Review Essay

Language, Law, and Social Meanings: Linguistic/ Anthropological Contributions to the Study of Law

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Sally Engle Merry *Getting Justice and Getting Even: Legal Consciousness among Working Class Americans*. Chicago: University of Chicago Press, 1990. 227 pp. $40.00 cloth; $19.95 paper.

John M. Conley and William M. O'Barr, *Rules versus Relationships: The Ethnography of Legal Discourse*. Chicago: University of Chicago Press, 1990. 222 pp. $34.00 cloth; $14.95 paper.

Scholars who study the social constitution of law have increasingly come to appreciate the importance of language in legal processes. Talk of discourse and language has become prominent in the writings of sociolegal scholars and legal theorists alike.[1] This review essay considers the question, What dif-

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[1] As Merry (p. 110) and Conley and O'Barr (p. 2) note, the term "discourse" has been used in different ways by different disciplinary traditions. Social theorists, anthropologists, and linguists use the term to refer to both spoken and written language and speak of "types" of discourse that vary in their structure. Thus discourses are stretches of language that can be viewed as structured or coherent; often analysts also examine the ways in which some stretches of language differ in principled ways from other kinds of language. Some discourse analysts from these traditions also pay particular attention to speech context. As Merry (p. 9) notes, a growing number of scholars, from Michel Foucault to Martha Fineman, have been concerned with understanding the social constitution and contexts of discourses. This kind of approach views discourses as always ideologically laden, as embedded in power relations in nonrandom ways.

From this vantage, then, kinds of "talk" are kinds of discourse. However, to the extent that we embrace Merry's somewhat Foucauldian vision of "discourses," discourse analysis would involve in-depth study of the social context of speech. It would be possible to analyze kinds of talk in terms of linguistic differences without much attention to the relevant communities and social history, but this would not be "discourse" analysis in Merry's sense. (It would, however, meet the definition of "discourse" analysis used by Conley and O'Barr—and by most linguists.) While at several points in this essay I use the distinction between "talk" and "discourse" to signal this kind of difference in approach, it is not my intent to assert any canonical usage of the terms. (Indeed, my own practice in general is to use the term "discourse" broadly.) Here the distinction is meant to signal a difference between Conley and O'Barr's more in-depth treatment of the language itself, as opposed to Merry's more in-depth analysis of the social/economic/political contexts of the language she studied.

ference does this attention to language make? I discuss a number of ways of approaching language, suggesting that some are more useful than others for social and legal analysis. In particular, I focus on the contribution of anthropological approaches and on two recent entries in the University of Chicago Press series "Language and Legal Discourse": *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans*, by Sally Engle Merry, and *Rules versus Relationships: The Ethnography of Legal Discourse*, by John M. Conley and William M. O'Barr.

The first section of the essay gives an overview of anthropological and linguistic approaches to language, from fundamental concepts in the work of Saussure and Peirce, through reflectionist and instrumentalist approaches used by sociolinguists and others, to the new anthropological vision of socially grounded linguistic creativity. The second section focuses on the study of language and law. It begins with a brief review of relevant past work on legal language, giving special attention to studies that focus on the contextual or social character of language. The section concludes with a discussion and comparison of the volumes by Merry and by Conley and O'Barr.

I. Ways of Thinking about Language

There have been many different conceptualizations of language in the linguistic and anthropological literature. Some have focused on formal properties of language as an abstract system with its own dynamics. Other approaches have concentrated on language as an instrument effecting social ends. And a number of linguistic anthropologists and sociolinguists have worked to formulate a theory encompassing both formal and functional aspects of language (see, e.g., Gumperz 1964, 1972; Hymes 1974; Labov 1964, 1966; Silverstein 1976, 1987). As this work has proceeded, a new focus has emerged: beyond formal grammatical structure or instrumentalist functions, language also embodies social creativity. We have just begun to explore the ways in which language functions not merely to express preexisting social categories but to forge, renew, shift, and break social bonds (see, e.g., Baumann & Briggs 1990; Brenneis 1984, 1988; Briggs 1986; Gumperz 1982; Hanks 1990; Irvine 1989; Lucy 1992; Mertz 1988a; Mertz & Parmentier 1985; Silverstein 1976, 1992; Woolard 1989).[2] This creativity is particularly obvious in legal arenas, where so much of the social "work" being accomplished is a powerful act of translation in which social ends are effected through the imposition of legal (and of course at the same time linguistic) cate-

[2] Although in this view language is an important structuring influence, the theory does not devolve into linguistic determinism because it conceptualizes language as itself shaped in crucial ways by social context.

gories.[3] To appreciate what linguistic anthropology can offer the study of law, we need to explore a number of basic linguistic concepts and consider some alternative approaches to studying language.

A. Fundamental Linguistic Concepts

A key formulation of the division between language as an abstract system and language as a medium for social exchange can be found in the work of Ferdinand de Saussure (1959).[4] Saussure made a distinction between *langue*—the abstract linguistic system that speakers of a language share (perhaps most easily understood as the system of "grammar") and *parole*—the "execution" of that system in use by individual speakers. The socially shared system of signs that comprise *langue*, described by Saussure as a union of sound-images (signifiers) and meanings (signifieds), is the crucial backdrop against which individual speech takes place:

> The signifier, though to all appearances freely chosen with respect to the idea that it represents, is fixed, not free, with respect to the linguistic community that uses it. . . . We say to language, "Choose!" but we add: "It must be this sign and no other." No individual, even if he willed it, could modify in any way at all the choice that has been made. (Saussure 1959:71)

The primary focus of Saussure's work was on the way in which language-internal structure generated meaning. The well-known Saussurean "proportion" posits a systematic relation between changes in the sound system of language and changes in meaning. (The actual social structuring of *langue* as it was realized in *parole* is not well explored in Saussure's work.) Subsequent work by Chomsky and other linguists continues the focus on abstract systematicity in language. As a result, a great deal of work on language structure has proceeded with a blind eye to the social grounding of language. This kind of decontextual approach by itself is of very limited value in understanding the social character of legal language.

Charles Sanders Peirce, the founder of the field of inquiry known as "semiotics,"[5] pointed the way toward a more social

[3] See, e.g., Edward Levi's (1949) classic study of the way in which classifying items as "inherently dangerous" was an essential part of tort law's response to social and industrial change.

[4] Although in this essay I focus on linguistic theory, it is important to note that Saussure's work was broader, dealing not only with language but with "signs" and "signification" more generally. Linguistic signs are only one way of communicating, and so an inclusive theory of communication needs to encompass nonlinguistic signaling as well. Saussure was the founder of "semiology," a broad inquiry into the nature of communication that includes the study of language.

[5] Peirce's "semiotics" and Saussure's "semiology" are obviously closely related endeavors, and much current work published in journals such as *Semiotica* draws on both traditions.

vision of language. Like Saussure, Peirce views the sign as composed of a sign vehicle (Saussure's sound-image or signifier) and a mental representation (Saussure's signified) (Peirce 1974:2.228).[6] However, Peirce also adds a third component—the *object* that the sign stands for.[7] As part of his analysis of sign meaning, Peirce characterizes signs according to the relations between sign vehicles and the "objects" they represent (ibid. 2.247–2.249).[8] He distinguishes three kinds of signs: (1) the *icon*, which represents its object by virtue of a perceived isomorphism between characteristics of the sign vehicle and of the object (e.g., a diagram), (2) the *symbol*, which represents its object "by virtue of a law, usually an association of general ideas" (e.g., the word "rose"), and (3) the *index*, which represents its object through an actual existential connection (e.g., a pointing finger and the object it points to, or the word "I" used by a particular speaker) (ibid.).

The index is of particular interest to those who study the social foundation of meaning, because indexes derive their meaning from the particular contexts in which they are used. This kind of context-based indexical meaning is also referred to as *pragmatic* meaning. Symbolic (or *semantic*) meaning, by contrast, is "general," obtaining apart from specific contexts. The word "rose," for example, acquires its meaning through a general rule or law—a cultural convention that tells us that this word ("rose") means this idea or concept ("kind of flower").

Linguistic signs usually function in multiple ways at the same time; thus a given stretch of language may at once index its context and convey symbolic meaning. Imagine, for example, that I tell you that "This rose is yellow." I index our speech context in the word "this," which relies on the details of where we are standing in relation to the rose to pick out (or index) that particular flower. The word "is" also indexes the current context (as opposed to a past or future tense verb) and thus depends on knowledge of the particular setting of our speech for part of its meaning.[9] The words "rose" and "yellow" rely

[6] I here employ the standard notation used by Peirce scholars; the number before the period is the volume number in Peirce's *Collected Papers* (1974); the numbers following the period indicate the passage number.

[7] As will become apparent from the examples below, the "object" need not be a concrete thing.

[8] Peirce introduced three trichotomies, each of which characterized signs according to different criteria; he then adduced ten classes of signs by combining some of these criteria. Here I focus on the second trichotomy and on the contextual character of the index.

[9] Even the words "this" and "is" rely on residual semantic meaning as well. For example, we know apart from any given context that "this" refers to things that are close rather than far away. Similarly, the words "rose" and "yellow" incorporate pragmatic meaning when they are used in speech to refer to particular instances of the categories. Our assessment that particular words rely more heavily on indexical or symbolic meaning is not meant to deny their multifunctionality.

more on our decontextualized understandings of their symbolic meanings. A number of long-standing traditions in linguistics and sociolinguistics have attempted to explicate how linguistic forms function pragmatically to index social context.

B. Reflectionist and Instrumentalist Views of Language Pragmatics

For some scholars, attention to language is important because language reflects social contexts. Alternately, language can be viewed as a way of effecting social ends. In either case, language itself is important only because it provides a window on social process; language is understood to be a straightforward expression of its social context. Much of the early (and some current) work in the field of sociolinguistics provides powerful examples of these aspects of language function. This work has been an important corrective to a prevailing focus on language as an abstract (grammatical) system for conveying decontextual (semantic) meaning.

Thus, for example, William Labov (1964, 1966) found that linguistic variation corresponds with class divisions. In a famous study of New Yorkers' speech, Labov demonstrated that a number of subtle linguistic distinctions (e.g., pronunciation of the terminal "r" sound in phrases like "fourth floor") mirror divisions in class identity. Labov used a sociological index combining occupation, education, and family income to designate four class groupings (lower class, working class, lower middle class, upper middle class). His study revealed that subtle variations in speech correlated with these class divisions. Sociolinguists also found that aspects of language structure mirror divisions of race and gender, as well as other divisions within and between social communities (see, e.g., Brown 1980; Eidheim 1969; Lakoff 1975; Quay, Mathews, & Schwarzmuller 1977; Van der Broeck 1977; West & Zimmerman 1975). This reflectionist view of language as a mirror of social reality has been characterized as a metaphorical approach (Silverstein 1992), for here variation in language forms is analyzed as a more or less straightforward expression of social variation. The social function of language is highlighted, but language does not have an independent role in shaping social results.

A similarly straightforward image of the language-society relation is at the heart of an instrumentalist theory of language. According to this theory, people use language transparently to achieve social goals. When we say language is "transparent," we mean that there is no distinctive effect imputed to language; linguistic forms operate as tools through which actors achieve certain social results. Thus, for example, Deborah Tannen (1989) views certain linguistic devices (tropes, repetition, im-

agery) as "involvement strategies" used to involve and keep the interest of audiences. Similarly, work in functional linguistics, especially that directed toward issues of language and power, often approaches language as a mechanism for reproducing and contesting social structures (see, e.g., Fairclough 1989). As one critic has noted, these models never allow for linguistic creativity independent of "preexisting socially determined enablements and constraints" (Huspek 1991:133).

Language is certainly used in instrumental fashion to effect social goals, and no integrative theory of language use could neglect consideration of this aspect of language function. However, purposive attempts to use language quite often run up against a resistance or unpredictability that is the result of language's social structuring—that quality of language that results from it being a system that has developed in complex ways over time, a system that is widely shared (in complicated and variable ways) by a community.

Thus linguist Kurylowicz (1945–49) compared language to gutters or channels through which rainwater pours; the falling rain, like many linguistic innovations whose origins are social, comes from outside the system but must move through the grooves already laid down. In the process, of course, many of the grooves and channels will be altered or remade. As some parts of the system of channels shift in response to external (social) stimuli, there may be other changes within the system. For example, the process of change that began as a shift in a pronoun form (perhaps in response to changing social circumstances) may have unanticipated consequences as this changing pronoun form influences other parts of the linguistic system (see Silverstein 1985). Even these apparently language-internal shifts have social dimensions, because the system of language itself is socially grounded. But to understand the relationship between language and society in all its complexity, it is important to allow for a moment of linguistic creativity, a moment when language is more than a transparent window or tool expressing preexisting social divisions. This is an approach that is emerging from current work in linguistic anthropology and semiotics.

If we ask, then, what difference it makes that we pay attention to language using reflectionist or instrumentalist models, the response is that language is a good diagnostic tool, a good window on social process. But there is an even more compelling answer. As Conley and O'Barr explain in *Rules versus Relationships*, "[m]any other social science research traditions . . . use language as a window through which other, presumably more important, things may be viewed. . . . Our premise has been that the window itself is often more interesting than what can be seen through it" (p. xi). And, as I have suggested, per-

haps it is not a transparent window but one that refracts and changes what is seen in systematic and important ways. Merry makes this point in *Getting Justice and Getting Even*, as she explicates her view of conflict as "a form of communication, a kind of extended conversation" in which messages are exchanged that "are not simple or straightforward" but rather are "encoded communications, subject to interpretation" in structured sociocultural ways (p. 93; see also Merry 1990).

We look to language because the details of how something is said—the shape of a particular verbal exchange or written communication—matters. When attorneys submit briefs and argue to appellate courts, for example, how they write and speak (as well as how they are received) may well to some degree reflect class or gender identities. Attorneys in these settings are almost certainly attempting to use their language in a conscious attempt to effectuate social results. But what happens in the interaction is not always a simple reflection of preexisting social divisions or a straightforward use of language as a tool. There is a rich and complex dynamic that includes those aspects of language use but also includes the shaping of the interaction by discourse forms (appellate briefs, oral arguments), the complicated speech context of the institutional setting in general (the court), the influence of the particular individuals involved in this instance (the judge, other court personnel, the attorneys, the litigants in this case), the *creation* of new meanings and relationships and contexts by ongoing oral and written communication, and so forth. This is an opportunity to move beyond determinisms that would view legal outcomes as foreordained reflexes of preexisting social structures while yet not pretending that legal interactions are somehow free of the strong constraints generated by distributions of power and wealth in societies. In the socially grounded study of linguistic creativity there is both a strong respect for these constraints and yet serious consideration given to the creative possibilities that inhere in every new interaction and utterance.

C. Socially Grounded Linguistic Creativity: An Integrative Approach

The integrative approach to language and social context emerging in anthropology offers a challenging alternative to the approaches described above. I begin with a very brief overview of the somewhat technical literature in linguistics (with the caveat that I am of necessity simplifying considerably).

Exciting recent work in anthropological linguistics, building from a number of traditions, reverses the usual assumption in the philosophy of language and other traditions that the dominant function of language is conveying semantic information

(see Silverstein 1976, 1979, 1985, 1992; see also Briggs 1986; Crapanzano 1992). An emphasis on the semantic or "referential" aspect of language is understandable, for it may be what makes human language unique: "[L]anguages may be unique among natural semiotic systems in their capacity to transmit descriptive [referential, semantic], as well as social and expressive, information" (Lyons 1977:174; see also Mertz 1985:8). However, under the newer approach developed by anthropological linguist Michael Silverstein (1976, 1985, 1992) and others, it is precisely the social and expressive function of language that orders and grounds its ability to convey semantic information.[10]

For language to be actually used[11]—for the abstract system of language to be translated into speech—there is a necessary move to the indexical or social contextual realm. Because it is in use that the system of language is created, the backbone of language structure is that part which is responsive to social contexts (see also Kurylowicz 1972). From this vantage, language-in-use is always functioning indexically, and conveying semantic information is but one of the things it does when that is happening (it can also express emotion, maintain social distance, etc.). Semantics thus becomes a subset, a special case of pragmatics (Silverstein 1992). The socially shared system of language is constantly being renewed and shaped as it is used by speakers in social contexts; thus, while it may add some twists and turns of its own (because it is a system with its own special dynamics), language is always responsive to social forces.

One of the key structuring pragmatic principles of language rests upon its capacity to refer to and represent itself (the "meta" level of language) (Silverstein 1992).[12] Recent anthropological work has focused on indexical or contextual structuring and its typification at "meta" levels (see Brenneis 1984; Briggs 1986; Errington 1988; Hanks 1990; Lucy 1992; Mertz n.d.; Parmentier 1987, 1992; Silverstein 1985, 1987).[13] One

[10] This formulation builds on work by a group of linguists known as the Prague School and on later work by Roman Jakobson, who began to unearth the ways in which indexical (or contextual) structuring plays a vital role in linguistic systems. Work by sociolinguists and ethnographers of speaking similarly forefronted the role of indexical meaning, but as noted above, earlier studies often treated indexicality as a more or less straightforward reflex of social context.

[11] We can translate this in Saussurean terms: for langue (the system of language) to be translated into parole (actual speech.)

[12] For example, when a speaker says "I'm asking you for information," she is naming and characterizing the act she is performing as she performs it. Such coincidence of reference and indexicality makes this kind of language particularly interesting to speech act theorists, for the unit of pragmatic meaning corresponds to the unit of semantic meaning.

[13] Work on political language, for example, has revealed that political oratory often embodies a model of social relations in the very structure of the discourse (Parmentier 1992; Silverstein 1979; see also Keenan 1975; Mertz n.d.). The linguistic struc-

aspect of linguistic creativity, then, is language's capacity to refer to itself, so that seemingly identical stretches of speech can be typified as different by the metalinguistic structure. If, for example, I read portions of the Bill of Rights to you in a questioning tone of voice, making questions of sentences that are written declaratively, I create a new metalinguistic structure, telling you through the pragmatics of how I am speaking that these words are not "a declaration of rights" but rather "a skeptical questioning"—an entirely different "type" of discourse. Creative use of this typification affords speakers an opportunity to create new understandings of what language is doing (and thus to use it differently) in given situations.

Two other key structuring principles contribute to linguistic creativity (Silverstein 1979, 1992). First, any particular event of speaking functions against a backdrop of "presupposed" social knowledge that can be specified ahead of time. For example, established norms may tell us that using first names or endearing terms rather than titles usually indicates social or emotional intimacy. Note, however, that in any given instance speakers may creatively manipulate these norms, using endearing terms to people they hardly know or formal titles with intimate family members. When this happens, the "same" linguistic form conveys a vastly different meaning (for example, an apparently endearing term takes on insulting meaning, as in the case of someone calling a stranger "dear," or an apparently formal term becomes humorous and affectionate, as in the case of parents referring to their infant son as "Mr."). In each of these cases, the new meaning is generated in part by a violation of presupposed linguistic norms. Indeed, linguistic creativity itself relies on the presupposing function of language as a background to work with and against.

At the same time, language also creates new meanings through its use in social context. Thus, in the example above, it is not just the presupposable norms that generate meaning but also the creative use of language in a particular time and place (Silverstein 1976, 1979). Let us look at two examples of language pointing to (indexing) its context of use. If I tell you that "that chair is broken but this chair is not," you will need to know something about the context to decipher my statement. If there is no chair in the vicinity, the statement becomes difficult to understand. If there are two chairs that are different dis-

ture acts as a commentary on the ongoing speech, a meta-level typification that contributes to speakers' feeling that a particular structure is "natural" or "right." White (1990) has advanced a similar argument about the structure of certain Supreme Court opinions in which judges' rhetoric mirrors their approach to constitutional interpretation. Thus Taft's "authoritarian" rhetorical structure matches his "plain meaning" approach to constitutional interpretation, while Brandeis's processual and democratic theory of interpretation is voiced in an "open" rhetoric embedded in the vernacular or "common" language.

tances from the speaker, you will be able to pick out the chair farther from me as the one that is broken. Decoding my use of the word "that" depends on your knowledge of aspects of the speech context that exist independent of my act of speaking; in conveying meaning here, I am relying on presupposable aspects of the context to a greater extent than I am creating new context.[14] On the other hand, the use of a formal title rather than a nickname to indicate formality may create a social reality that did not exist prior to the act of speaking. That is, if a close friend suddenly uses a more formal style of address, she is not pointing to an aspect of the context that was knowable ahead of time. Rather, she is pointing to and simultaneously creating a change in relationship between the speakers (part of the social context of speaking), indicating and creating a new distance between the speakers. Of course, there are also presupposing aspects of even this very creative use (knowledge of the norms for use of nicknames, knowledge of the previous relationship between the speakers, knowledge of the current speech situation). But this would be an example of language functioning at the more creative end of the scale.

As these examples suggest, if we only focus on the content (semantics) rather than the form (pragmatics) of speech, we miss a great deal about the creative function of language.[15] White (1990:x–xi) has eloquently critiqued this kind of static focus:

> The habit of mind I am describing assumes that our most important uses of language are fundamentally propositional in character, indeed that any meaningful piece of discourse asserts (or denies) that such and such is the case. . . . Once our auditors perceive the objects we are naming in the real or conceptual world, language has done its job and can—and should—disappear.

White proposes an alternative vision that focuses on what I have been calling linguistic creativity (see also Mertz 1988a, 1989, 1992a): "But we have another way of thinking about language. . . . This is a way of imagining language not as a set of propositions, but as a repertoire of forms of action and of life. . . . Our purposes, like our observations, have no prelingual reality, but are constituted in language" (White 1990:xi). This vision of language as constitutive focuses our attention on the creative role of language use.[16]

[14] This is, of course, a relative judgment, as all utterances change the context to some extent, contributing in some way to ongoing interaction among people, or to self-expression of some kind.

[15] Silverstein (1979, 1981) explains this skewing as a predictable outcome of the way language itself works (see also Weissbourd & Mertz 1985; Mertz 1992).

[16] In a similar vein, Sally Merry stresses the uncertainty and the contingent and potentially powerful character of language use as a conflict unfolds; while a "retrospective" analysis might make it seem as if a certain interpretation and concomitant legal

The framework I have outlined, then, provides a compelling reason for paying attention to the language of the law, for language *is* the process whereby cultural understandings are enacted, created, and transformed in interaction with social structure. At the same time, language is structured in crucial ways by its social context, and social power is implicated at every level of contextual influence on language (sometimes all the more powerfully at the subtle levels of pragmatic structuring that are not easily accessible to conscious awareness).[17] Legal language affords a particularly good opportunity to examine both the constraining influences of social context and the potentially creative power of linguistic interaction.

II. Socially Grounded Linguistic Creativity and the Law

The legal arena affords students of language an exciting locus for examining the connection between language and social power. Nowhere is an act of linguistic translation more obviously laden with socially powerful consequences than in judicial opinions, where, for example, the decision to call a certain verbal exchange an "offer and acceptance" carries with it direct social results. The socially grounded and creative character of language is everywhere evident in the law, and language functioning in this fashion is no small part of the way that the law achieves its results. A number of previous studies have provided accounts of linguistic creativity in the law and its social consequences.

A. Some Past Studies of Language and Law

Here I focus on a few previous studies that set the scene for the two books I discuss in more detail below.[18] I begin with studies focusing on the powerful effects that very slight linguistic differences can have on legal outcomes and then move to studies that have examined more broadly the ways in which legal language can affect relationships and social structures.

result was inevitable, from the perspective of a person in the process of an ongoing linguistic exchange, all manner of meanings could potentially result from their choices in speaking (p. 94). Conley and O'Barr also stress the contingent character of linguistic exchanges in the courtrooms they studied, demonstrating that results do not flow automatically from presupposable aspects of the context but flow rather from the creative use of language by litigants and judges.

[17] This approach to discourse merges a Foucauldian emphasis on social power (Foucault 1980; see also Bourdieu 1977) with a sociolinguistic concern for the social context of speech.

[18] I again begin with the caution that this is by no means an exhaustive literature review. There are a number of excellent sources for such a review of the language and law literature; see Brenneis 1988; Danet 1980; Levi 1982, 1986; O'Barr 1981.

Effects of Language Pragmatics on Legal Outcomes

A view of language as more than a system for conveying propositional or semantic meaning also emerged in earlier work on language and law. This work demonstrated that language functioning contextually is effectual in certain ways. For example, psycholinguists have demonstrated that language affects assessments of eyewitness reliability (Loftus 1975, 1979) and juries' comprehension of instructions (Charrow & Charrow 1979; Sales, Elwork, & Alfini 1977). Certain styles of speech in the courtroom may damage a truthful witness' credibility. In particular, Conley, O'Barr, and Lind (1978) found that use of a speech style that was characteristic of "powerless" people (women as opposed to men, lower-class as opposed to upper-class people, etc.) undermined a witness's chance of being believed (see also O'Barr 1982). In all this work, there is clear acknowledgment that language structure and the meaning it conveys play a potentially vital role in legal outcomes.

Another common thread in these works is that they focus on subtle—often pragmatic—aspects of language that are in danger of being ignored by the court in favor of more semantic readings. This danger arises when language is taken at face value, viewed as a medium for conveying abstract information rather than as a socially embedded system conveying meaning in multiple ways. Indeed, pragmatic cues are often subtle, because the pragmatic structure of language is often less accessible to awareness than semantic, "surface" meaning (see Silverstein 1981). For example, Elizabeth Loftus (1979:96) conducted an experiment in which witnesses were shown a film and then asked whether they had seen something that was not shown in the film. She found that they were much more likely to report seeing the nonexistent object if asked, "Did you see *the* broken headlight?" than if asked, "Did you see *a* broken headlight?" If we analyze Loftus's insights in linguistic terms, we see that the difference between "the" and "a" involves a shift in presupposable aspects of contextual structuring: the word "the" generally is used to point to (index) an object that has been previously introduced, whereas the word "a" does not presuppose previous introduction.[19]

Other studies have focused broadly on the way legal language affects the very constitution of ongoing negotiated relationships and of wider cultures and social structures.

Constituting Relationships, Social Structures, and Cultures in the Language of the Law

Other work on the language of the law has explored the

[19] On the different ways in which previous referents are introduced and accompanying presuppositions in children's speech, see Hickmann 1980.

possibility of still stronger formative effects of legal language on social outcomes and structures. I focus on two varieties of social results: immediate effects on the relationships of speaking parties and more global effects on whole cultures and societies.

Work in the "process-oriented"[20] tradition concentrates on the way in which the use of language in legal arenas structures the relationships of interacting parties. Combining the ethnomethodologist's focus on shared commonsense understandings (Cicourel 1974; Garfinkel 1967) with the conversational analyst's attention to linguistic detail (Sacks, Schegloff, & Jefferson 1974), scholars in this tradition view linguistic exchanges in courtrooms and law offices as part of an ongoing process in which participants negotiate and create social reality (see Atkinson & Drew 1979; Danet et al. 1980; Maynard 1984; Pomerantz 1978; see also Goodwin 1980). Atkinson and Drew (1979), for example, analyze the way speakers take turns talking, tracing the way in which different forms of questioning or response accomplish underlying social or psychological goals (blaming, denying, etc.). Here the organization of talk is viewed as a key to the ongoing interaction through which people together produce social structure. Language does more than reflect preexisting structures. However, this understanding of the effect of language on social interaction is limited by its focus on the immediate speech context.

A broader view emerges from work that examines the effects of semantic and discourse-level phenomena on the constitution of cultures and societies more generally. However, these studies vary in the degree to which they take pragmatic aspects of language seriously—and in the way in which they take account of the wider sociocultural surround.

In their study of the language of the lawyer's office, Sarat and Felstiner (1988) are concerned with how legally circumscribed linguistic interaction frustrates participant's goals:

> [M]ost of the time lawyers remain silent in the face of client attacks on their spouses. . . . When they do interpret behavior they limit themselves to conduct that is directly relevant to the legal process of divorce, and they stress circumstances and situations that produce common responses, rather than intentions or dispositions unique to particular individuals. In this way they deflect what is, for many clients, a strong desire to achieve some moral vindication, even in a no-fault world. (Ibid., p. 764)

This work employs a careful semantic-level analysis of linguistic interaction to explain the way in which lawyers use language to reinforce their own authority and their clients' dependence, re-

[20] See Maynard 1984:5; see also Brenneis 1988 for a review of this approach and an enlightening discussion of how it differs from ethnography of speaking approaches.

maining deaf to what clients view as the most salient parts of their stories, while fostering a negative view of the legal system (see also Sarat & Felstiner 1986, 1990). Here linguistic interaction creates and reinforces power relationships, validating only some stories, hearing only some voices. This vision of legal language has much in common with that of Conley and O'Barr and of Merry (see below).

In an interesting study of the "transformation of disputes," Mather and Yngvesson (1980–81:780) focus on

> the differing abilities of litigants to argue their cases; the role of lawyers in shaping the way disputes are defined and presented; the influence of various publics or audiences with an interest in the definition and outcome of a particular case; and the complex relationships and informal norms which develop among groups of persons who cooperate in processing cases.

Their conclusion links legal language and forms of reasoning with transformations of dispute in different kinds of societies, transformations that effectuate change in the social order and distribution of power in society. Thus, the effectiveness of different "rephrasings" of a dispute through "narrowing" or "expansion" depends on the structure of particular social contexts.[21]

The structure of particular societies is precisely the concern of a number of anthropologists who similarly view legal disputes as culturally specific and culturally laden ways of managing social conflict (see Brenneis 1987, 1988; Brenneis & Myers 1984; Duranti 1984; Goldman 1983; Hutchins 1980, 1981; Myers 1986; see especially Brenneis 1988:19–21).[22] Thus Brenneis and Myers examine the way in which various kinds of speech may function to exert political constraint differentially in egalitarian as opposed to hierarchical societies (see also Bloch 1975; Brenneis 1987; Irvine 1979; Myers 1986). Rosen (1989a, 1989b) views speech in legal settings as continuous with speech in other settings in Moroccan society, all of it constantly reasserting and creating a world in which webs of relationship provide the frame for cultural understandings and social interaction (see also Greenhouse 1986, 1992).

An appreciation for the formative effect of legal language emerges also from recent work by feminist, critical race theory, and critical legal studies theorists in the legal academy (see, e.g., Delgado 1989, 1990; Matsuda 1987, 1989; Minow 1990; Williams 1991). For example, Fineman's (1991) most recent

[21] Merry criticizes work on dispute transformation for its assumption that disputes "change along a unidirectional path" and for its omission of a description of contested interpretations (p. 92).

[22] Brenneis (1988:19–21) distinguishes three sorts of constitutive roles for legal language: socially constitutive, constitutive of knowledge, and constitutive of rules.

work analyzes legal and political language dealing with poverty and uncovers an ideological vision that attempts to attribute responsibility for poverty to the "pathology" of single motherhood. This discourse shapes and reinvigorates patriarchal culture and society, directing attention away from structural contributions to inequity for which it would be harder to disown responsibility. Crenshaw (1988:1372–76) examines the polarized categories central to a language subordinating blacks to whites. Matsuda (1987:334–36) describes the power of black women's poetry and of Douglass's and King's rereadings of the Constitution as sources of resistance to social and legal oppression. Anthropologists are similarly turning attention to the power of discourse in legal struggles over racial and gender inequalities (see Coombe 1991a, 1991b; Hirsch 1989; see also Frohmann 1991).

Each of the studies discussed in this section shares a view of language and discourse as formative in some way. In some studies it is the word meaning, the semantics of language, that does the crucial shaping. In others it is both the semantics and the structure of the discourse itself that create strong formative effects. In a sense, these studies have begun the work suggested by current developments in anthropological linguistics because they begin to explore the role of linguistic creativity in the law.

Two recent studies in particular continue this tradition. Taken together, they combine attention to details of the contextual structuring of language with a broader social vision of the role of language. The increased understanding of legal process that flows from this combination demonstrates the value of the integrative approach proposed at the beginning of this essay and suggests that we should proceed still further in analyzing the social foundations of linguistic creativity in the law.

B. Conley and O'Barr's Legal Talk, Merry's Social/Legal Discourses

Both of these studies are concerned with the social grounding of discourse as well as with careful analysis of the actual language of interactions. I use the designations "talk" and "discourse" only heuristically to highlight an apparent difference in approach between the two books (see note 1). After an initial discussion of the books, I focus first on the linguistic diversity Conley and O'Barr described and then on how that language might be embedded in the complex social picture Merry paints.

Merry and Conley and O'Barr begin with very similar problematics:

> This is a study of the ways in which ordinary people relate to the American legal system. (Conley & O'Barr, p. ix)
>
> The book talks about the ways people who bring personal problems to the courts think about and understand law and the ways people who work in the courts deal with their problems. (Merry, p. ix)

Both studies deal with the understandings and discourse of "ordinary people"—in Merry's case, specifically, of working-class people—who are approaching the legal system as nonexpert participants. In both cases the basic unit or organizing principle is the pattern emerging from a litigant's encounter with the legal system rather than a community, case, or legal institution: "My organizing principle is a pattern of court use" (Merry, p. 4); "our unit of analysis is the encounter of the litigant with the legal system" (Conley & O'Barr, p. 29).

However, the two studies employ quite distinct methodologies in attempting to analyze citizens' commonsense understandings of the legal system. Conley and O'Barr look at the language litigants and judges used in small claims courts, focusing on 14 courtrooms in six cities. By expanding their sample beyond one or two judges or communities, they are able to give us a feeling for broader patterns that emerge in different settings. Merry, on the other hand, examines intensively cases that reached three mediation programs (and sometimes the courts) located in two New England towns—Salem and Cambridge. She supplements observation of mediation sessions and court hearings with a number of other techniques: (1) she conducts ethnographic studies and surveys in several neighborhoods—one lower-middle-class and two working-class neighborhoods in Salem, and one affluent suburb; (2) she performs in-depth interviews with court personnel and participants in the struggles (as well as studies of comparable populations that wound up in court but either were not referred to mediation or failed to participate after being referred), and (3) she carries out quantitative analysis of two of the mediation programs' caseloads. Thus her discussion of the discourses in which problems are discussed in court and mediation sessions is grounded in a social contextual analysis of the particular courts and communities in question.

By combining the insights of these two studies, we begin to approach the kind of integrative vision suggested by the many-layered linguistic model outlined at the outset of this essay.[23]

[23] Thus the challenge of integrative work may also be integrative in another way, bringing together a community of scholars to contribute parts of the picture. This echoes White's (1990:20) more moving plea for intellectual integration:

> [My] dissatisfaction is especially acute with specialized professional or academic discourses, but it is not confined to those. More generally it is with a bureaucratized culture, one that reduces human actors to very narrow roles, human speakers to very thin speech. For me the best response is what I have

From Merry we get an in-depth vision of the way that legal discourse is grounded in social divisions and needs—a crucial part of any theory of language that takes social context seriously. From Conley and O'Barr we get a broader view of the varieties of speech in which litigants and judges construct legal processes and outcomes; at the same time, we also see a more detailed linguistic picture of the details of courtroom exchanges. Thus we can see linguistic creativity at work in the subtleties of courtroom exchanges and in struggles over power within and between communities. I do not suggest that the findings of the two studies are fully compatible; in fact, the two studies differ on the relation of particular ideologies and speech styles to class divisions. My question is not whether we can merge the findings of the two studies to create a "complete" picture but rather whether we can bring the perspectives of the studies to bear on one another to generate a more complex understanding of legal language. We begin with the more detailed linguistic study and then move to Merry's more contexualized approach to legal discourse.

Conley and O'Barr's study centers on 14 judges who varied in their qualifications and duties and whose courts varied in the amount of pretrial assistance given to litigants. Conley and O'Barr interviewed 101 plaintiffs before trial, taped trials in 466 cases, and performed follow-up interviews with 29 litigants—both plaintiffs and defendants. They transcribed 156 trials, choosing those that were "especially rich in dialogue."[24] From their analysis of those transcripts, Conley and O'Barr develop typologies of litigants' and judges' speech and then discuss what happens when different styles of litigant and judge speech mix or clash.

A fundamental distinction for Conley and O'Barr is one between "rule-oriented" and "relational" discourses:

> *relational* litigants focus heavily on status and social relationships. They believe that the law is empowered to assign rewards and punishments according to broad notions of social need and entitlement. . . . By contrast, *rule-oriented* litigants interpret disputes in terms of rules and principles that apply irrespective of social status. (P. 58)

Relational accounts of disputants' troubles focus on the social

called integration and transformation, the attempt to put together parts of our culture, and corresponding parts of ourselves, in ways that will make new languages, voices, and forms of discourse possible.

[24] As Conley and O'Barr admit, this biases their sample in favor of cases in which the defendants present an active defense (p. 32). Given their interest in litigant speech, this makes perfect sense. But just in case there are distinct linguistic processes at work in these cases, it might be useful to also develop a sketch of the quick, smaller cases, in order to discover continuities and differences between the two kinds of cases. This would also permit us to see if there is a relationship between the language of those cases and the social "work" they are doing.

relationships and histories of the people involved rather than presenting a focused theory of causality, contractual responsibility, or any of the other issues that might be central to a legal framing of the problem. Rule-oriented accounts center on facts that are relevant to the legal categories and rules at issue, often leaving us with very little feeling for the context or social relationships involved in the dispute.

In one landlord-tenant example, Conley and O'Barr contrast the relational account of plaintiffs (who eventually lose) with the more rule-oriented account of the defendant landlords. The plaintiffs rented a "fixer-upper" house from the defendants, thinking that they could repair the home and buy it. They now seek a return of their deposit and $1,000 to compensate them for repair work done, claiming that the defendants misrepresented the extent of the work needed on the home. In court the plaintiffs' accounts center on their needs and predicament (e.g., "But when we moved into the house, we were in a predicament at the time. We had formerly been renting a house in the country . . . . we were in a bind. We had only one month to find another house"; p. 158). The landlords, by contrast, in an effort to show that the plaintiffs had full knowledge of the condition of the house, focus their account on the crucial legal issue of the inspection done before the plaintiffs moved in.

One obvious question is whether these differing orientations correspond with social distinctions in any way. Although they "suspect a greater tendency" on the part of women litigants to emphasize relationships over rules, Conley and O'Barr do not see a straightforward link between the orientations they have isolated and any single social category such as gender (pp. 79–80). Rather, they describe a complex relationship in which gender, race, and social class all play a role in the shape of courtroom language. Conley and O'Barr defend their decision not to quantify convincingly (pp. 181–85), for it is apparent after a few well-chosen examples that forcing complex speech into simplistic categories for purposes of quantification would have yielded little of value. I would, however, have liked more discussion of comments such as "We suspect a greater tendency among women to emphasize social relations" (p. 79) or "We suspect that judges offer advice more often and in more detail to parties with whom they have some common social and cultural background" (p. 84). As Conley and O'Barr note, "[i]f one is interested in how litigants perceive [a certain judge], 'our impression' is a highly relevant datum" (p. 204), and so I would have liked more information on how these suspicions and impressions were formed and founded. This would of course not necessarily require quantification but would simply call for further explication and presentation of the kind of in-

terpretive evidence that the authors so ably handle in other parts of the book.

In Conley and O'Barr's account, the language of the rule-oriented litigant appears to be generally more effectual in courtroom settings and is more typically used by business people, landlords, and professionals (p. 80). While "typical" women's socialization might foster a more relational style of speech, women who become part of the business and professional world often use rule-oriented discourse. However, Conley and O'Barr (pp. 80–81) find

> a convergence of the tendencies toward the powerless speech style and the relational orientation, and a complementary convergence of rule-orientation and the absence of powerless stylistic features. Thus, it may be that the burden of stylistic powerlessness, which falls most heavily on women, minorities, the poor, and the uneducated, is compounded on the discourse level by the tendency among the same groups to organize their legal arguments around concerns that the courts are likely to treat as irrelevant.

In previous studies, Conley, O'Barr, and their collaborator Allan Lind examined the relative impact of two distinct speech styles on potential jurors in experimental situations (O'Barr 1982; Conley et al. 1978). They found that the style that had been viewed as typical of women actually was typical of men and women occupying relatively powerless social positions and that people using this style were less likely to be viewed as authoritative or credible. Powerless speech contains marked use of features such as hedges ("I think," "kinda," "sort of") and hesitation forms ("um," "well"), while powerful speech does not.

Thus Conley and O'Barr posit a complex picture in which a discourse-level "orientation" and corresponding speech style can contribute to legal results that reinforce social inequities—but not in any necessary or reflexive way, for there is no neat correspondence between the language and any particular social category. Rather there are "tendencies," opportunities for negotiation of differing realities, and varieties of language that interact with legal logics in different ways.

Conley and O'Barr further distinguish five orientations typifying the approaches of the 14 judges in the study: (1) the *strict adherent* to the law (who views her/himself as "at times . . . an unwilling conduit for the nondiscretionary application of the abstract rules and principles that constitute the law"—p. 85); (2) the *lawmaker* (distinguished by "unabashed willingness to manipulate rules of law in pursuit of goals that they value more highly than respect for legal precedent"—p. 87); (3) the *mediator* (pursuing "justice primarily through the manipulation of procedure"—p. 90); (4) the *authoritative decisionmaker* (who

stresses his "personal responsibility" (and power) in making decisions—p. 96); and (5) the *proceduralist* (who puts "high priority on maintaining procedural regularity"—p. 101).

Conley and O'Barr note that the judges who do more mediating tend to be women, while the proceduralists are all legally trained men (pp. 110–11). However, there appears to be a still starker contrast; all the white men were either authoritative decisionmakers, proceduralists, or unclassified. (Indeed, all the authoritative decisionmakers and proceduralists were white men.) All the women, black and white, were either strict adherents, lawmakers, or mediators. The one black male judge was a strict adherent. Of course, the sample is too small to permit much generalization, but it seems striking that there is so little overlap in predominant orientation between the white male judges and the other judges (see p. 205).

Conley and O'Barr relate these distinctions to their fundamental division between rule-oriented and relational approaches. For example, authoritative decisionmakers and strict adherents both stress legal rules rather than social relationships. However, strict adherents do so with a sense of powerlessness; they point to the rules as constraining them in ways they are powerless to overcome. By contrast, the authoritative judges "imply that the law, while no less binding, takes on life only through their intervention," with the result that they "appear as willing and active collaborators in the dominance of rules, not victims of it" (p. 108). This is particularly interesting given the gender and race distinctions noted above. Mediators obviously fall closer to the "relational" end of the continuum, given their interest in negotiating the relationships involved in the case. Conley and O'Barr describe the lawmaking judges as "an interesting blend of relational and rule-oriented tendencies" because they appear to ignore the content of legal rules while laying great stress on the formal, rule-dominated quality of their own judgments (p. 108). Similarly, the proceduralists pay a great deal of attention to rules of procedure yet "convey an impression of largely unfettered judicial discretion when announcing their judgments" (p. 109).

Conley and O'Barr then consider what happens when litigants and judges with similar and with different approaches come together in courtrooms. The most usual case of concordance is between rule-oriented judges and rule-oriented litigants (often experienced business people; p. 123). Discord is, however, more common than harmony (p. 126), and Conley and O'Barr describe a number of ways in which a rule-oriented and limiting legal system[25] disappoints litigants with relational

[25] I would note that there are points at which Conley and O'Barr's typification of the legal system's discourse as predominantly rule-oriented seems to overstate the role of formalist views in law school and in legal practice (see, e.g., pp. 52, 59, 60). In both

agendas who had viewed the legal system as potentially enabling.[26] Surprisingly, these litigants may yet maintain faith in the "legal system," approaching the system as an abstraction that can be differentiated from their own unsatisfying experience in court.

In terms of the model of language with which this essay began, Conley and O'Barr span a number of levels. The bulk of their analysis focuses on semantic themes in the language of litigants and judges, themes that emerge as framing orientations for the interacting parties. These themes (rules-relationships) are grounded in the social context of courtroom interaction and so are not neutral in institutional terms. Conley and O'Barr furthermore attempt to connect these semantic themes with pragmatic structure in several ways.

First, they correlate the speech styles analyzed in their previous study (powerful-powerless) with the discourse themes here (rules-relationships), so that there is at least a possible connection between the details of language structure ("powerless" speech making heavy use of features such as hedging and intensifiers) and broader semantic themes (rules/relationships). Given the important role of indexical structuring (see sec. I), however, it would seem that there is a great deal more that could be done to explore the ways language structure contributes to the creative linguistic process Conley and O'Barr found in the courtroom.[27]

Second, Conley and O'Barr stress the creativity involved in the production of "stories" in court contexts: "A 'story' does not exist fully developed on its own, but only emerges through a collaboration between the teller and a particular audience" (p. 171). Thus a litigant may have carefully rehearsed the story she will tell in court, but the story actually told emerges from the interplay of the litigant's attempt to tell her tale and the judge's attempts to elicit a story deemed appropriate for this arena. Interruptions, questions, encouraging or hostile background murmuring, and other sorts of reactions are all ways in which the audience of a story contribute to the shape of its telling (see Brenneis 1987).

Here Conley and O'Barr are insisting that the structure of

settings it is quite common for the role of social relations and equity to be considered as important components of "the law." However, as a significant part of Conley and O'Barr's discussion of judges deals with judges who vary from the rule-oriented model in one way or another, their discussion demonstrates, at one level, that they are aware of this.

[26] For example, relational litigants may want emotional needs to be met through the court (pp. 127–31).

[27] Some current work has attempted to develop the connection between details of indexical structuring and the creative role of language in legal struggles over social change—particularly as regards gender and race (see Hirsch 1989; Mertz 1988a, 1988b, n.d.).

discourse cannot be presupposed or dealt with abstractly but must be analyzed with full appreciation for the way it is created in social contexts. Litigants' accounts alone do not give the full picture, for they are often structured by or responding to judges' speech. And judges' speech is quite different in form and content from everyday speech,[28] so that the clash of two kinds of speech in court is another creative moment where language and institutional context/structure come together in a potentially formative but nondeterminative way. Thus Conley and O'Barr, in delineating the way in which differences in discourse styles can affect legal interactions and outcomes, demonstrate the role of linguistic creativity.

Sally Merry's book *Getting Justice and Getting Even* moves yet further in analyzing the role of context. As I have noted, her study focuses intensively on mediation programs and courts in two communities, combining attention to the discourse in legal settings with in-depth ethnographic and historical work on the social contexts involved. The result is an unusually rich combination of sensitivity to legal language with the nitty-gritty feeling for context that comes from good ethnography.

Merry begins with an investigation of the social histories of the two towns in question. She concludes that the people who use the lower courts in an attempt to solve "personal problems" are disproportionately from that segment of the working class in New England that lost a secure economic base when major industries (such as textile and leather) closed down (p. 29). At the time of Merry's study, the area was undergoing economic revitalization, with a boom in high technology industries and a shift on the part of major urban centers to financial, management, and service industries. However, the litigants with whom Merry worked were largely left out of this revitalization because they were unable to make the investment in education required for high technology jobs. Thus they were left with insecure, low-paid service jobs as their only option at the same time that low-cost housing became scarce: "As the working class is squeezed out of jobs, it is also squeezed out of housing" (p. 28). Thus Merry's (p. 27) informants

> are neither the poorest and the most recently arrived nor the educated and affluent; they are working-class individuals living in dilapidated and dangerous housing in neighborhoods experiencing the influx of new residents, people surviving without two wage earners in the family and coping with relatively low incomes. They also tend to be people who have lived for one or more generations in the United States.

[28] In addition to their typology of themes in judges' speech, Conley and O'Barr describe a structure of discourse common to most of the judges, beginning with "notice of the impending judgment" (p. 83), moving to an announcement of the decision, then an explanation of "the factual and legal reasoning underlying the judgment" (p. 84), and then sometimes concluding with advice (usually to the losing party).

Unlike recent immigrants, these people feel they are entitled to certain rights, including use of the courts for redress of wrongs.

Merry then moves to an analysis of the kinds of problems that are brought to courts and mediation programs.[29] A refreshing aspect of her approach is her use of litigants' cultural categories rather than legal categories to organize the analysis. Thus, she begins with neighborhood, marital, boyfriend/girlfriend, and family problems rather than sorting the problems by the legal categories (assault, harassment) or even the kind of court (juvenile, lower criminal, small claims) involved.

Like many of the plaintiffs in Conley and O'Barr's study, Merry's plaintiffs think in terms of relationships and rights: "These plaintiffs do not think in terms of specific doctrines or rules but instead think in terms of fundamental rights of property, autonomy, and parental authority. These rights are embedded in relationships with spouses, children, and neighbors" (p. 38). And the relationships are embedded in wider cultural constructions of self and society and in social contexts. At every turn, we find connections between the social history with which Merry began and the disputes she analyzes. For example, neighborhood problems center on issues of "shared space" and become more intense where parties cannot avoid one another, either because they lack financial resources to leave or because the space itself is in short supply (or both): "more intense and more frequent neighborhood fights came from working-class and poor neighborhoods than came from widely spaced suburbs" (p. 39). Neighborhood problems also often reflect tension between older inhabitants and newer immigrant populations. Marital problems also more often become severe enough to move parties to seek legal relief under economically difficult circumstances: "Marital disputes often emerge when a couple feels trapped in the relationship, money is short, the house is small . . . . These problems become most intense when marital disintegration is thwarted, when the couple lacks the resources to separate" (p. 48). Many problems between parents and children "are clearly related to crowded houses, long hours of work, and limited incomes" (p. 57).

Merry distinguishes the groups of plaintiffs bringing neighborhood and parent/child problems, who tend to be "settled-living" working-class people with middle-class aspirations, from those bringing marital and boyfriend/girlfriend problems, who correspond more to the "hard-living" category of poor families who have given up the fight for upward mobility and often suffer the pain of violence, desertion, and substance abuse at close

[29] Previous work by Susan Silbey and Merry had revealed continuities between mediation programs and normal court processing of disputes, so that mediation was not "sharply divergent in its modes of operation or ways of talking" from courts (p. 29; see also Silbey & Merry 1986; Merry & Silbey 1984).

quarters (pp. 60–61). For example, neighborhood disputes often occur among people who are homeowners, a common marker of "settled living." In one case, Merry details a dispute between a plaintiff who is a newcomer to the neighborhood and an older defendant whose son is accused of harassing and damaging the property of the newcomer. In counting the cases filed or referred to mediation that had originated in the middle-class Salem neighborhood she studied (in 1980–81), Merry finds that five out of the six cases were neighborhood problems, a much larger proportion than was found in the two working-class neighborhoods (p. 66). In another case, Merry describes for us the conflict between a young woman and her former boyfriend; both parties fall into Merry's "hard-living" category. The woman is seeking protection from continued harassment following her decision to end their relationship; she feels endangered by his actions, which include attacking her, pulling her hair, and continually calling her at work.

Merry's ethnographic and interview work reveals that use of the court for family and marital problems has itself become identified as embarrassing, a mark of lower-class origins, among the more upwardly mobile, "settled-living" people. For "hard-living" people use of the courts for such problems is "a more refined alternative to violence . . . the symbol of the way educated, professional people deal with differences" (p. 83). Yet, ironically, Merry shows us that the "escape from community" characterizing the flight of "settled-living" people to more suburban communities also leaves them more dependent on the courts, for as they escape the watchful eyes of the local authorities in their old neighborhoods (local parishes, ward bosses, etc.), they also leave behind them alternative sources for the solution of problems.

In addition to these class-based distinctions, Merry also notes that women are more likely to bring cases to court, partly because they are at a physical and economic disadvantage outside of a legal forum and partly because they are attracted to nonviolent solutions to their problems. This differential use by women highlights the role law can play in challenging hierarchies of authority, but Merry reminds us that court is also used by "previously dominant groups whose control is challenged: parents with rebellious teenage children or older people whose neighborhoods are changing" (p. 86). In either case, Merry tells us, it is the plaintiff whose position tends to be most strengthened by invocation of this symbolic power of the court—but often at some cost. The most important cost is a loss of control as the unpredictable power of the state intrudes on their lives and relationships.

Against this backdrop Merry explicates the way the legal process works for and against these plaintiffs. Her account (p.

110) of legal processing of conflicts is one of creative linguistic channeling of social interaction:

> Discourses are aspects of culture, interconnected vocabularies and systems of meaning located in the social world. A discourse is not individual and idiosyncratic but part of a shared cultural world. Discourses are rooted in particular institutions and embody their culture. Actors operate within a structure of available discourses. However, within that structure there is space for creativity as actors define and frame their problems within one or another discourse.

Merry distinguishes three kinds of discourses in the courts and mediation programs she observed: legal, moral, and therapeutic. She acknowledges an apparent similarity between her categories of legal and moral discourse and Conley and O'Barr's categories of rule-oriented and relational discourse, adding that their approach differs because "they see these two forms of account as characteristic of different kinds of people rather than as part of an available repertoire to be used from time to time by all litigants" (p. 205 n.11). However, she would seem to agree with their strong correlation of rule-oriented discourse with the legal arena; her discussion of the legal reframing of "problems" as "legal cases" describes precisely a shift from complex, ongoing emotion-laden relational problems to finite, dispassionate legal cases with simple legal labels (pp. 105–7).

Merry describes this labeling process as "crystalliz[ing] a few issues out of the wider matrix of the problem" (p. 108). When the judges she describes reach legal decisions, we see a similar boiling down of complex relational problems to legal results through imposition of legal categories and rules. Thus one judge, after urging the parties to handle the difficulty as a "social problem" to no avail, finally announces that he must reach a "legal decision" (p. 107). The result then depended on several simply stated legal "rules": a letter one party wished to use as evidence was inadmissible because it was not notarized, and the complaints of one party about the condition of her apartment were not relevant because she was not technically a tenant (but a former lover of the other party).

I am not concerned with reconciling the difference between Merry and Conley and O'Barr in the substance of their descriptions, as my goal here is to learn what can be gained by combining their approaches to legal language and its social constitution. But I would note several points that might clarify the issue. First, like Merry, Conley and O'Barr speak of litigants as using both kinds of discourse; however, unlike Merry, they focus on the relative distribution of these discourses in different litigants' and judges' speech. Second, a close reading of their examples seems to indicate that Conley and O'Barr are using

somewhat different criteria than Merry; use of "legal" categories in an ineffectual way in accounts that otherwise center on nonlegal considerations does not count as "rule-oriented" discourse for them. In other words, there is a notion of legal effectiveness linked to their identification of rule-oriented discourse that does not seem to appear in Merry's approach. This might lead Merry to view the speech of a litigant whom Conley and O'Barr would classify as "relational" as more rule-oriented. Third, Merry is focusing on people who bring personal problems to court, often in cases likely to wind up in mediation. This might select against the kind of cases resulting from "arm's-length" business transactions that show up in Conley and O'Barr's account as the most heavily "rule-oriented" in terms of litigant speech. Merry's litigants do not typically seem to be business people of the sort that Conley and O'Barr find using more heavily rule-oriented discourse. Thus she might not have many examples of their more "rule-oriented" litigants in her study. This may explain some of the differences between the two studies.

Nonetheless, as I have noted above, it would be useful if Conley and O'Barr could give us a richer feeling for the basis of the class distribution they posit (as well as for race and gender dimensions). It would be interesting as well to hear from Merry whether the relative distributions of legal and moral discourse varied by kind of plaintiff and defendant. I was also curious about the differing styles of the mediators and judges in Merry's study, who in the excerpts we were given in the book seem to vary somewhat from each other in discourse styles.

Like the large proportion of Conley and O'Barr's litigants who are frustrated by the apparent unwillingness of the court to let them tell their stories, Merry's litigants are often unhappy with their treatment in court: "Many plaintiffs complain that the court is rushed, that the judge is bored, that their individuality is lost. They find the experience in court to be frustrating and humiliating and that their cases are handled in a hurried and impersonal way" (p. 134). This does not necessarily pose a contradiction to the findings of Lind et al. (1990) painting a brighter picture of litigant satisfaction, for both Merry and Conley and O'Barr describe processes whereby parties can be simultaneously unhappy and satisfied with their experience in courts and mediation programs:

> [W]e see a subtle process whereby litigants rationalize their experiences by separating the ideal of the law from the reality of its implementation. Their future legal behavior may be co-opted by the ideology of limitation, but they retain a belief in the law as an instrument of enablement. The more sophisticated become competent players in the game of law and business, achieving enough satisfaction in small victories to dis-

> tract them from the larger issues that originally brought them to the legal system. (Conley & O'Barr, p. 165)
>
> These encounters with the legal system shift plaintiffs' consciousness of law. The people involved come to think of the courts as ineffective, unwilling to help in these personal crises, and indifferent to the ordinary person's problem. They discover that one need not fear the court; one need not even appear. Areas of resistance to the authority of the court open up . . . . One can insist on retaining legal discourse and block the shift to moral or therapeutic discourse. The court turns out to be different, in some ways, than what it seemed from the outside; but the reward of experience is greater skill in wresting help from the court. (Merry, p. 170)

This suggests that qualitative studies such as these two may be able to contribute a deeper cultural understanding of what the quantitative findings about litigant satisfaction mean.

The contrast between the two quotations above also suggests an apparent difference in attitude about linguistic creativity and resistance, although I believe that the difference is largely one of emphasis. Merry views the linguistic exchanges in courts and mediation sessions as truly creative encounters in which plaintiffs can resist and contest the hegemonic power of legal institutions, struggling through the creative power of their own language to gain control of the discourse.[30] Conley and O'Barr at times stress that the apparent openness of such moments is underlain by a deep conservatism on the part of the institutional structure itself; the promise of openness is but a mask for the courts' general failure to admit and hear new voices. However, Merry clearly acknowledges the power and the deceptive character of legal institutions. At the same time, Conley and O'Barr see creative possibilities arising in the interactions of different discourses and people, emphasizing that how both litigants and judges talk can be crucial to the outcomes of linguistic encounters in legal arenas. In both studies we see that linguistic interaction in legal settings can be creative, forging new and unpredictable understandings. The difference appears to be one of emphasis, with Merry leaning toward a more optimistic view of the creative power of plaintiffs' discourse, and Conley and O'Barr stressing the way even apparently creative language can function to reproduce existing structures.[31]

Merry concludes with the warning that even when plaintiffs believe that their stories were taken seriously, they face a fur-

[30] Here Merry joins a number of anthropologists and other scholars who are concerned with taking seriously the role of resistance (see, e.g., Comaroff 1985; Comaroff & Comaroff 1991; Lazarus-Black 1991).

[31] Their assessment of the power of discourse to affect individual outcomes, however, seems more optimistic than their assessment of its power to effect broader institutional and social change.

ther difficulty, for they in effect surrender control of their problem to the state when they go to court (p. 181). In powerful linguistic acts of naming (labeling) their problems (p. 132), whereby framing forms of discourse are forced on litigants (for example, refusing to permit a legal frame and forcing a "therapeutic" frame onto the case), the state acts through the law to take the power of interpretation away from plaintiffs. This is what Merry calls the "paradox of legal entitlement"—that attempting to use the courts for empowerment entails a disempowerment (pp. 181–82). She adds, however, that there are forms of resistance: plaintiffs return, "learning to use legal categories with more sophistication, mastering legal discourse" (p. 180). Here Merry's account elegantly illustrates the connection between creative uses of language and struggles over legal power, showing us the larger social structure at stake in seemingly mundane, face-to-face legal encounters.

III. Conclusion

In conclusion, we can see that together Conley and O'Barr and Merry give us an exciting view of the way that legal language makes a difference in socially powerful processes. Moving from the details of speech styles in interaction with one another to wider issues of discourse frames and labels, we see that imposition of legal language can still dissenting voices and reinforce socially powerful interests. And yet, at the same time, there is room for resistance, for struggles over language, for creative acts of translation and interpretation that shift the social ground as well. Here we can see clearly the power of linguistic creativity. Judges who come from historically excluded groups may also shift the ground as they operate in new kinds of language from the bench. In these two studies, careful attention to the language of litigants and judges has resulted in a more precise and sophisticated explication of the process whereby law participates in social transformation and reproduction. Here, then, is an anthropological response to the question, What difference does language make?

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