daniel Goleman, *All Too Often, the Doctor Isn't Listening, Studies Show*, N.Y. TIMES, Nov. 13, 1991, at C1 (doctors who listen to their patients are more satisfied with their work; their patients are less likely to sue them for malpractice).