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

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INSIDE THE LAW SCHOOL CLASSROOM: TOWARD A NEW LEGAL REALIST PEDAGOGY

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In recent years, the legal academy is experiencing a strong renewed interest in empirical research on law. Variously described as a "new legal realism" or as "empirical legal studies," this return to a focus on the social sciences in many ways echoes an earlier era of legal realism in American law – with some important differences, to be sure.[1] Within the legal academy, empiricism may seem to be a discovery; however, there has been continuous intellectual concern with social science research on law for many decades now, most notably embodied in the Law and Society movement.[2] At the same time, there has also been growing interest in introducing possible reforms to the U.S. system of legal education, an interest that is given eloquent expression in this Symposium issue.

This article combines these two themes -- empirical research on law and careful examination of legal education. It reports on an empirical study of legal education, which I have been conducting under the auspices of the American Bar Foundation (a research institute which also has been actively developing an interdisciplinary program of research on law for many decades now).[3] After discussing that study, I will move on to consider its implications for law teaching. A core issue raised by the article is the question of how law works when it translates information about society – from social science findings to the nitty-gritty details of plaintiffs' and defendants' lives. I argue for a more rigorous approach to conceptualizing and teaching this process of legal translation, and I contend that this kind of rigor should be central to any new

legal realist or empirical project in the legal academy. Indeed, the New Legal Realism project is an ongoing intellectual movement formed to encourage more thoughtful translation between law and social science.[4]

I. INSIDE THE LAW SCHOOL CLASSROOM

As legal scholars turn once more to social science, inevitably they bump up against the question of method. Although some would argue for a limited set of preferred empirical methods, an emerging consensus seems to be that it is important to remain objective in selecting methods to fit the questions asked.[5] For example, quantitative and qualitative methods give us different kinds of information, as do experimental and econometric approaches. Large-scale survey and statistical studies give a better sense of how general a pattern is, but do a poor job of sensitively tracking subjects' own understandings of events. Participant observation has the advantage of generating more accurate information about subjects' cultural and social frameworks, and also often gives us a better picture of what is actually happening than do self-reports (because people may behave in observably different ways than indicated by their self-reports on surveys, etc.). However, as studies grow more detailed and accurate about law on the ground, the focus is narrowed and it is more difficult to assess generalizability. For this reason, leading sociolegal scholars have urged empirical legal researchers to combine multiple methods where possible, to consider evidence from studies using a variety of approaches, and/or to take care in fitting research question to research method (and in being appropriately modest about the reach of their results).

The study on which I report here examined in great detail the linguistic interactions between professors and students in eight different law schools.[6] The question animating the

research was whether law school pedagogy has a shared linguistic structure and/or epistemological message, across a variety of professorial styles and student responses. We also examined differences among the classes we studied, asking how a variety of factors interacted to create more and less inclusive classrooms for students. In-class observation and taping were clearly necessary to address these research questions. I drew on the methods of linguistic anthropology and sociolinguistics, which insist on detailed observation of classroom exchanges and on use of verbatim linguistic data. Interestingly, a recent research report to be published by the Carnegie Foundation reached conclusions that were very similar to mine.[7]

We selected schools from across the "indigenous" U.S. status hierarchy of law schools, with three from the "elite/prestige" category, two from the "regional" category, and three from the "local" category. [8] We also varied the gender and race of professors. The result was a comparative set of in-depth case studies.[9] The entire first semester of classes was tape-recorded in each school, while in-class observers also coded aspects of the classroom interactions. The tapes were then transcribed; transcripts, tapes, and in-class coding sheets formed the basis for a new coding process, tracking aspects of each in-class turn (such as length of turn, gender/race of speakers, whether the turn was volunteered or called-on, etc.). Coders also generated an ethnographic account of each class meeting, noting aspects of the developing classroom culture, use of humor, how social context was discussed, etc. These were used to create overall ethnographic summaries for each classroom in the study. I personally performed the in-class coding and taping of one of the schools; I also interviewed six of the eight professors. In schools where students were willing to participate, we conducted small-group interviews with them as well. The study combined qualitative and quantitative analyses so as to produce a more accurate understanding of law school classroom dynamics.[10]

Attention to details of language and its context are hallmarks of a longstanding empirical tradition emerging from anthropological linguistics, sociolinguistics, conversation analysis, and other similar fields. Many standard approaches to language analysis – both outside and within legal scholarship – have generally stressed the "semantic" or decontextual aspects of language meaning.[11] However, more recent research has uncovered the crucial role played by "pragmatic" or contextually-dependent aspects of language structure. [12] It turns out that pragmatic meaning is crucial to the process by which language becomes a vehicle for conveying meaning, communicating feelings, building relationships, and so forth. And it is through these myriad functions that language becomes an important avenue for creating and imposing social structure. (Inevitably this brings with it implications for power dynamics, in addition to the place of language in conveying meaning that does not necessarily implicate power.[13]) Thus, my study tracks the details of language pragmatics (as well as semantics) across a full semester in eight different first-year Contracts classrooms, located in a broad range of different kinds of law schools.[14]

II. SIMILARITIES AND DIFFERENCES ACROSS LAW SCHOOL CLASSROOMS

As noted, the study on which this article is based tracked two basic kinds of patterning in law school classrooms. First, it asked whether one could discern a shared message imparted across all the many differences that divided the kinds of classes, schools, students, and professors of this study. Second, it asked what if any differences in linguistic patterning emerged from observational data obtained in these classrooms.

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

We found a great deal of variation, at the surface level, in the linguistic patterning of the classrooms of this study. At the same time, analysis at a deeper level shows that an identical

message about language is conveyed in all of these classrooms – and that message is simultaneously *about* pragmatic or contextual structure and conveyed *through* language pragmatics in the classroom.

I chose to hold the content of the teaching as constant as possible, by taping only first-semester, first-year Contracts classrooms. In this way, we could be more certain that variability found among the classes was not due to differences among first-year subjects. We selected first-year, first-semester classes because this is the time period during which students experience their first re-orientation to language as they enter their new chosen profession. It is the time period that most closely approximates the first days of an initiation rite, a time when entrants to a new social status are taught to shift old patterns in favor of new ones. [15] In the first year of medical school, for example, medical students must undergo a change in their orientation to the body, a shift seen most dramatically through the first semester of gross anatomy lab. As they dissect human cadavers, students take their first step into a new profession in which they must develop a more removed and dispassionate approach often referred to as "the clinical attitude."[16] If we look now to the first-year law school experience, we find a similar emphasis on learning to "think like a lawyer."

So, then, what core re-orientation is required if a first-year student is to "think like a lawyer"? In the gross anatomy lab, cultural norms around reverence for the body and death are routinely violated, so that students are encouraged to give up old attitudes and to adopt new ones. What we found in the law school classroom was that linguistic norms are ruptured, as law students are urged to give up old approaches to language and conflict and to adopt new ones. "Thinking" like a lawyer turns out to depend in important ways on talking (and reading, and

writing) like a lawyer. And this change is largely a matter of a shift in language pragmatics, one that we can trace in different forms through all of the classrooms of the study.

1. The Importance of Being Pragmatic[17]

Researchers studying the interface of language and society have found that it can be very useful to track the contextual structuring of language. For example, anthropologists studying political oratory have found that the contextual or pragmatic structure of powerful political speech often subtly mirrors the very model of the polity that the politician seeks to convey. In other words, subtle aspects of language form work to reinforce or even create an underlying orientation in the world. Ethnographers studying children in classrooms have found that teachers working with students perceived to be low status (where because they are labeled "low ability" or because of class or racial bias) send very different pragmatic cues than do teachers working with higher status children. In everything from interruption patterns to how they cue children to speak, teachers can convey very different messages. Low status children are sent the message that the text they are reading is simply something to be pronounced, and they are interrupted and corrected continually as to mechanics. This prevents them from developing a sense of the text as something to be mined, interpreted, and mastered – a message commonly sent to higher status students. Of course, no one ever sits the children down and tells them, "Don't bother trying to understand this – just see if you can pronounce it properly." Indeed, a teacher might be shocked to hear that this is the message he has conveyed. But it is conveyed nonetheless, through a variety of pragmatic cues.

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

It might, however, come as something of a surprise to hear that the most classic Socratic teaching resembles the low-status children's classrooms in terms of uptake structure. The classic style of Socratic questioning is characterized by low amounts of uptake, as I have elsewhere demonstrated.[18] However, when we examine how and when uptake happens, it becomes clear that this (pragmatic or contextual) way of shaping language's meaning is actually being used to refocus law students' attention on new aspects of the text. Unlike the low-status students, law students are being taught to master the text, but in a new way. Now they are taught to read the text not only for its semantic content, but for the way it points to contexts of legal authority. What was the status of the authoring court in the hierarchy of courts? What was the procedural stance of the case? What doctrinal categories (given in precedent by the appropriate courts) or statutory provisions (again, enacted correctly by authorized legal "agents") does the court discuss? Slowly but surely, law students learn to listen for new aspects of the "conflict stories" with which they are presented. And they are taught to do this not primarily through semantics but through the restructuring, in context, of the very language in which they discuss what they have read. This, then, is a very different use of uptake and other contextual features of language: one that pushes students into a new way of talking, reading, and "thinking." Although

some of the tightest mirroring of this message in linguistic structure can be found in the most canonical Socratic pedagogy, we find some sort of contextual mirroring in all of the classrooms of the study – whether the overt discourse form is more or less Socratic, or even moves into primarily lecture (as it did in one of the classrooms of the study). A ubiquitous question-answer format, even when enacted entirely by the professor in lectures (for example, asking a question first and then answering it), is used throughout all of the classes in this study to refocus students' attention on layers of textual and legal authority.

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

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

What, then, is the distinctive shape of the worldview or epistemology conveyed in the law school classroom? Through careful analysis of the structure of discourse in each classroom of the study, we can find a distinctive legal approach. When students attempt to tell the stories of conflict embodied in the cases assigned for their courses, they typically start by focusing on the content of the story. First-year law professors insistently refocus the telling of these stories on the sources of authority that give them power within a legal framework. What was the court authorized to decide on? If it writes about hypothetical situations rather than the one before it, students learn, this part of the "story" is to be separated from the "holding" – the authoritative part of the case. The holding is valid only if uttered by the correct authority, following the

correct procedure, delivered in the correct form. This is a new and very different sense of where to look when we decide what counts as a "fact," how to construct valid accounts of events, where to demand accuracy – as opposed to permitting unsupported suppositions.

Over and over again, the professors in this study demanded precision from their students on issues of legal-textual authority. If they did not reproduce the precise words required for one prong of a legal test, the professor would continue on until those words were spoken. Professors reviewed the procedural stance of cases, reminding students that on an appeal from a motion to dismiss, the facts as stated in the case did not have the same status as facts in an appeal from a jury trial. Regardless of the status of school or philosophy of the professor, law students were called to increasing precision about the texts, their institutional histories, and their relationships with other texts (precedent, for example). At the same time, wide-ranging discussions of the social contexts within which the underlying disputes would sometimes be permitted after serious legal analysis had been performed. During these discussions, all manner of suppositions and hypothesized data about the social world were permitted, with very little consideration of how to achieve greater accuracy.[19] The move to focus on form, authority, and legal-linguistic contexts is thus accompanied by a shift away from precision or depth in discussions of content, morality, and social context.

Interestingly, a snapshot of this difference can be found in the distinctive footnoting conventions in law reviews and peer-reviewed journals. Law reviews require a high degree of precision in the citation to authority: student editors diligently check each footnote in an article to be sure that the citation's page number is correct and that the text of the citation actually says what the article claims it does. On the other hand, they cannot and do not check the validity of the texts being cited themselves. If the methodology of a study being cited is faulty, the citation

will still pass muster as long as the footnote accurately quotes what is said in the faulty study. By contrast, peer-reviewed journals rely on authors to be accurate about page numbers (which may indeed be a leap of faith!). It is quite possible to put the wrong page number into a footnote for a peer-reviewed journal and get away with it. On the other hand, if one cites a faulty study, ideally the peer reviewers will notice this. If the article author has relied in some crucial way on a study known to be unreliable, he or she will not be able to keep the citation – indeed, either a "revise and resubmit" or a rejection will likely result.

Thus we see very different approaches to issues of accuracy and authority in the social sciences and law. For the social scientist, it is often quite confusing to witness what amounts to almost a form of agnosticism on the part of many legal professionals: when reading legal texts, their core mission is not to determine "what actually happened," but rather to determine whether the legal-textual ordering or authority has been satisfied. The details of social context are important only as they fit into legal categories decreed by precedential tests or statutory requirements. It is not, after all, generally up to an appellate judge to decide what happened , nor is it up to any particular attorney to decide that a previously-decided case was unfair. "Thinking like a lawyer" requires that one be able to step nimbly among a variety of positions, and it is possible that none of them resembles the attorney's own personal stance.

Erving Goffman usefully introduced the concept of "footing," which helps us to distinguish the various positions that a person may occupy in any given segment of speech. For example, Goffman delineates a number of distinct positions occupied by producers of language: the person doing the actual speaking is the "animator," the person who composed the words spoken is the "author," the person ultimately responsible for the position expressed by the utterance is the "principal." This concept of "footing" permits us to analyze the way speech

contains signals about speakers' positions, relationships, and social power. Goffman refers to a shift in footing as "a change in our frame for events."

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

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

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

Mr. M.: Right.

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

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

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

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

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

In this transcript excerpt, we could view both professor and student as occupying the footing of mere animators: that is, by using direct quotation, they give the semblance of merely speaking the words which were actually authored by characters in the story. However, it is also relatively clear that both professor and student are putting words into these characters' mouths, and thus are in fact authors as well as animators. On the other hand, this authorship is hidden (albeit thinly) by the metalinguistic signals that accompany direct quotation.[20] There are a number of subtle ideological messages conveyed by the ubiquitous use of this kind of fictionalized reported speech in law school classrooms:

(1) First, the effortless elision of animator and author footings through the use of reported speech in this setting conveys a subtle message about the power of legal discourse to put words in people's mouths--indeed, to literally create reality through discourse. As we saw in the previous chapter, the rendition of legal events as "facts" in legal narratives actually creates an authoritative account of truth (under the terms of the discursive system's own ideology). In the law school classroom, use of imagined direct quotation has already begun to loosen the anchoring of reported speech from its "original" speaker and context, substituting instead the primacy of legally-relevant strategic renditions in this kind of translation of events.[16] In developing the background characterizations of the legal personae who make legal arguments, it is strategic reasoning (which locates them in terms of those arguments) that becomes most important. The process of figuring this all out involves proceeding as if these strategic considerations were already part of the characters' internal or external dialogue, as events unfolded. In unpacking the legal story, professors in essence move their characters around in a

strategic landscape, trying them out (and allowing them to speak) in this location or that to see how their different positionings might affect the shape of the arguments they can make.

Interestingly, this free attribution of fictionalized locutions to characters in the story exists side-by-side with a demand for great precision about what was actually said--for certain purposes. As Matoesian has pointed out, precise repetition of previous utterances is highly valued as a means of impeaching witnesses who produce "inconsistent" renditions of the same events. Similarly, in law school classrooms, professors will at times insist that students reproduce with precision aspects of written or spoken language that are legally crucial (for example, to establishing whether there was "acceptance" of a contract). As I explain elsewhere, a hallmark of legal readings is this combination of blurred and precise boundaries, of obsessive attention to detail and yet also a permission to generalize freely without any substantiation about some matters.[21] Here we find another such combination, bewildering to the layperson, but entirely explicable within the bounds of legal epistemology: if the precise wording of a document or utterance is doctrinally important, then a proficient legal reader will be careful to focus on the exact phrasing involved. However, if we are developing a legal characterization of the players in the story, moving them about in order to locate them strategically and in terms of possible arguments they might make, we can freely imagine what they might have said. After all, it is precisely what strategies and arguments they can or might have developed that centrally define them as characters in this story. (And it is the attorney's job to figure this out and put the appropriate words in the characters' mouths.)

(2) When they employ direct quotation, law professors are also presenting the case through other people's voices--just as attorneys do in court (albeit with a somewhat different linguistic apparatus). In court, the process by which an authoritative version of the "facts" is created

involves presentation of competing stories through the utterances of witnesses. Attorneys attempt to shape these utterances, selecting particular witnesses and rehearsing them in an effort to present the story that is most favorable to their side. Although the witnesses often give the appearance of being both authors and animators of the stories they tell, the attorneys in fact share the author role--not only through coaching witnesses, but because they actually co-produce the narrative as they elicit testimony from witnesses through questioning. However, notice that this co-production is somewhat covert, because overt metalinguistic signaling frequently points to the witness as the main author of the narrative; the attorney's questions often appear as mere prompts and the answers as the "real" narrative. (This is obviously much more the case with well-prepared direct examinations of "friendly" witnesses than with overtly hostile cross-examination of the opposing side's witnesses.) Just as with professors' use of direct quotation, lawyers' authorship is at times hidden behind a thin metalinguistic veneer. In court, the witnesses produce their own "direct" locutions, which the attorney may then repeat as direct quotations in subsequent questions--a process that conceals the role the attorney played in producing the witnesses' utterance in the first place. Thus there is a quiet linguistic ideology that emerges from deployment of direct quotation, one that foregrounds an inauthentic authorship and hides the complex play of social power and discursive maneuvering that are really involved in the utterance. This linguistic ideology surrounding use of direct quotation in legal settings, as Matoesian has pointed out, plays a role in obscuring and naturalizing "how the law-in-action tacitly incorporates forms of social power, and how it constructs claims to knowledge, truth, and facticity in the details of discursive interaction."[22]

(3) Another subtle message conveyed through use of direct quotation by professors is the primacy of the dialogic (and/or question-answer) form in legal discourse. Dialogue is central in

courtrooms--between attorneys and witnesses in direct and cross-examination, between opposing attorneys as they make objections and tell competing stories in opening and closing arguments. Even in written opinions, judges create dialogues between two opposing arguments or sides as a way of tracing the steps that lead to their decisions. And in law school classrooms, professors not only enter into dialogues with students, but also, as we see here, create dialogues within their own speech turns through use of direct quotation:

TRANSCRIPT #2 [2/16/12]

Prof.: Okay, okay, or to put it more simply, the company in Indiana is saying, "Listen, we got this law in Indiana that is essentially for the benefit of the commonwealth of Indiana; it says that people who do business here can be made subject to Indiana's law." And, the plaintiff is saying, "This Florida company is doing business here in Indiana." Right? And the defendant Florida company is saying, "Forget that, I don't do business here in Indiana, I don't even have shop in Indiana." And it's a little bit unclear, actually, as to the way the court sort of smooshes together its statutory analysis and its constitutional analysis. What the court means to say is, "One. The statute does not seem to apply. Indiana says that companies that do business in Indiana are subject to Indiana's jurisdiction, but, it doesn't seem as though this statute applies given the facts of this case because this doesn't seem to be a company doing business in Indiana." The court then cites to a whole bunch of federal Supreme Court cases and uses the term "due process." And, what the court really means to say there is, "Even if a judge were to view Indiana's statute as giving jurisdiction to a court under these circumstances, that statute itself would be unconstitutional; it would be unfair to make this Florida cour( ) answer to this Indiana

corporation in Indiana since this Florida corporation, you know, didn't have any- wasn't really doing business in Indiana." Okay. Let's just- okay. Then, after having discussed that stuff and again ( ) that's due- just a jurisdictional issue, statutory, constitutional. Then the court says, "But, that doesn't end the issue for us," right? There may be another basis on which- there may be another basis on which the court can exercise jurisdiction in this case, and what's that other basis? Yeah.

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

This short excerpt contains a wealth of interesting linguistic detail. In the initial portion of the professor's turn, we see the characteristic use of turn-internal dialogue to vividly summarize the core arguments on each side. Again, the professor glides easily between the opposing sides, taking first one voice and then the other. The footing in this passage is somewhat unclear. On the one hand, this is not wholly fictional dialogue; it is a translation of arguments presented in the text of the opinion. Thus the professor can more credibly appear as a mere (re)animator here than in the previous excerpt. On the other hand, it is clear that the translation is not an exact one, and so we have peculiar exactitude given by use of direct quotation to what is at best a very loose rendering of what was actually said or written. The footing becomes still more complicated when a third interlocutor, the court, enters the discussion. Because the professor views the court's text as somewhat confused, he proceeds to put words in the court's mouth as well, telling the students what the authoring judge "means to say." In a sense, the direct

quotations here seem to signal that the professor is giving us the "real" message encoded in the confused language of the opinion, in an interesting inversion of the usual metapragmatic convention under which direct quotation would replicate the form rather than the gist of the message with exactitude. At the end of the exchange, we find the student responding using a fabricated quotation to loosely represent the plaintiff's argument-based perspective.

In addition to using direct quotation to create turn-internal dialogue, professors at times talk to themselves within their own turns--first asking and then answering their own questions. Or, they may also employ a mix of the two, asking themselves a question but answering using reported speech. The following excerpt contains examples of both of these alternatives:

TRANSCRIPT #.3 [7/20/8]

Prof.: What's- what's a very reasonable alternative interpretation of the first term, "first come, first served"? "As the entire metropolitan area lines up to purchase coffee at 49 cents a tin, we will wait on you and take your money in the same order of which you appear." So that's why that's not going to- that's not going to change it. That's not an indication *[. . .]* Okay, how 'bout if it says, everything that we've suggested previously, says "One per customer, one per customer"? Offer or no offer? Now, again, you cannot answer the question without measuring it against the legal rationale. Is there still a potential for theoretical unlimited demand in this type of problem? Yes. It's not as easy knowing you can come in there and start ordering it by the carload and trainload. *[. . .]*

At the beginning of the turn, the professor poses himself a question about reasonable alternative interpretations of a (directly-quoted) term. He responds to himself with an unframed quotation,

> which is nonetheless recognizable as such by virtue of the shifts in pronouns and tense ("we will wait on you" rather than "they would wait on first-comers"). Here he appears to take on the voice of a business that may or may not have made an offer to customers, speaking to the entire metropolitan area in the second person plural ("you"). This is however clearly another voice as well--not the professor's own, but that of one possible interpreter of the written text, who is not necessarily rendering the meaning of the text as the author would. The professor then proceeds to vary the facts, creating a small hypothetical ("how 'bout if it says.... 'one per customer'"), and poses himself another question, "Offer or no offer?" This question is followed by a brief metalinguistic injunction about how to answer these kinds of questions, and then by another question ("Is there potential . . . ?"), which he answers ("Yes.").

These excerpts give a sense of how professors convey the primacy of dialogic and/or question-answer form in legal language and thought (thought and language, again, remaining thoroughly intertwined in the indigenous, legal/linguistic ideology). Not only must lawyers respond to and initiate argumentative dialogue with others, but they should proceed when analyzing legal texts using internal dialogue structured around the posing of a series of questions. By mid-semester, we see the students begin to adopt the format (albeit with some interesting and creative variations) in their responses. One tacit epistemological lesson that is conveyed along with the discourse format is that legal truth emerges through argumentative dialogue, the privileged discursive form in this domain. Take one side, pose the appropriate questions, then take the other side--and from this ongoing debate.

Note, however, that the focus on language form creates a very closed linguistic system which is capable of in essence gobbling up all manner of social detail without budging its core assumptions. By contrast, at least some kinds of social science demand that researchers remain

open to revising core assumptions. If the data conflict with your pet theory, unfortunately, in the long run, it is probably your theory and not the data that has to go. By contrast, an attorney is required to hold onto his or her client's interests, and to contest any data that might get in the way. As Epstein has noted, an attorney who treated her client like a social scientist would be disbarred, while a social scientists who treated his data like a client would be ignored. This means that there is a fundamental difficulty in introducing forms of epistemological humility into legal thinking. The ubiquitous hedging and modesty about their conclusions that we find in well-regarded social scientists frequently seem like a dangerous luxury to those engaged in legal pursuits. And yet, a more subtle and sophisticated understanding of the social world could arguably contribute to better legal outcomes, if we could only find a good bridge between the two discourses and worlds.

B. Different Classroom Patterns: Whose Voices are Heard?

At the same time as we can track a closed character to the pragmatics of legal language, at least as it is taught in first-year law school classrooms, we can also find another kind of premature closure in the form of the discussions held in law school classrooms. In most of the classrooms of the study we found differential silence from the women law students, and an even clearer silencing of students of color.[23] This finding seems to be emerging as consistent across most of the observational work done to date in law schools.

On the other hand, there are some interesting variations. In our study, female students spoke as much or more than would be predicted by their numbers in the class in the two classes taught by female professors in non-elite schools. Along with other researchers, we did not find that the encouraging effect of female law professors was as great in more elite schools, leaving us with a question about the interaction of school status with gender. By contrast, students of color spoke more in classes taught by professors of color even in elite schools. They emerged as the leading speakers only in classes where there were professors of color and substantial cohorts of

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

Looking at both the qualitative and quantitative results from this study, we can see that the backbone of legal language sends powerful messages to law students, along a number of different dimensions. Starting with an examination of formative experiences in law school, we can use a better understanding of the messages conveyed in language structure to open legal discourse – both in form and content – to more voices and perspectives. This should have obvious benefits for the legal system in a nominally democratic society. [24]

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

We have seen that there is a powerful, linguistically-circumscribed system of legal knowledge, imparted in the law school classroom. The law school classroom is itself arguably the site of more than lessons about technical law. Educational research has demonstrated that the structure of classroom interactions affects how we "create settings in which students can learn lessons of caring, justice, and self-worth."

One important step would be taken if those trained in law could be made more aware of the limitations tacitly built into the very framework of the language in which they work. As we have seen an empirically-informed perspective helps to problematize the process of legal translation itself, challenging complacent presumptions regarding the transparent character of legal language.

Like all human language, legal language is embedded in a particular setting, shaped by the social context and institution surrounding it. Systematic study of this contextual molding provides an important antidote to the hubris that inheres in standard legal metalinguistic assumptions, and pushes legal professionals to remember the limits of their knowledge. Excellent translation, whether across disciplines or among people, begins with epistemological modesty; it is only when we recognize that there are other possible perspectives or frameworks that we can start to comprehend them. The arrogance that accompanies a closed linguistic system can contribute to the alienation of lawyers and the legal system from the people they are supposed to serve, because it can prevent those speaking the language of law from truly hearing alternative perspectives. We can trace in legal language a metalinguistic structure that is at once powerful and problematic. Understanding the problems alongside the power might help law students balance the intoxicating appeal of their new language with a realistic reminder of its limitations. This kind of attention to the translation process itself is the goal of the New Legal Realism Project.

Endnotes

[1] *See generally*, *New Legal Realism Symposium: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, and in particular, see Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used To Be,"* 2004 WIS. L. REV. 365.

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

[3] See http://www.abf-sociolegal.org/ ("Established in 1952, the American Bar Foundation is an independent, nonprofit national research institute committed to objective empirical research on law and legal institutions. This program of sociolegal research is conducted by an interdisciplinary staff of Research Fellows trained in such diverse fields as law, sociology, psychology, political science, economics, history, and anthropology.")

[4] See www.newlegalrealism.org

[5] For example, Vanderbilt law professor Tracey George advocates " a model-based approach coupled with a statistical method" as the preferred way of studying law empirically, urging that scholars combine "a positive theory of a law or legal institution" which should then be tested using "quantitative techniques developed in the social sciences." Tracey George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, Vanderbilt University Law School Law And Economics Working Paper 05-20, available at http://ssrn.com/abstract=775864 . However, ABF Director (and Northwestern sociology professor) Robert Nelson notes that "theoretically driven research that uses multiple methods can produce stronger validity claims, can better illuminate the social mechanisms through which law operates, and may lead to research findings that more readily translate to broader publics." www.elsblog.org/the_empirical_legal_studi/2006/06/index.html (June 21, 2006). Cornell law professor Michael Heise, a founder of Empirical Legal Studies, similarly notes: "I've always been of the mind that

different methodological approaches possess different blends of strengths and weaknesses and that none possess an exclusive lock on advancing knowledge. To be sure, certain research questions, designs, and data might lend themselves more appropriately to one methodology or another. But using 'multiple methods,' where appropriate and helpful, strikes me as a good idea." *Id.* at June 22; see also discussion on ELS blog during the week of June 19-23, 2006. There are a variety of ways of defining "empirical," but what they have in common is an emphasis on experience and observation, which are core features of a variety of social science methods. In disciplines such as history, of course, the original data are of necessity more archival – but this can be true in other fields as well.

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

[7] CARNEGIE FOUNDATION, EDUCATING LAWYERS (in press, manuscript on file with author).

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

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

[10] One of the many enjoyable aspects of doing this kind of research is that it has inadvertently put me into a kind of tacit conversation with the work of law students at a number of law schools – who thus far seem to be the only other source of extensive observational reporting on law school classroom dynamics. Enterprising law students at Yale, Harvard, and the University of Chicago have organized to track gender dynamics at their law schools; the Yale students have now in fact performed a second wave of the research. See (listed in chronological order): Catherine Weiss and Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988) (Yale); Karen Wilson and Sharon Levin, The *Sex-Based*

Disparity in Classroom Participation, THE PHOENIX (Nov. 26, 1991), at 3 (University of Chicago Law School student newspaper); Adam Neufeld, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13. AM. U. J. GENDER, SOC. POL., & L. 511 (2005); YALE LAW WOMEN, YALE LAW SCHOOL FACULTY AND STUDENTS SPEAK ABOUT GENDER: A REPORT ON FACULTY-STUDENT RELATIONS AT YALE LAW SCHOOL, 2001-2002, available at http://www.yale.edu/ylw/YLW%20Gender%20Report.pdf. Although student-run efforts generally do not cover large numbers of class sessions for any individual class (nor can they perform more complex research tasks such as tracking timing of turns, etc.), they do manage to report on a wide variety of classes within each school. Later studies have added innovations such as having a male and female coder simultaneous code in any class session that is being observed, tracking whether turns were volunteered or called-on, and reporting outcomes as ratios rather than as raw numbers. I have very much enjoyed following the growing conversation among law students as to how best to study and track classroom dynamics, which I view as one hopeful avenue for encouraging an engaged and more sophisticated exposure to empiricism for law students:

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

MERTZ, *supra* note 5, at 464. In this regard, some of the students may be ahead of their professors in coming to understand some of the real difficulties and intricacies of using empirical research to address policy issues.

[11] See Elizabeth Mertz and Bernard Weissbourd, *Legal Creativity versus Rule Centrism: The Skewing of Legal Ideology through Language*, *in*, SEMIOTIC MEDIATION: SOCIOCULTURAL AND

PSYCHOLOGICAL PERSPECTIVES 261 (Elizabeth Mertz & Richard Parmentier eds., 1985); Elizabeth Mertz, *Tapping the Promise of Relational Contract Theory: "Real" Legal Language and a New Legal Realism*, 94 NW. U. L. REV. 909 (2000).

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

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

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

ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER," 362 (2007).

[14] The Carnegie Foundation team visited sixteen different law schools, which permitted observation of classes across a still wider variety of schools and topics (although for shorter periods of time), and, as noted above, came to some quite similar conclusions. CARNEGIE FOUNDATION, *supra* note 6, at xxi.

[15] On the concept of "liminal" states, which characterize the period of initiation into a new social status, see ARNOLD VAN GENNEP, THE RITES OF PASSAGE (1960); see also VICTOR TURNER, DRAMAS, FIELDS, AND METAPHORS (1974).

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

[17] Actually, more accurately, I should say "metapragmatic" here, but I have found that this particular technical word has a very adverse affect on many legal audiences. (Something I have trouble understanding, given that legal professionals deal with all manner of arcane technical vocabulary.) By

"metapragmatic," anthropological linguists mean to indicate the way language functions at a "meta" level to monitor and convey information ABOUT the pragmatic meaning that is continually being conveyed when we communicate. For example, if I say "I don't want to fight with you, I'm just trying to explain," I am attempting to use the metapragmatic level to reorient your understanding of the ongoing flow of our speech. I am saying, "don't interpret the contextual signals I am sending as angry, please, interpret them as a mere attempt to explain." This is a meta-level linguistic signal (language referring to itself).

[18] Elizabeth Mertz, *Recontextualization as Socialization: Text and Pragmatics in the Law School Classroom, in* NATURAL HISTORIES OF DISCOURSE 229 (Michael Silverstein & Greg Urban, eds., 1996).

[19] See MERTZ, *supra* note 12; see also CARNEGIE FOUNDATION, *supra* note 13.

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

[21] MERTZ, *supra* note 12, Chapter 5.

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

[23] See Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1 (1998).

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