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# TEACHING LAWYERS THE LANGUAGE OF LAW: LEGAL AND ANTHROPOLOGICAL TRANSLATIONS\*

ELIZABETH MERTZ\*\*

*Generally insensitive to context, legal analysis as it is reflected in judicial opinions can leave out much that seems relevant to an assessment of whether justice has been done. I cannot count the number of times that I have come to the end of an opinion and been perplexed and dismayed because some essential fact or element seemed to be missing. The opinion could not possibly contain the whole story. There had to be something else about the particular circumstances or the larger setting, which frames it that would have made the parties' actions explicable or the courts' rulings more intelligible.<sup>1</sup>*

## INTRODUCTION

The intriguing focus of this symposium<sup>2</sup> is the challenge posed to legal educators by the “diverse social, anthropological, political, philosophical, and analytical forces” that confront them everyday. These forces emanate not only from the “law itself,” but also from the students and professors engaged in the dynamic process of socialization into the legal profession. The symposium title emphasizes that we are examining these forces through the lens of language, and we are asking how the languages of race, feminism, philosophy, and anthropology translate in the legal skills classroom. I am honored and pleased to have been asked to write about the discipline of anthropology, the social science field that is my own “home base.” As someone trained in both anthropology

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\*\* Senior Research Fellow, American Bar Foundation; Associate Professor, University of Wisconsin Law School. I wish to express my thanks to the American Bar Foundation and the Spencer Foundation for funding this project, to Nancy Matthews and Susan Gooding, my project managers, to Wamucii Njogu, who oversaw the final quantitative work, and to the very talented team of researchers who assisted in data collection and analysis.

1. Regina Austin, *Contextual Analysis, Race Discrimination, and Fast Food*, Paper presented at The John Marshall Law School November 4, 1999 (on file with author).

2. This article is part of The John Marshall Law School's symposium entitled: “The Languages of Race, Feminism, Philosophy, and Anthropology: Translating for Legal Skills Classroom.”

and law, I continually confront the dilemma of translating between two radically different fields. In this paper, I hope to share with you some of the discomfort as well as the excitement of performing this difficult task.

I begin with a translation of law and legal training into the discourse of anthropology. For a number of years, I have been conducting a study of the language of legal education using the methods and analytic tools of linguistic anthropology. The first section of this paper reports some of the results of that study. Overall, the analysis reveals that the legal language taught in first-year classrooms in the United States carries with it an intrinsically decontextualized approach to morality. This approach wrests lawyers from the contextualized forms of normative judgment commonly found among laypeople. I will discuss both the putative benefits and troubling detriments that follow from this approach to ethical and moral judgment. In a sense, this study provides the backdrop for Regina Austin's analysis, in this symposium, of the decontextual character of legal reasoning.<sup>3</sup> This article examines the processes law schools employ to habituate students to this decontextualized form of legal reasoning, reporting on how initiates to the profession—the law students themselves—learn to approach problems this way.

The final section of this paper asks whether the language taught to lawyers is actually capable of translating the kinds of insights generated by a discipline such as anthropology. On the one hand, my conclusion can be read as somewhat pessimistic. Given the profound discursive and epistemological differences between the two fields, any effort to translate one into the other must proceed with both caution and modesty. On the other hand, it is precisely by integrating perspectives such as those offered by anthropology that the U.S. legal language—as well as the legal system it encodes, and the educational institutions that teach it—might respond to some of the most pressing challenges facing them today.

#### I. TEACHING LEGAL LANGUAGE: A PERSISTENT PUZZLE IN ANTHROPOLOGICAL PERSPECTIVE

Previous research on law school education has drawn upon a number of different disciplines and approaches. Issues addressed in these studies range from the effects of legal education on students' psychological health, or on their commitment to public interest work, through historical questions about the evolution of legal training in the United States.<sup>4</sup> A number of studies have

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3. See generally Austin, *supra* note 1.

4. See generally ROBERT BOCKING STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983); ROBERT V.

focused on a distinctive style of pedagogy associated with doctrinal teaching in U.S. law schools. From a number of different vantages, legal scholars and social scientists often remark on a persistent puzzle: the Socratic method and associated approaches to teaching law found in many first-year doctrinal classes do not seem to make sense. These techniques do not appear to convey legal constructs any more effectively than would other methods such as lecturing. Moreover, the Socratic method has been the subject of a great deal of criticism and has been connected to elevated student stress. Additionally, it fails to adequately prepare attorneys for practice. How, then, has doctrinal teaching—particularly doctrinal teaching using a Socratic approach—continued in use for so long?

The study reported in this article examines legal education from a novel standpoint, drawing on the methods and theory of anthropological linguistics.<sup>5</sup> Anthropological studies of language begin with the premise that it is crucial to actually observe people's use of language in context, rather than to rely on their reports of how they speak. The accuracy of a speaker's perceptions regarding his or her own speech can vary widely, and even when they are correct as to general patterns, such perceptions cannot achieve the level of detail required by anthropological linguists. In order to obtain detailed data on language patterns in first-year classrooms, we taped the entire first semester of Contracts classes in eight different law schools. The schools varied across the prestige hierarchy used to provide school rankings (despite the many criticisms of such rankings). Although there were many interesting differences among the classrooms, this research uncovered a shared underlying "message" imparted to law students in all the schools and classrooms examined in the study.

As I will explain, careful examination of this message or worldview helps to explain the puzzle of the "Socratic method" of legal education. The distinctive epistemology that underlies legal language, as it is taught in doctrinal classrooms, fits very well with overall goals and features of the legal system in the United States. Thus, there is a symbolic "fit" that connects teaching method, legal language, the legal system, and that system's

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STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL (1989); Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392 (1971). For a general review of scholarship on legal education, see OLAVI MARU, RESEARCH ON THE LEGAL PROFESSION: A REVIEW OF WORK DONE (1985).

5. Susan Philips pioneered work in this area. Her article, "The Language Socialization of Lawyers: Acquiring the 'Cant,'" was the first examination of legal education using linguistic anthropological techniques. Susan Philips, *The Language Socialization of Lawyers: Acquiring the 'Cant,'* in DOING THE ETHNOGRAPHY OF SCHOOLING: EDUCATIONAL ANTHROPOLOGY IN ACTION 176 (George Dearborn Spindler ed., 1982).

underlying worldview.<sup>6</sup> This symbolic connection makes sense of the persistence of certain Socratic aspects of legal teaching, despite ongoing complaints about efficacy, fairness to students of differing backgrounds, and negative impacts on students. The cultural logic entailed by the fundamental worldview taught to law students alters incipient lawyers' orientations concerning human conflict, authority, and morality. A crucial aspect of this changed orientation involves training students to read texts with a new focus, so that they learn to interpret stories of conflict in legal terms. When viewed through this lens, traditional legal pedagogy symbolically mirrors and reinforces an epistemology that is vital to the legal system's legitimacy.

We begin with a brief review of the "puzzle" surrounding the entrenchment of traditional pedagogy in doctrinal classes. I will then summarize the findings of the research, first focusing on features that are found across all of the first-year classrooms in the study. Then I will address the differences among these classrooms in their structures of participation and verbal interaction. Building from these findings, this section will conclude by explaining, in detail, the symbolic fit between pedagogy and legal worldview.

#### A. *The "Puzzle" of First-Year Doctrinal Teaching*

The genealogy of the Socratic method in United States legal education reaches back to the nineteenth century, when Christopher Columbus Langdell brought this distinctive style to the Harvard Law School. Although the intellectual underpinnings of Langdell's approach have long since lost their credibility among legal academics, many aspects of the pedagogy that he developed from those conceptual foundations continued to survive for over a century. Critics of the Socratic method and other traditional methods of teaching law vigorously debate the merits of this tradition.<sup>7</sup> These scholars charge that students either do not

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6. As I explain elsewhere, this legal worldview also helps in understanding a number of other findings from the social science literature on legal education. For example, once certain aspects of this legal epistemology are understood, we can more easily comprehend the kind of complex findings that are now emerging regarding the impact of gender and race on legal training. These findings indicate that the impact of law school on students is contextually dependent and variable. Furthermore, the often remarked negative effect of legal education on the public interest ambitions of law students is in fact predictable from the cultural logic underlying this legal pedagogy. See generally Elizabeth Mertz, *Legal Education*, in *LAW'S DISCIPLINARY ENCOUNTERS* (Bryant Garth et al. eds., 2001) (manuscript in preparation, on file with the author).

7. For a discussion and critique of the Socratic method in the legal classroom, see generally DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983);

absorb moral values or that they absorb largely deleterious values; skeptics have further asserted that this kind of teaching does not even successfully convey legal doctrine, and that students exit law school without adequate preparation for the practice of law.<sup>8</sup> While this last criticism did not end the use of Socratic training, it contributed to a partially successful movement for clinical education in law schools.<sup>9</sup> Some scholars express concern that, historically, as the Socratic method became more popular, legal pedagogy and the legal profession moved further away from a model of lawyers as moral decision-makers. These writers observe that embracing Landell's scientism entailed an abandonment of moral considerations, and a concomitant shift toward an image of law as a field of technical expertise.<sup>10</sup> Moreover, critical legal theorists interpret this emphasis on technical expertise as actually embodying a new morality, one that favors the privileged in society.<sup>11</sup> In addition, multiple studies find that law students tend to lose their desire to pursue altruistic or public interest career goals as they move further into their legal education.<sup>12</sup> Social scientists also criticize the Socratic method from psychological and other perspectives, uncovering its negative effects on self-esteem and interpersonal relationships.<sup>13</sup>

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Robert Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223 (1981); William C. Heffernan, *Not Socrates, but Protagoras: The Sophistic Basis of Legal Education*, 29 BUFF. L. REV. 399 (1980); Jacob Landman, *Anent the Case Method of Studying Law*, 4 N.Y.U. L. REV. 139 (1927); John W. Wade, *Some Observations on the Present State of Law Teaching and the Student Response*, 35 MERCER L. REV. 753 (1984).

8. See, e.g., David Bryden, *What Do Law Students Learn? A Pilot Study*, 34 J. LEGAL EDUC. 479 (1984); Landman, *supra* note 7; Karl Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211 (1948); Edwin Patterson, *The Case Method in American Legal Education*, 4 J. LEGAL EDUC. 1 (1951); James B. White, *Doctrine in a Vacuum*, 35 J. LEGAL EDUC. 155 (1986).

9. See, e.g., A.S. Cutler, *Inadequate Law School Training: A Plan To Give Students Actual Practice*, 37 A.B.A. J. 203 (1951); Leon Thomas David, *The Clinical Lawyer-School: The Clinic*, 82 U. PA. L. REV. 1 (1934); Edward Devitt, *Why Don't Law Schools Teach Law Students How To Try Lawsuits?* 29 CLEV. ST. L. REV. 631 (1980); William Vukowich, *The Lack of Practical Training in Law Schools*, 23 CASE W. RES. L. REV. 140 (1971).

10. WILLIAM R. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES*, at xvii (1978); FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 204-06 (1981).

11. See KENNEDY, *supra* note 7, at 17-20. See also Thomas Shaffer, *Moral Implications and Effects of Legal Education*, 34 J. LEGAL EDUC. 190 (1984).

12. See generally STOVER, *supra* note 4; Howard S. Erlanger et al., *Law Student Idealism and Job Choice: Some New Data on an Old Question*, 30 LAW & SOC. REV. 9 (1966); Howard S. Erlanger & Douglas A. Klegon, *Socialization Effects of Professional School: The Law School Experience and Students' Orientation to School Reform*, 13 LAW & SOC. REV. 11 (1978).

13. See Stone, *supra* note 4, at 412-28 (discussing the psychological effects

Supporters of the Socratic method, on the other hand, assert that the method mirrors the style of reasoning used by lawyers. Additionally, they argue that it is an efficient system for teaching large classrooms and that it stimulates active student involvement. Supporters also maintain that the Socratic method does not dominate and manipulate any more than do methods used in clinical teaching. Additionally, they maintain that it conveys, at once, the guiding principles and indeterminacy of the law in a way that lectures could not.<sup>14</sup> In this paper, I will demonstrate a different form of congruence between the canonical Socratic method and legal thinking. This is not an argument that the Socratic method has greater efficacy, certainly, given the results of this and other studies, but is rather an argument for a stronger symbolic resonance or "fit."<sup>15</sup>

Social scientists have also studied variations in the teaching methods employed across different law schools as well as differences in the skills imparted by particular methods. Several studies found that differences between law schools correlated with the school's prestige ranking—elite schools being less likely to emphasize rigid rules and more likely to emphasize analytical thinking and theory.<sup>16</sup> Garth, Martin and Landon asked urban and rural attorneys to identify the skills taught by law schools that were the most useful in legal practice.<sup>17</sup> Practitioners agreed

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of legal education). Mitchell, taking a different approach, draws upon cognitive and developmental theories of expert and novice thinking to develop a list of suggested improvements upon the traditional teaching methodology. John Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEGAL ED. 275 (1989).

14. See generally ALBER HARNO, LEGAL EDUCATION IN THE UNITED STATES (1953); Conclin, *supra* note 7; Heffernan, *supra* note 7; Thomas Konop, *The Case System—A Defense*, 6 NOTRE DAME L. REV. 275 (1931); Pierre Louiseaux, *The Newcomer and the Case Method*, 7 J. LEGAL EDUC. 244 (1954); Edmund Morgan, *The Case Method*, 4 J. LEGAL EDUC. 379 (1952); Wade, *supra* note 7.

15. Studies of teaching methods have often produced negative results; there is little, if any, relation found between the method used and the results. Thus, controlled experiments in which first-year classes were divided into separate groups, some taught Socratically and others not, resulted in generally similar performances. When Bryden attempted to test the difference between first and third-year abilities to perform functional analysis applying concepts to facts, to distinguish holdings from dicta, and to construe ambiguous statutes, he found less difference than would be expected, given that third-year students had had a number of years of training under the Socratic method. Bryden, *supra* note 8.

16. See ALFRED SMITH, COGNITIVE STYLES IN LAW SCHOOL (1979) (discussing the willingness of a law school to adhere to rigid teaching styles); ZEMANS & ROSENBLUM, *supra* note 10, at 57.

17. See generally Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 472 (1993) [hereinafter *Construction of Competence*] (drawing on surveys they conducted in Chicago and Donald Landon conducted in Missouri); also Joanne Martin & Bryant G.

that legal reasoning is the skill most important to practicing lawyers that law schools address relatively well: “[t]here are some relative successes in teaching the specifically legal skills of legal reasoning, legal research, substantive law, and now also professional responsibility.”<sup>18</sup> Similarly, lawyers in a number of studies overwhelmingly agreed that “ability to think like a lawyer” was the most important knowledge imparted by law schools.<sup>19</sup> This knowledge would include specific skills such as “fact gathering,” the “capacity to marshal facts and order them so that concepts can be applied,” and the “ability to understand and interpret opinions, regulations, and statutes.”<sup>20</sup> There is still a puzzle as to why the Socratic method of teaching, as opposed to any other approach, should be so important in conveying these skills.

This study analyzes the Socratic method as an oral genre or speech style, using the methods of sociolinguistics and anthropological linguistics. Sociolinguists have developed a considerable literature on the social ramifications of different discourse styles or genres as well as on the role of language in classrooms. In what follows, I will build from this literature and my own initial excavations of law school teaching to provide a detailed analysis of the language of the law school classroom.<sup>21</sup> In addition, I will examine the issue of social inclusion and exclusion, specifically focusing on race, gender, and status.<sup>22</sup>

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Garth, *Clinical Education as a Bridge Between Law School and Practice: Mitigating the Misery*, 1 CLINICAL L. REV. 443 (1994).

18. Garth & Martin, *Construction of Competence*, *supra* note 17, at 508.

19. E.G. Gee & Donald Jackson, *Current Studies of Legal Education: Findings and Recommendations*, 32 J. LEGAL ED. 471, 481 (1982) (summarizing several studies).

20. ZEMANS & ROSENBLUM, *supra* note 10, at 136. Zemans and Rosenblum found that lawyers viewed general and practical skills as most essential in practice; these were the very skills that they felt were most lacking in their law school education. *Id.*

21. No study to date has used tape and transcript analysis of law school classes along the lines of sociolinguistic studies of other classroom settings. However, there has been some close attention to law school training. Although Stone's study does not use direct transcripts of classroom speech, he employs a psychoanalytic framework to analyze observed interactions. *See, e.g.*, Stone, *supra* note 4. Shaffer and Redmount use transcript material to illustrate their finding of “erosion” in the traditional Socratic style and to demonstrate the advantages of more “low-pressure” teaching styles. Shaffer, *supra* note 11, at 169-89. Stover and Philips use material from their own experience as social scientists going to law school. *See, e.g.*, STOVER, *supra* note 4; Philips, *supra* note 5. Granfield uses some direct quotation of classroom exchanges to illustrate aspects of law school training. *See, e.g.*, ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* (1992).

22. Studies have tracked the ways in which law schools recruit students, student adjustment during law school, and their paths after leaving law



*B. In the Law School Classroom: Learning a New Language for Telling "Conflict Stories"*

As noted earlier, my research on legal education involved taping first semester Contracts classes in eight different law schools. The law schools ranged from those generally recognized as among the elite to those denominated "regional" and "local" by scholars studying legal education. Observers ("in-class coders") in each classroom also tracked the speakers, noting the gender and race of each speaker as well as aspects of the "turn-taking" (for example, did the speaker volunteer or did the professor call on the speaker). The tapes were subsequently transcribed, and transcript coders encoded features of each turn, including length of

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school. In many cases, these studies demonstrate that this channeling process tends to exclude students from working class backgrounds as well as those from other traditionally marginalized social groups. There has also been a growing debate in recent years over possible differential impacts of law teaching on students who were traditionally excluded from this elite domain, particularly students of color, working-class students, and women. See Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 46, n. 117 (1994) (discussing the impact of legal education on women); Suzanne Homer & Lois Schwartz, *Admitted but not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKLEY WOMEN'S L.J. 1, 30 n.101, 51 (1990) (same). Most of the studies to date focus on the problems of women in law school settings, with some suggesting a relatively "chilly climate" in law classes for female students—a climate that some have suggested may impact their performance. Recent work by Sander and Knaplund demonstrates that even where the Socratic method does not impact their performance, women have differentially negative responses to their experience in law school. This is a finding supported by other studies as well. Sander and Knaplund also found that women had more interest in altruistic and public interest work, a factor that seems to correlate with increased dissatisfaction during law school. See RICHARD H. SANDER AND KRISTINE S. KNAPLUND, PRELIMINARY REPORT ON NATIONAL STUDY OF STUDENT PERFORMANCE IN THE FIRST YEAR OF LAW SCHOOL (1999); see generally Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157 (1995) (analyzing the participation in and satisfaction with support services at law schools by different groups separated by factors including grades). In his fine-grained analysis of women students' reactions to Harvard Law School, Robert Granfield similarly found that women who entered legal training with "social justice" goals were more likely to find law school alienating than were women with "individualistic" goals. GRANFIELD, *supra* note 21, at 97. There have been far fewer studies focusing on race or class than on gender in law school education, but the available information indicates, if anything, more disparities in class participation, and in overall feelings of inclusion and satisfaction, among students of color. Taunya Lovell Banks, *Gender Bias in the Classroom*, 14 S. ILL. U. L.J. 527, 535-36 (1990). See also Homer & Schwartz, *supra*, at 50-54; LINDA F. WIGHTMAN, WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL EXPERIENCES OF WOMAN AND MEN: PERFORMANCE AND LAW SCHOOL (1996). A number of recent articles have asked whether particular teaching methods are responsible for any differential performance or satisfaction among diverse groups of students.

the turn, who spoke, and whether the turn was part of extended or short dialogue, etc. In addition, both the in-class coders and transcript coders noted qualitative aspects of the interactions.

As a result of access to both qualitative and quantitative findings, this study combines an analysis of the underlying message or worldview imparted to law students with an examination of the patterns of classroom interaction between the professors and students. Despite strong differences in the teaching and participation patterns among the classes, the study finds a similar underlying decontextualized orientation to human conflict, authority, morality, and text across all of the classrooms.<sup>23</sup> We can trace this approach by examining the way in which legal pedagogy deconstructs and analyzes the underlying “conflict stories” (the factual accounts of the underlying conflicts that led to legal intervention) of each case. Although the linguistic structure of Socratic teaching provides a particularly strong mirroring of this orientation, even classrooms that did not employ the Socratic method imparted the same decontextualized orientation to students. Thus, all of these varying methods of legal instruction manage to impart a shared cultural worldview throughout the notably different classroom environments.

At the core of this legal epistemology is a distinctive orientation toward human social conflict and related notions of authority and morality.<sup>24</sup> Interestingly, achieving this orientation involves the creation of a new relationship with language and text. As law professors teach students to read and discuss legal texts, the students learn to ask new questions and to focus on different aspects of language than they had previously. Indeed, legal education pushes students to direct their attention toward textual and legal authority, casting aside issues of “right” and “wrong,” of emotion and empathy—the very feelings most likely to draw the hearts of lay readers as they encounter tales of human conflict. Instead, legal educators rigorously urge law students, as initiates into the legal system, to put aside such considerations—not to stifle them entirely, but push them to the margins of the discourse.

This process of reorientation has parallels in other kinds of initiations. Anthropologists studying initiation rituals describe a process whereby previous orientations and values are broken

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23. I use “decontextulized” here as a shorthand reference to the bracketing of social context in this approach. Of course, in another sense, the approach taught to law students is not decontextualized at all because it is providing a new, legally focused context for human conflict.

24. This approach is in the tradition of scholars such as Bourdieu and Passeron, who view schooling as embodying and conveying social structure. See generally PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, *REPRODUCTION IN EDUCATION, SOCIETY, AND CULTURE* (1977).

down, as identity is reformulated.<sup>25</sup> A sociological study of medical school education in the United States suggests that the gross anatomy lab experience during the first year of medical training performs just such a function.<sup>26</sup> As medical students dissect human cadavers in the lab, joking behaviors and other casual approaches to the task violate normal cultural taboos about death and the body. Such detached behavior reorients students so that they can adopt "the clinical attitude." As the days pass, these new markedly different and prosaic approaches to the body being dissected rupture students' earlier more reverential attitudes. This is a crucial part of the students' initiation into their new professional identities.

My study presents data suggesting that first-year law school teaching performs a similar function. However, instead of breaking down attitudes toward the body and death, law professors rupture linguistic norms. Law teaching challenges students' previous attitudes toward speech, reading, and texts—at the same time as it imparts a new approach to conflict, morality, authority, and language. Just as the bodies in the laboratory are the vehicles through which "the clinical attitude" is imparted to medical students, the stories of conflict contained in legal texts and language become vehicles through which the legal "initiates" learn to "think like lawyers." The most canonical form of legal instruction, the "Socratic method," has a linguistic structure that precisely mirrors this reorientation.<sup>27</sup> I would therefore argue that although the Socratic method, as a medium of teaching, may be no more (or even less) effective than others, this approach to legal pedagogy may continue to linger because of a symbolic "fit" between the form and function of language. We begin with an examination of the reorientation toward text, authority, and morality that lies at the heart of first-year legal education. Then, we consider related concepts of the person, human conflict, and social context that are implicated in this linguistic re-ordering.

### *1. New Sources of Authority: Reconfiguring the Semantics and Pragmatics of Text*

In all the classrooms of this study, law students learn to refocus on new aspects of the legal texts with which they work during their first-year classes. Educational research demonstrates

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25. VICTOR TURNER, *DRAMAS, FIELDS AND METAPHORS* (1974); ARNOLD VAN GENNEP, *THE RITES OF PASSAGE* (1960).

26. Peter Finkelstein, *Studies in the Anatomy Laboratory: A Portrait of Individual and Collective Defense*, in *INSIDE DOCTORING* (Coombs et al. eds., 1986).

27. See generally Elizabeth Mertz, *Recontextualization as Socialization: Text and Pragmatics in the Law School Classroom*, in *NATURAL HISTORIES OF DISCOURSE* (Michael Silverstein & Greg Urban eds., 1996).

that during initial educational experiences, teachers encourage the more “able” and elite students, for the most part, to read texts with a focus on content or “semantics.”<sup>28</sup> Scholars call this fundamental approach to text “referentialist” ideology, because it privileges referential or semantic content as the “autonomous (fixed, transparent, universally available)” meaning understood as being inherent in the text.<sup>29</sup>

The primary focus in law school pedagogy, by contrast, is on the “pragmatic” or contextual structure of legal texts. More specifically, doctrinal teachers in law school classrooms train their students to notice those aspects of pragmatic structuring that relate most to authority. Instead of putting priority on the content of the factual “conflict stories” told in legal texts, law professors urge their students to analyze how the texts point to (or “index”) authority. This focus shifts the students’ orientation towards several major sources of authority: (1) the relationship between this text and the language of other texts that provides precedent and authoritative guidance (and correlative issues concerning the authority of the courts, legislatures, or framers who authored those texts); (2) the procedural history of the case, which determines the questions a court can address, the types of standards that are applicable to those questions, and the court’s jurisdiction or power to consider the case at all; and (3) the related strategic questions involving framing legal arguments within this authoritative backdrop. When first confronted with stories of conflict between parties, students often begin by concentrating on the drama of the conflict itself. For example, when asked to “start developing for us the arguments for the plaintiff and the defendant,” one student begins: “Um, that—the plaintiff was a young, youthful man.”<sup>30</sup> This student is starting to “tell the story”

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28. James Collins, *Socialization to Text: Structure and Contradiction in Schooled Literacy*, in *NATURAL HISTORIES OF DISCOURSE* 203 (Michael Silverstein & Greg Urban eds., 1996). Charles Morris distinguished three different ways in which “signs” (that is, both linguistic and non-linguistic signaling) convey meaning: (1) syntax (meaning derived from the interrelationship of signs to each other); (2) semantics (the meaningful content conveyed by a sign); and pragmatics (meaning based on the context in which a sign is used). Charles Morris, *Foundations of the Theory of Signs*, in *INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE* 6 (1938).

29. Collins, *supra* note 28, at 224. There are some interesting exceptions to this focus on semantics, or content, in earlier training. Classes in rhetoric, for example, or some varieties of literary criticism, encourage students to approach language and text more with a more complicated vision. However, these classes tend to be uncommon in elementary and even high school settings, and are therefore far from universal aspects of earlier education for first-year law students.

30. Elizabeth Mertz, *Transcripts from Eight Contemporaneous Contracts Classes* [hereinafter *Transcripts*] 3-3-3 (unpublished transcripts on file with author).

of the events in question through the lens of a traditional semantic reading, one focused on character, plot, and content. The professor subsequently admonishes her: "all I'm interested in, Ms. M., is what the arguments are . . . all right? I want the arguments, okay?"<sup>31</sup> Throughout the subsequent interchange, the professor repeatedly urges this student to place any "facts" concerning the conflict story of the case within the framework of the relevant precedential legal categories instead of focusing on morality or narrative structure.

This move towards a more "pragmatic" reading of texts requires students to suspend, at least temporarily, their judgments about the emotional or moral character of events. Thus, whether someone was right or wrong, moral or immoral, reprehensible or ethical is not an issue in this pragmatic reading. In another class, a student confronted her professor about whether or not salespeople had to be honest in negotiating with customers. The professor responded by pointing to relevant sections of a key authoritative text for this case:

Well, if he's made an offer, he's revoked it and unless 2-205 [of the Uniform Commercial Code] is going to be applied and there has to be a signed writing, unless you could argue estoppel, if you're dealing with the code number 1-103, which opens the doors to the common law, you don't have that kind of protection, unless it's a consumer statute, or a federal trade regulation . . . regulation, you don't have . . . that kind of protection.<sup>32</sup>

When the student responded with an indignant question, "*i.e.*, salespeople can lie?", the professor hastened to disabuse her of any notion that moral indignation or fairness were proper frames for use in deciphering this issue:

Professor: Huh? Not only. Salespeople can lie; salespeople do lie, constantly.

Student: That's not fair.

Professor: No, no, fairness is not something that I accept as a general proposition, and certainly not in my household.<sup>33</sup>

The clear message here, as it is throughout the classes of this study, is that a legal reading is primarily focused on "what the law says you can or cannot do," rather than on "what's fair." Just as medical training requires a hardening and distancing of students' sensibilities from empathic reactions to death and human bodies, legal training demands a bracketing of emotion and morality in dealing with human conflict and the language of "conflict stories."

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31. *Id.*, at 3-3-4.

32. *Id.* at 1-7-9.

33. *Id.*

Interestingly, if a key aspect of the legal approach to texts is a rupturing of standard semantic readings of “conflict stories,” then the Socratic method actually initiates this fracture through its linguistic structure. As I have demonstrated elsewhere, classic Socratic teaching involves a distinctive pattern of interruption and inversion of formal or polite speech norms.<sup>34</sup> In addition, this style uses predominantly negative uptake questions on the part of professors. “Uptake” represents a measure of the degree to which professors incorporate some feature of the student’s answer in their subsequent questions. To the extent that professors’ questions give little or no recognition to preceding answers, students’ responses are, in effect, ignored and have little or no impact on the ongoing conversation.

Typical Socratic questioning frequently involves both a high frequency of interruption and low, or negative, uptake. The primary exceptions to negative uptake occur when students answer questions by pointing to procedural history or to precedent. Both represent pragmatic aspects of textual authority hierarchies to which students must attend. Thus, instead of explicitly telling students (through the content or semantics of speech) what a new legal reading of text entails, professors use the pragmatic structure of classroom discourse to teach students how to read for a distinctively legal pragmatic structuring of text. For this reason, we can speak of an iconic or a mirroring connection between the form of speech in the legal classroom and the approach to reading legal text that legal pedagogy seeks to inculcate. The rupturing of normal speech in law school classrooms uses the pragmatic, or contextual, structure of classroom talk to reorient students. This breaks down a more semantic, or content-based, approach to reading stories of human conflict, drawing attention instead to issues of textual form and authority. Professors in Socratic classrooms teach students to focus on the contextual structure of texts using the contextual structure of language in the classroom. This parallel between classroom discourse structure and the legal approach to textual language may help to explain the persistence of Socratic teaching in the face of continuing criticism. Regardless of whether it has any functional advantage in teaching legal reasoning, the Socratic method may simply have a strong symbolic appeal by virtue of pointing to and mirroring the approach to language it promotes.

This issue raises the question of whether there is any possible connection between the orientation to text and authority found in legal education and the epistemology underlying legal thought in the United States. Philosopher Stephen Toumlin uses the term “warrant” to describe the background knowledge that permits us

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34. See generally Mertz, *supra* note 27.

to make assertions.<sup>35</sup> In the legal classroom, professors focus their students' attention on the pragmatic warrants that give legal texts their authority. By redirecting students' attention to hierarchies of authority, professors shift their attention away from the drama of the human conflict and the moral dilemmas inherently involved. As students are socialized to this new reading of legal texts, their increasingly expert gaze moves ever more fluidly through the most wrenching of conflict stories. The "reoriented" students search for those key "facts" and pragmatic cues that allow them to link this story to previous cases and situate it within its current legal context. Indeed, a common approach to law school examinations on the part of professors is to compose their own conflict stories, known as "issue-spotters," through which students must sift in order to select the most legally salient features. Frequently, composing "issue spotters" involves throwing emotionally compelling—but legally irrelevant—cues into the fact pattern. This tests students on their ability to read texts for legal pragmatics rather than for social, emotional, moral, or narrative contexts.

There is an interesting combination of abstraction and specificity involved in this process. In order to connect each new conflict story with legal precedent, students must focus on detailed aspects of the stories, in order to categorize the new facts as instances of general, legally-specified types. For example, a student would argue that a particular act or event in this new conflict story constitutes a breach of contract because it is arguably the "same" as an action or an event in a previous case where the courts found a breach. Yet, this apparent concern for specificity wrenches detail from its particular social and narrative context in ways that can obscure or erase the features of the story to which lay people look when reaching moral judgments. One could argue that there is an attraction in the apparent neutrality of this kind of categorization; it conveys the idea that no matter who you are, you will be dealt with similarly. Thus, by running the "facts" of your conflict or case through the filter of legally relevant categories (guided by and invoking forms of legal authority), any individual may escape the prejudices and inequities of socially-embedded moral judgments. Indeed, we can point to cases in which this has been the case—in which appeal to more formal and abstract legal categories and procedures has permitted socially-stigmatized victims to be heard. However, I argue that there is a double-edged character to this legal mediation, one that social theorists have found in the commodity form more generally.

Building from the Frankfurt School, Moishe Postone, for

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35. STEPHEN EDELSTON TOUMLIN, *THE USES OF ARGUMENT* 98-99 (1958).

example, describes the complex “double character” of capital, labor, and time in capitalist societies.<sup>36</sup> In particular, I focus on his insight that labor has both an abstract and concrete character in capitalist societies. Labor has a concrete character because, in order for society to survive, certain kind of work must be physically performed. However, in capitalist societies, concrete labor is mediated by an abstract level in which “individuals are compelled to produce and exchange commodities in order to survive.”<sup>37</sup> Postone calls this “abstract labor.”<sup>38</sup> This new kind of social mediation is “impersonal, abstract, and objective.”<sup>39</sup> It creates a form of domination and alienation that is quite different from those found in other kinds of societies. However, this does not mean that capitalism is necessarily worse than other societies, which exerted different forms of domination. For example, in feudal society, precisely because labor was not taken away in such an impersonal and abstract way, Postone argues that “expropriation . . . [by the non-laboring classes] was *and had to be* based [more] upon direct compulsion.”<sup>40</sup> Thus, the move to abstraction provides both a liberating possibility and increased opportunity for concealing the alienation of concrete labor through an illusion of freedom. Although there is an obvious need to proceed with caution when drawing parallels at this level of social analysis, it is interesting that the legal language taught in the United States also has this kind of double-edge. On the one hand, reading legal texts for legal authority offers the student a potentially liberating opportunity to step into an impersonal, abstract, and objective approach to human conflict. On the other hand, erasing many of the concrete social and contextual features of human conflict can direct attention away from grounded moral understandings, which some critics believe to be crucial to achieving justice. Moreover, this step out of social context provides the law with a “cloak” of apparent neutrality, which can conceal the ways in which law participates in and supports unjust aspects of capitalist societies. This approach also gives the appearance of dealing with concrete and specific aspects of each conflict, thereby hiding the ways that legal approaches exclude from systematic consideration the very details and contexts that many would deem important for moral assessments.

As a result, the alienation experienced by some law students

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36. See MOISHE POSTONE, *TIME, LABOR, AND SOCIAL DOMINATION: A REINTERPRETATION OF MARX'S CRITICAL THEORY* 148-55 (1993). Postone also finds a “double character” in the very categories used to analyze capitalism. *Id.* at 158-76.

37. *Id.* at 159.

38. *Id.* at 144-48.

39. *Id.* at 158-159.

40. *Id.* at 160.



during legal training may be an unavoidable consequence of a process in which increasingly instrumental and technical appeals to legal authority blunt moral and contextual judgment. Such technical appeals lie at the heart of United States legal epistemology and are part and parcel of the legal system's own legitimacy. We can find another example of this process in legal pedagogy's approach to social context and the person.

## 2. *The People and Social Context of the Legal Landscape: Pedagogical Translations*

Just as a distinctively legal reading of text directs attention away from the drama of the story and its attendant moral or emotional responses, the legal reading also provides a characteristic approach to context and to the social construction of the "person." In each case, such a reading does not deny the existence of the concrete or particular—on the contrary, the framework of legal discourse subsumes and includes specific "facts." However, the frames of legal discourse subtly marginalize and tame these aspects of the conflict story. Pushed to the margins, the moral and emotional dimensions become "equities"—those wildcards that every lawyer must factor when composing legal strategies.

Thus, when we examine classroom discussions concerning the effects of race or ethnicity on legal outcomes, we find a common pattern. Although professors readily admit that such "extraneous" (from a legal standpoint) factors may affect the decision of a judge or jury, they focus primary attention on the legally controlling aspects of the case. In dealing with the famous *Dempsey* case, involving an interracial boxing match, one professor noted:

I think, it was one of the first occasions in which there was gonna be an interracial fight, and, therefore, one of the reasons clearly not articulated, clearly not arguable to the court, would be some racism that would enter in—ah—some concern on the part of the court that—ah—maybe people wouldn't pay, that they would boycott such a fight or maybe that they would, maybe they would pay more. Racism is not the kind of thing you would argue in the court, but it may have been a factor certainly in the court's refusing to let the issue go to the jury.<sup>41</sup>

After acknowledging the possible impact of the context and identities involved, the professor proceeded to focus the students' attention on the "real" legal problem: the "damage issues arising under *Dempsey*," which were discussed as a distinct—and more central—matter.<sup>42</sup> In another classroom, the professor also mentions race at the beginning of his discussion of *Dempsey* but

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41. Mertz, Transcripts, *supra* note 30, at 3-12-8.

42. *Id.*

dismisses its importance in the development of the case.<sup>43</sup> A third professor covered the *Dempsey* case with no mention of race whatsoever.<sup>44</sup> This last approach was closer to the norm of most classroom discussions in this study. In general, professors rarely touched on race, gender, class, history, or other aspects of social context when analyzing the cases covered in their courses.

If law professors push certain aspects of context and identity to the margins of classroom discourse, they make other aspects of context part of the central inquiry. One common type of contextualization in these classes involves the consideration of general occupational or legal categories, or of the “contexts” created by differing political philosophies.<sup>45</sup> Thus, for example, professors frequently made sure that students paid careful attention to the effects of occupational identity or legal categories on the litigants’ expectations and thoughts:

If you think about what we’re worried is, on the one hand, the farmer is going to go out there as soon as the price rises, all right, make more money off his wheat, all right, thinking that he’ll be hedged, all right, he’s trying to make a profit out of his wheat, okay. And I suppose in that particular case, what might the farmer be hoping . . . What might the farmer be hoping would happen? . . . Notice, why is it the farmer doesn’t perform? One reason is, the market’s gone up.<sup>46</sup>

There is, in a sense, a great amount of contextualization taking place here as the professor asks students to focus on the mental framework of the “standard average farmer.” However, the professor does not locate that farmer in social or historical terms. This abstract form of contextualized identity appears in even starker form when professors reduce the people involved to “parties,” “buyers” and “sellers,” or “promisors” and “promisees.” In this way, the professors push students to conceptualize people in terms of legally salient categories:

Student: The defendant has—uh—requested information.

Professor: Is he a purchaser or seller?

Student: Purchaser.<sup>47</sup>

\* \* \*

Professor: All right, what happened in this case?

43. *Id.* at 5-8-14.

44. *Id.* at 4-7-8.

45. See Elizabeth Mertz, *Linguistic Constructions of Difference and History in the U.S. Law School Classroom*, in *DEMOCRACY AND ETHNOGRAPHY: CONSTRUCTING IDENTITIES IN MULTICULTURAL LIBERAL STATES* (Carol J. Greenhouse ed., 1998).

46. Mertz, *Transcripts*, supra note 30, at 8-10-18.

47. *Id.* at 1-6-9.

Student: Uh—the defendant, Oliver, was selling some land—

Professor: All right, let's talk in terms of buyer, seller, vendor, vendee, so we can follow the case, all right. All right, go ahead.<sup>48</sup>

Just as initial medical school training moves students away from a personalized understanding of the human beings whose bodies they will treat, legal education pushes law students to place people in legal categories, using abstraction to distance themselves from human dimensions of their clients' problems. The medical student's eye begins to narrow on anatomical parts and systems, losing a view of the body as a person. Likewise, the law student's vision locates people involved in conflicts using categories that define them in terms of argumentative positions.

Perhaps the most ubiquitous form of contextualized identity found in these classrooms occurs when professors invite students to play the roles of legal personae—of parties, lawyers, and judges—and make legally relevant arguments. When asked to play the roles of litigants or other legal actors, students “become” abstracted individuals within a removed and “acontextual” context. The most salient aspect of identity in these scenarios is students' location within a legal landscape, situated in a geography of strategies and argument:

Well, if I say I intend to give you \$5,000 if you climb to the top of the Sears tower, is that an offer?<sup>49</sup>

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So, in other words, if I give you \$5,000 this year for your tuition, is part tuition, and \$5,000 next year, your tuition . . . All right? And, depending on how you do in school for the next two or three years, \$5,000. I'm wondering whether or not if I renege you can sue me for breach of contract.<sup>50</sup>

\* \* \*

Okay. What do you think, Mr. B? You are the lawyer for the company that's seeking to fire her. What are you going to say to argue that she should have accepted the position as appliance clerk?<sup>51</sup>

Thus, professors place students in the shoes of people occupying legal “positions,” located in landscapes whose key referents are legal requirements. The only relevant context becomes that provided by legal argument and strategy. The particular place in which the conflict took place is generally

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48. *Id.* at 1-6-19.

49. *Id.* at 1-3-9.

50. *Id.* at 1-3-25.

51. Mertz, Transcripts, *supra* note 30, at 5-5-11.

mentioned to help students remember the importance of differences among jurisdictions, as if the setting had no other function than determining legal jurisdiction:

Professor: Where is the cottage?

Student: In Michigan.

Professor: In Michigan. Where are we in the case?

Student: We're in Wisconsin.

Professor: We're in Wisconsin. Does that raise any problems?<sup>52</sup>

The professor's questions highlight the potential problem that the laws in Michigan may differ from those in Wisconsin. Additionally, dispute could arise concerning this court's authority to hear the case. Legal training transforms "geographic" and sociopolitical locations into "jurisdictions," where the crucial borders are defined by the boundaries of legislatures' and courts' authority.

Each time a professor places a student in this landscape, the student must learn to focus on the details needed to shape a legal argument, to convert social referents into legal categories, and to discern the levels and types of authority. The human characters in the conflict story become strategizing skeletons, defined by legally delimited contexts, shaped by their places in ongoing dialogic arguments.<sup>53</sup> While role-playing in the classroom attempts to bring students to the level of actual people, the particular roles played omit many of the social particulars that shape not only social interactions, but also moral assessments of those interactions.

Returning to our discussion of the distinctively capitalist shape of law in the United States, we see that this removed approach to the person and to human conflict feeds into an ideology of universal translatability in which legal language serves as a discursive medium of exchange across all areas and levels of society. In converting virtually every possible event or conflict into a shared rhetoric, legal language generates an appearance of neutrality that belies its often deeply skewed institutional workings. The classroom experience initiates law students into this new approach using a discourse that focuses attention away

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52. *Id.* at 4-13-16

53. I have elsewhere argued that a key aspect of legal pedagogy is training to engage in this ongoing dialogue, where it is imperative that speakers continue to play their roles, carrying on the argument, even when unsure of their footing. See generally Elizabeth Mertz, *Linguistic Ideology and Praxis in U.S. Law School Classrooms*, in *LANGUAGE IDEOLOGIES* (Bambi Scheffelin et al. eds., 1998).

from the emotional and socially-embedded particulars of the conflict. Instead, law professors direct their students' gaze to the abstract categories, contexts, and actors provided by legal doctrines, procedures, and layers of authority. Students thus begin to learn a process of translation that they will eventually take for granted. This legal translation is a key ground from which they operate when performing their role as lawyers; it embodies an epistemology that is the background "grammar" for all legal discussion. When students speak this language, they operate in a world where social context and identity have become invisible. This is the phenomenon I refer to as "cultural invisibility." It is important to note that although some aspects of culture become invisible in this process, other facets of dominant culture become highly visible, so that a "cultural dominance" for certain aspects frequently accompanies a "cultural invisibility" for others.<sup>54</sup> Thus, when professors translate human conflict into this legal language, they drain away many aspects of sociocultural and moral specificity. In doing so, they subtly erase the contexts and details upon which most lay people would rely in forming ethical judgments.

### *C. Distinctive Participation Structures in U.S. Legal Classrooms*

Despite the existence of a common epistemology imparted across all the classrooms in this study, there nonetheless appear to be vast differences among the professors and students in speech styles and degrees of participation. Through analysis of participation patterns, we begin to see the ways in which this shared legal language is differentially refracted, imparted, and absorbed by different students.

This study tracked a number of features of classroom participation, including length and number of turns in which each student and professor participated. The resulting picture is complex, but some patterns are tentatively identifiable. Because we worked in depth in eight classes, the study is most properly understood as a set of comparative case studies. By combining comparisons among the classes of this study with the data generated by other in-depth research on law schools, we begin to delineate interesting trends and generate hypotheses for further research.

Previous observational studies of gender in law school education indicated generally lower participation rates for female

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54. I am indebted to Susan Hirsch and Leti Volpp for making this point clear to me. See generally Susan Hirsch, *Making Culture Visible: Comments on Elizabeth Mertz's "Teaching Lawyers the Language of Law: Legal and Anthropological Translations"*, 34 J. MARSHALL L. REV. 119 (2000); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 60 (1994).

students than for male students at Yale and University of Chicago law schools.<sup>55</sup> Interestingly, the two more comprehensive studies did not find that the presence of a female professor helped to equalize gendered participation patterns.<sup>56</sup> A similar picture of women's overall participation emerged from self-reports of participation rates in studies performed at a number of other law schools, including the University of Pennsylvania, Stanford, Berkeley, and nine Ohio law schools: "Many women report, however, that when speaking in class feels like a 'performance,' they respond with silence rather than participation."<sup>57</sup> Another recent study across a wide variety of law schools showed that even when women performed as well as men in school, they were less satisfied with the law school experience than men.<sup>58</sup> Similarly, studies found that students of color reported negative results regarding overall satisfaction and participation.<sup>59</sup>

This study's results lend some support to these previous findings. Overall, women students participated at lower rates than men in all classes taught by men.<sup>60</sup> In the one class taught by

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55. See Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1364-65 (1988) (tracking the amounts, percentages, and frequency of comments/responses by men and women in a law school class); Karen Wilson & Sharon Levin, *The Sex-Based Disparity in Class Participation*, THE PHOENIX (University of Chicago Law School student newspaper), Nov. 26, 1991, at 3 (discussing participation based on gender at the University of Chicago); Mary Becker, *Questions Women (and Men) Should Ask When Selecting a Law School*, 11 WIS. WOMEN'S L.J. 417, 419 (1997).

56. See Weiss & Melling, *supra* note 55, at 1364-65 (reporting a ratio of 1.9 [meaning that men spoke almost twice as much as women did] in one class taught by a female professor in the Yale study); THE UNIVERSITY OF CHICAGO LAW SCHOOL, GENDER STUDY 1993 1 (1993).

57. Guinier et al., *supra* note 22, at 46 n.117. See also Homer & Schwartz, *supra* note 22, at 50; Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 314, 325-26 (1994) (reporting in table and text form the results of self-evaluation questionnaires regarding law school participation). Taunya Banks reported parallel results in two earlier studies of unidentified law schools across the country. See Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 141 (1988) (surveying five law schools); Tanya Lovell Banks, *Gender Bias in the Classroom*, 14 S. ILL. L.J. 527, 530-35 (1990) (surveying fourteen private and public law schools).

58. See generally SANDER & KNAPLUND, *supra* note 22.

59. See, e.g., Homer & Schwartz, *supra* note 22; Krauskopf, *supra* note 57; Banks, *supra* note 57. Astonishingly, given the amount of public controversy and litigation on issues of race in legal education, there were no previous observational studies tracking racial dynamics in law school classrooms.

60. Participant ratios of total time taken by students showed that proportionate to their numbers in the class, male participation rates ranged from 12% to 38% higher than female rates in male-taught classes. Disproportion in favor of male students in terms of total turns ranged from 10% to 17% in these classes. See Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1, 46 (1998) (reporting data on class participation in eight semester-long contracts

a female professor in an elite school, women also participated less than men.<sup>61</sup> On the other hand, in two non-elite law school classes taught by female professors, women students participated at nearly equal or slightly higher levels than did men.<sup>62</sup> Women generally spoke less in the more Socratic classrooms.<sup>63</sup> Interestingly, students of color participated at high levels in classes taught by professors of color.<sup>64</sup> In fact, these were the only classrooms in which students of color became dominant speakers in classroom exchanges.<sup>65</sup> Moreover, this effect carried over into elite schools.<sup>66</sup>

When we examine these findings in light of the fact that white male professors still dominate the first-year curriculum in most U.S. law schools, we find yet another kind of cultural invisibility/dominance problem emerging in the teaching of law. If students of color and female students tend to be more silent in these classrooms, then any differences these students bring with them in experience or background are not given voice in classroom discourse. To the extent that these differences in experience reflect race, gender, class, or other aspects of social identity, we again see aspects of social structure and difference pushed to the

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classes and noting contextual complexity and patterns of reduced participation by women and minorities).

61. In the elite school class taught by a woman, there was a 38% disproportion in favor of men in terms of time, and a 54% disproportion in favor of men in terms of turns. *Id.*

62. In the two female-taught classes at non-elite schools, there were 7% disproportion in favor of women students in terms of time and 5% disproportion in terms of turns. *Id.*

63. *Id.* at 60.

64. *Id.* at 62. The report notes that where a professor of color instructs the class:

In turns, students of color participate more than white students in both classes; in time, students of color have a favorable ration in the smaller class. Note that in terms of time, students of color participate (proportionately) 15 percent less than white students in the larger class—and this was the largest class in the study. The 15 percent figure, although not favorable to students of color, is the smallest disproportion of all the classes in which white students had higher proportional times; the disproportions in the other classrooms ranged from 34 to a whopping 289 percent in class 1. Note also that the disproportion in terms of time in the larger class is largely attributable to lack of participation by Asian-American students [ ], who had a 220 percent negative disproportion in time. In contrast, African-American students participated proportionately 10 percent more than European-Americans.

*Id.* In addition, there were also favorable proportions for students of color in one of the “regional” law schools in which the class was taught by a European-American male professor. *Id.* at 63.

65. Mertz, *supra* note 60, at 65-66.

66. *See id.* (noting that students of color participated more actively in courses taught by professors of color in elite schools).

margins of legal discourse. The previous discussion demonstrated this tendency in the content of law school teaching; here we see a similar marginalizing in the actual structure of voices heard in law school classrooms.

This raises a concern about the overall culture of the classroom, an issue that is independent of concerns about student performance on exams. In other words, even if there is no connection between class participation and grades, we can still ask what the classroom culture conveys to students about law and its central priorities—and correlatively, about which voices can speak in the language of the law. If certain voices, attitudes, and experiences become invisible during lawyers' formative training, this arguably sends a message about what the law values (and what is unimportant or irrelevant).

There is obviously some need for caution in developing an understanding of the way that "cultural invisibility/dominance" becomes a feature of training across different law school classrooms. Indeed, this study itself suggests some possible variable patterning based on school status, teaching style, and classroom dynamics. I do not intend to suggest a simplistic or homogenous model of this process; rather, the results of the study provide a broad outline which contains many interesting complexities and nuances. However, to the degree that we notice an erasure of the voices and experiences of traditionally marginalized people, we arguably uncover vital clues to the underlying worldview taught to law students. Both the linguistic structure and the linguistic ideology of law school pedagogy convey this worldview.

An anthropological perspective does not yield simplistic or easy answers, nor does it point the way to "quick fixes" for any problems that exist in the training of lawyers in the United States. To the contrary, it pays full respect to the depth of the connections between the training and underlying cultural epistemologies. Nor does this approach generate a one-dimensional view of legal education; the anthropological perspective does not identify a "bad" or "good" aspect of teaching law that is somehow definitive. Rather, it focuses attention on the complex interaction of institutional and social worldviews, educational structures, and linguistic contexts that shape legal training.

#### *D. Summary and Implications*

This study indicates a possible reason for continued adherence to a distinctive Socratic teaching approach, even after critics had discredited the foundational philosophy underlying this method. If, as Garth and Martin demonstrate, one of the primary skills taught well by law schools is "legal reasoning," then Socratic training contains a precise linguistic mirroring of aspects of that



reasoning.<sup>67</sup> The argument, then, is that this kind of training has a symbolic resonance that generates a particularly strong tie between the form of classroom language and the epistemological message conveyed by that language. Even in classrooms in which Socratic pedagogy is less prevalent, we still find features of law school discourse that convey a distinctive approach to language, text, authority, and morality. This approach frames human conflict within a new context that, at the same time, takes account of and neutralizes many of the "heated" social specificities commonly used to form situated moral judgments. Arguably, a mere shift in legal pedagogy may not suffice to address the complaints of alienation during legal training because that alienation results in part from fundamental aspects of the language and epistemology taught to law students. Unless legal language and the fundamental logic of the legal system change, these complaints may remain inevitable concomitants of training that is effective in teaching that language and logic.

Although there are doubtless multiple other reasons for law students' progressive shift away from public interest ambitions,<sup>68</sup> the underlying language and worldview described above could partially explain this trend. As we have seen, the prevailing process and linguistic structure of legal education detaches students from their ethical moorings and focuses them, instead, on the structure of authority provided by law. Public interest commitments require students to focus on substantive justice—a focus undermined by constant attention to strategic considerations. Through subtle, unconscious aspects of classroom language, legal pedagogy continually urges students away from a focus on ethics and justice.<sup>69</sup> Thus, legal training never overtly discourages students from maintaining an emotional commitment to social justice. In fact, in some classrooms, professors may expressly encourage students to hold onto such considerations. But at a constant, quiet level, the meta-linguistic prioritizing of authority over ethics—as well as ubiquitous indexing of pragmatic warrants—wears gently but powerfully away at substantive concerns.

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67. Garth & Martin, *supra* note 17, at 508.

68. This shift is documented in numerous studies. See generally STOVER, *supra* note 4; Erlanger et al., *supra* note 12; Erlanger & Klegon, *supra* note 12.

69. On the ways in which linguistic structure creates effects of which speakers are partially or completely aware, see Michael Silverstein, *The Limits of Awareness*, in WORKING PAPERS IN SOCIOLINGUISTICS, No. 84 (1981); also Richard Parmentier, *The Political Function of Reported Speech*, in REFLEXIVE LANGUAGE: REPORTED SPEECH AND METAPRAGMATICS (John Lucy ed., 1993); Elizabeth Mertz & Bernard Weissbourd, *Legal Ideology and Linguistic Theory: Variability and Its Limits*, in SEMIOTIC MEDIATION: SOCIOCULTURAL AND PSYCHOLOGICAL PERSPECTIVES (Elizabeth Mertz & Richard Parmentier eds., 1985).

Returning to issues of diversity and inclusion, we have seen that a number of studies pointed to differential alienation by students of color and white women in law schools. Because these groups tend to enter law school with strong commitments to public interest work,<sup>70</sup> the general move away from these concerns that occurs during legal training might be one reason for their high degree of dissatisfaction with the law school process. However, we have also seen two other possible reasons for this problem. First, the content and style of teaching render aspects of social context invisible—aspects that arguably have greater salience for people who have been socially marginalized. Second, there are indications that the structure of the legal classroom differentially silences students from these traditionally excluded categories during the first-year law school courses. Thus, this study's findings support suggestions by Brook Baker that aspects of the actual teaching structure in law classrooms may differentially disadvantage students with different experiences and learning styles.<sup>71</sup> Baker's work contains rich additional information about how traditional law school classrooms tend to exclude particular kinds of students.<sup>72</sup> On multiple levels, then, this research makes sense of findings on differential satisfaction and participation in law school classes.

Finally, this paper considers the ways in which this distinctive linguistic approach fits within broader legal epistemology in the United States. It notes a tension that emerges between abstract categories and conceptions of justice, on the one hand, and, on the other hand, the democratic ideals of inclusion that require more social, contextual, and grounded moral reasoning. When considered in this framework, the problem of "cultural invisibility/dominance" in legal training emerges as a profound challenge. There is a certain genius about a system of legal reasoning that treats all individuals the "same," within safely abstract layers of legal categories and authorities, regardless of social identity or context. Yet this process pulls students away from grounded moral judgment and fully contextualized consideration of human conflict. This can produce an ongoing alienation—legal decision-making from ethics and of lawyers from socially shared values.

Thus, across diverse areas of inquiry within the study of legal education, this study suggests the value of studying cultural frameworks as they are enacted and expressed in language. As

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70. See generally GRANFIELD, *supra* note 21; SANDER & KNAPLUND, *supra* note 22.

71. See generally Brook Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287 (1994).

72. *Id.*

students are taught this language, they begin to hear some voices but erase others, to focus on legal authority and texts but not on morality. These initiates to the legal profession learn new attitudes toward human conflict, ethics, authority, social context, and identity—not through heavy handed admonitions, but through the subtle reframing of language structure and ideology imparted by their professors. Their own voices shift, and as they undergo a reorientation toward spoken and written language, they achieve new identities as lawyers.

## II. CODA—PROCEED WITH CAUTION: LEGAL AND ANTHROPOLOGICAL TRANSLATIONS

Given this picture of a canonical form of legal language and epistemology, what is the prognosis for an adequate translation of anthropological and other contextual forms of understanding to legal language? The findings of this study suggest, at the very least, that one should be quite cautious in assuming that canonical legal language is capable of these kinds of translations. Anthropological approaches, in particular, fundamentally depend on a deeply contextual understanding, situating human interaction within historically and socially specific frames and paying close attention to minute details of particular events and talk across social divisions.<sup>73</sup> One effect of this more thorough contextualization is that non-dominant aspects of culture and context become integral parts of an anthropological analysis. A legal language bent on translating these detailed analyses into types of events and interactions, using an epistemological focus generated by the society's elite, would miss much of the core explanatory apparatus and method of anthropological studies. Indeed, anthropologists would study and analyze the extent to which elite culture erases evidence of social inequality through typification processes, while formal legal language might simply perform this erasure without reflection. Susan Hirsch's recent book on African Islamic courts provides an elegant example of an anthropological approach, analyzing how class and gender are differentially refracted in legal negotiations.<sup>74</sup> In particular, she demonstrates the divergent relationships to legal text and legal discourse created by social divisions. Anthropologist Susan Philips has recently made a similar point about the process by which guilty pleas are negotiated in Arizona criminal courts.<sup>75</sup>

On the other hand, as Baker and others have pointed out, the

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73. For an excellent example of this approach, see SUSAN HIRSCH, *PRONOUNCING AND PERSEVERING: GENDER AND THE DISCOURSES OF DISPUTING IN AN AFRICAN ISLAMIC COURT* (1999).

74. *Id.* at 9-11, 88.

75. See generally SUSAN PHILIPS, *IDEOLOGY IN THE LANGUAGE OF JUDGES: HOW JUDGES PRACTICE LAW, POLITICS, AND COURTROOM CONTROL* (1998).

language that is taught in a traditional doctrinal classroom is not the only kind of law school language.<sup>76</sup> Law students learn their craft across multiple settings, including legal skills classrooms, clinics, and externships. It is precisely these settings that require forms of speech more sensitive to context and tailored to the specific situation at hand. One implication of this study is that in order to escape the limitations of the a contextual language that forms the backbone of doctrinal learning, law schools may have to look to those areas of legal education sometimes deemed to be on the “fringes” in order to locate their teaching more centrally in this diverse and changing world to which lawyers must respond. If lawyers could learn from the “fringes,” and listen to parts of society that are often erased from dominant discourses, they would internalize some of the best lessons that the anthropological tradition has to offer.

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76. See Brook Baker, *Language Acculturation Processes and Resistance to In”doctrine”ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz’s Critical Anthropology of the Socratic, Doctrinal Classroom*, 34 J. MARSHALL L. REV. 131, 154-56 (2000) (discussing distinctions in legal pedagogy between the doctrinal classroom and the legal skills classroom).

