Language and Power in a Place of Contingencies: Law and the Polyphony of Self-Representation

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Language and Power in a Place of Contingencies:  
Law and the Polyphony of Self-Representation  

Jonathan Yovel*  


The Show is not the show,  
But they that go.  
-- Emily Dickenson  

ABSTRACT  
How does language mediate action, communication and relations in legal settings not "contaminated" by the mediation of professional counsel? What is its interaction with the concerns that drove litigants to seek institutional justice in the first place? How to approach these questions in the context of communities

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diversified by ethnicity, gender, language, religion, education, income and age—whose members nevertheless meet in the same courtroom, where they must speak to authority as well as to each other in the role of institutional antagonists? In order to examine this set of questions, this paper analyzes legal language through the rhetorical, argumentative and narrative structures employed by self-represented litigants, whose linguistic interaction with the court is not mediated by professional counsel. It identifies two levels of linguistic diversity: the polyphony of competing argumentative strategies expressed by antagonistic litigants in multicultural settings, and the “internal” polyphony, or “monopolyphony,” expressed by “relational” litigants who negotiate and shift between such strategies in real time. This linguistic infrastructure frames the two distinct concerns that lay litigants express when approaching justice: rhetorical effectiveness in terms of persuading the court of their case, and authentic expression of their justice-related concerns, moral standing and other social parameters. Existing research correlates these concerns, roughly, with rule-oriented and relational linguistic approaches, and acknowledges tradeoffs that lay litigants make between them. In this research, however, litigants were observed to resist such tradeoffs, requiring their relational concerns to count as rhetorically compelling; indeed, this was their main requirement from the court. This essential tension of linguistic performance, between authentic expression and institutional efficacy, in fact becomes a definition of justice. As the standard rule-orientated bias of courts is generally not equipped to accept such linguistic strategies, the tension remains unresolved, although it is at times mitigated by effective monopolyphonic performances.

Data for this study was collected in small claims courts in Israel’s northwestern region. The study focuses on ethnic, generational and cultural parameters rather than on social stratification of class and economic status emphasized by previous research.

Keywords: Legal language, legal ethnography, empirical legal studies, legal theory, language ideology, self-representation, polyphony, legal rhetoric.

I. A Place of Contingencies: Courts of Self-Litigation

Courts that allow or require self-litigation instead of professional representation by lawyers, such as small claims courts, are extraordinary places to examine people’s first-hand interaction with the law, the courts and each other in the role of institutional antagonists. While other venues of litigation involve professional representation and
thus mediation and translation from the language of the everyday worlds of relations into that of legal institutions (White 1990), self or “lay” litigants bring the language, narrative modes, relevance criteria and argumentative strategies with which they are otherwise familiar into the courtroom. Legal counsel blurs the distinctiveness of litigants: their personal and identity traits turn collective, and their idiosyncratic uses of language are subdued or transformed (Kritzer 1998). Counsel’s primary function is to represses the litigant as a distinctly contingent subject in order to reconstruct it in rhetorically effective ways. Lay litigants who attempt to do the same, however, get involved with their own language, identity and relations. Rather than obscure who they are, the language available to them closely expresses their extra-legal identities. Lawyers are trained to apply language that courts understand and have come to expect. Lay litigants address courts by whatever means they possess or—at time ingeniously—contrive. Professionals manipulate levels of narrative and argumentative abstraction, but lay litigants—as shown by the cases examined in this study—are always concrete.

Such courts seem to be growing in number and variety of subject matter (Baldwin 1998; Leith 2010; Herman 2006). Small claims courts are a paradigmatic venue of self-litigation: junctions where people who would otherwise have little opportunity to interact, meet. This may depend on the kind of dispute. While contractual claims presuppose some level of initial voluntary exchange between the parties prior to the encounter in court, many tort claims are about accidents, where the very occurrence of interaction between the parties can be seen as a sort of social accident. Tort cases may bring together persons from different speech communities that might otherwise be unlikely to form exchanges into the same intersubjective linguistic space (i.e., the courtroom and its surroundings).

Speech in its many varieties is the main instrument of communication and expression of the diverse body of lay litigants. Not all speech variations, however, find equal attentiveness in courts. For the courts themselves, the linguistic diversity of nontranslated speech is frequently a nuisance; at worst they ignore it, at best they attempt to gloss over it or perform crude translations into the normal normative
grammar with which courts are familiar (e.g. the familiar structure of rule-breach-remedy that underlies legal claims, Conley and O'Barr 1990:3). Linguistic diversity in court threatens the constitutive requirement of an equal distribution of attentiveness and respect for all litigants, and while evidence of bias favoring some linguistic structures over others can sometimes be traced in the textual decisions, no available methodology can measure the level of cognitive resources that these command. Be that as it may, for lay litigants the freedom of linguistic expression and its indispensable plurality of voices is a necessary condition for authentic expression, action and communication. Borrowing a musicological term from the literary critic and theorist Mikhail Bakhtin, I propose calling this condition “polyphony” (Bakhtin 1934-5, 1981).¹ Yet I suggest understanding polyphony as expressing not merely the diversity of voices among a relevant sociolinguistic group thrown into a communicative nexus, such as self-represented litigants, but also as expressing shifts between different linguistic modes performed by single speakers as they negotiate changing communicative challenges and contexts (Silverstein 1976). Polyphony, then, is not just the sociolinguistic aggregate generated by multiple speakers each expressing their own uniqueness, but also the different voices logged, so to speak, within each speaker or the linguistic modes available to them in various social contexts. Risking a measure of terminological cumbersomeness, I refer to this phenomenon as “monopolyphony.”

Monopolyphony differs from mere layered linguistic diversity. The latter is usually thought of as an expression of the more general phenomenon of cultural diversity that occupies overlapping spaces. Monopolyphony would exist also under conditions of linguistic similitude due to speakers’ need to perform in different institutional and non-institutional contexts, even within a single hegemonic culture. In the context of this paper, monopolyphony is directly linked to the constitutive tension underlying all lay litigation, which involves both a drive for authentic expression and rhetorical

¹ According to Bakhtin, polyphony is a constitutive quality of the novel genre, through which characters appear in their own voices, by which they express their separate identities rather than their lives being recounted by a single uniform authoritative voice. (Bakhtin 1934-5).
effectiveness—both which must be accommodated within a single linguistic interaction, sometimes by a single speech act. This builds on language’s general performative and discursive multifunctionality (Silverstein 1993), here played out in a specific institutional setting. Performative multifunctionality, however, is a property of language, not of institutional justice, and herein lie the seeds of the incongruity between language and law that polyphony and monopolyphony express.

To wit: on the one hand, lay litigants must make use of the social variety of discourses available to them, and with which they are familiar, to express themselves and their concerns as best they can. Language expresses, and to an extent is—as Wittgenstein put it and as has been quoted almost ad nauseum—“a form of life” (Wittgenstein 1953:§19). In courts of self-litigation, lay litigants are faced with the challenge of appropriating legal discourse, making it—through language—a part of their own life and experience, yet in ways that would still accommodate their understanding of reality, make sense and be relevant. On the other hand, they have a clear interest in rhetorical effectiveness and persuasion, through speech that responds to the court’s conventions and preference for a relatively uniform, normalized language that obscures the idiosyncrasies of relational representations and sooner or later needs to accommodate a reduction into the rule-based forms through which law usually works.2

John Conley and William O’Barr, pioneers in the study of self-litigation and language, determine that “the most significant practical question faced by informal court litigants is whether their accounts will satisfy the courts. The strategies that they employ in their efforts to meet this burden reflect their varied understandings of the law” (Conley and O’Barr 1990:44). Yet this concern must be played out within the confines of the modes of speaking that are actually (and contingently) available to lay litigants, as well deal with their concerns for authentic, rather than merely tactical, expression of relations. Lay litigants attempt to import, manipulate, and navigate what

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2 By “normal language” I refer to what Bakhtin termed “general language:” what is perceived as the correct, standard linguistic approach in any institutional, discursive or plainly semiotic context (Bakhtin 1981, 1990; Medvedev 1978).
they perceive to be the correct verbal approach to law, and in this study have shown various degrees of linguistic flexibility when challenged and confronted in an institutional context.

Monopolyphony both allows and results from the basic tension explored in this study, between authentic expression—whether rhetorically effective in respect of the case or not—and what Conley and O’Barr refer to as “satisfying the court.” Courts as institutions are not structurally equipped—or necessarily receptive as a matter of disposition—to appreciate and deal with the concerns that brought these litigants to court in the first place. Framing relations, moral beliefs and social “upstandingness,” expressing expectations for distributive and possibly more holistic forms of social justice than those categorized by standard legal discourse, may at times prove as strong as the need for rhetorical effectiveness in terms of swaying the court, or “winning” the case.³ And all the cases explored below feature this tension. While in some matters, courts’ biases towards some litigants may be overtly observed, they are institutionally geared towards linguistic conventions that “will satisfy” them. Conley and O’Barr’s findings stress that lay litigants strive to “satisfy the court” (1990:19), which does not mean that they are always equipped to do so. Indeed, a major part of their seminal work was to classify and analyze those classes of lay litigants that would tend to benefit from this structural bias (i.e., through application of rule-based language), and those who would tend to suffer from it (through relational language). Monopolyphony, however, suggests that it is far harder to determine a general – let alone a-priori – preference for the rhetorical function over the expressive one. Moreover: Conley and O’Barr determine that when tradeoffs between the two functions become available – in terms of forsaking one linguistic approach for another, geared more towards “satisfying the court” – lay litigants overwhelmingly prefer the rhetorical function. The present study, however,

³ One of the more perplexing matters was how to decide when parties in fact “won” cases. Partial judgments could be construed as either “win” or “loss” or “imposed settlements” according to different parameters. In some cases, litigants expressed themselves as winners in terms of symbolic capital and power relations, even though the amount of the monetary award suggested otherwise.
finds that lay litigants frequently do not treat this as a tradeoff at all, and instead expect that their relational talk count and be treated as rhetorically effective.

II. Rules and Relationships, Rules as Relationships

The present paper presents reflection and qualitative analysis generated as part of a larger, empirical study of the language of lay litigants that involves both qualitative and quantitative methods and analysis. The empirical study took place in small claims courts in five different localities in Israel’s ethnically diverse northern region and collected data from some 220 cases over 18 months. It centers on the interplay of identity signifiers (socioeconomic, ethnic, gender, age, language and language competence), and conceptions of justice as expressed by non-represented speakers in their capacities as institutional antagonists. Findings building on analysis and breakdown of larger segments of the collected database will be reported elsewhere. Applying quantitative narrative analysis, the present paper makes use of only a small sample of cases to explore and support insights relating to the significance of polyphony and of monopolyphony to conceptions of justice in legal and social interactions. Thus this part of the larger research project, while opening with ethnographic approaches, maneuvers to jurisprudential reflection. Consequently, it only glosses over some of the

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4 Data collection followed cases throughout their various stages in real time. These were: 1. Collecting pleadings and other filed documents from courts’ secretariat and archives; 2. Entry interviews of litigants just prior to the hearing, in the courthouse (taking advantage of standard schedule delays), including a personal questioner and a survey of attitudes and expectations; 3. Coding, recording or documenting speech events performed by litigants, judges, witnesses, and additional participants during the hearing, as well as litigants’ behavior and that of their “support teams,” if such were present—family, friends, and informal counsel; 4. Exit interviews with the same litigants, documenting their reactions to various aspects of the hearing and judgment, self-assessing their own performance, and evaluating the court’s distribution of attentiveness during the hearing; 5. Analyzing textual products: the judgment and stenography (these so-called “protocols” are very poor documentary devices and are mainly used by judges to summarize the litigants’ positions and for mnemonic functions). In several cases, follow-up phone interviews with litigants were conducted. In entry and exit interviews, informants were encouraged to express themselves informally as well as relate to a series of scaled statements. In entry interviews, litigants were asked to grade such statements as “I intend to repeat everything I wrote in my pleading,” and in the exit interview “The judge had all the facts for deciding the case,” or “The judge understood what kind of a person I am,” etc.
methodological exegeses that are appropriate for a more social scientific exposition of the program. Nevertheless, it still provides demographic and other identity signifiers relevant to the protagonists in the case studies, concretizing what would otherwise become distinct voices emanated from abstract speakers.

How to study justice in view of polyphony? Although presenting different conclusions, this research begins with methodologies developed by Conley and O’Barr as part of their “ethnography of discourse.” Rather than thinking of language merely as “a window through which other, presumably more important, things may be viewed,” Conley and O’Barr approach language as “the object of study rather than merely an instrument of analysis” (1990:xii). This approach calls for meticulous attention to the language of lay litigants as a primary perspective on law in action, _inter alia_ in order to generate a better understanding of the role of language in shaping structural inequalities in the courtroom. The sociolinguistic and ethnographic traditions that inform this approach—as opposed to standard or “theoretical” linguistics—focus on language as a type of social action rather than a semiotic system, and thus on language’s performance rather than on matters of grammatical structure or the propositional construction of meaning (Bauman and Briggs 1990, for legal context see Yovel 2000, 2011).5

Conley and O’Barr identified sets of speech and language attributes according to which they classified litigants’ language as being of either “rule” or “relational” orientation. These are language ideologies: they express the correct, legitimate mode of linguistic expression and performance in given contexts. Language ideologies operate as shared bodies of consensual/commonsense notions about the nature of language in the world or compartmentalized segments of practice.6

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5 However, “rather” does not mean “instead” and the question of relations between function/performance and structure remain pivotal questions for inquiries that examine language as a matter of action and performance; see Searle 1969, 1973; Derrida 1972. For theoretical background, see Hymes 1962, 1974.

6 As a concept, language ideology builds on two separate sources, joining continental critical theory with metapragmatics. It is ideological because it responds to such questions as “what
So-called “rule-oriented” litigants (the term is qualified since my distinction is between discursive strategies that are contextually appropriable by speakers rather than classes of people) typically “describe their problems in terms of specific rule violations and seek concrete legal remedies, demanding remuneration” (Conley and O’Barr 1990:xi; 1988; Conley, O’Barr and Lind 1978). Such litigants are more likely to use legal terminology, follow relevance criteria familiar to the court, and frame their narratives on the structure of standard legal claims, expressing the rule-breach-remedy structure of legal claims.

“Relational litigants” (same qualifier) “describe their problems in broad social terms and seek remedies that would mend soured relationships and respond to personal and social needs” (Conley and O’Barr 1990:58), and would frequently express a broader view of the court’s mandate in dispensing justice, both in terms of distributive and retributive justice. They would sometimes use relevance criteria different than those applied by the court: for instance, in tort suits following automobile accidents we have observed plaintiffs insist on the relevance of evidence concerning the behavior of antagonistic drivers after the accident had occurred (relating to abusive speech, refusal to exchange insurance details or to respond to subsequent phone calls, etc.), while the court, for its part, was attempting merely to establish liability and thus receptive only to evidence relating to behavior antecedent to the accident as relevant. In other cases, when the sole purpose of the hearing was to determine the amount of material harm and consequent monetary damages – the question of blame having been settled – “relational” plaintiffs insisted on stressing reckless driving or absence of proper insurance or registration, thus extending the discourse of blame.

“Relational” lay litigants argue from broader conceptions of justice, sometimes

counts?” and “what is the salient aspect of being human?” in any given linguistic interaction. Michael Silverstein has shown how various layers of performance are operative in terms of linguistic ideology that shape discourse; more often than not, speakers are unaware of these modes of performance (Rumsey 1990; Silverstein 1979; Woolard 1992). Building on and developing some of Silverstein’s theoretical work, Mertz 2007 shows how linguistic ideology is impressed on law school students as, effectively, the major pedagogical transformation in the early stages of initiation into legal discourse.
refusing or failing to limit their claims to the “relevant” specifications of the dispute at hand. Relational speech may attempt to establish the speaker’s own, as well as their antagonist’s general ethical profile, as well as invoke distributive considerations instead of the remedial language more familiar to courts. Litigants sometimes consider it imperative that the court be informed of their own, as well as their opponent’s character, and that blame be established even when doctrinally irrelevant, because to them that was what mattered, and thus it should also matter to the court. Generally, Conley and O’Barr treated this as an argumentative handicap.

Rule-oriented rhetoric, in contrast, typically limits its claims to the confines of relevance criteria that correspond to the court’s own notions of what the case is “really about.” It frames narratives in terms of specific rule breaches and quantifiable remedies and employs legal or quasi-legal jargon and terminology (such as “contract,” “lease,” “liability,” “third party,” etc.), albeit sometimes erroneously or out of context. Relational rhetoric resists such abstractions, but may in turn invoke others. It does not attempt to show that the incident, or claim, conforms to a general model. In its concreteness, however, it may require that a case be considered in its broader scope of relations and circumstances. By bringing in rich relational context into the legal locus, relational litigants attempt to transform it into a more local, informal establishment, where judges can rely not only on formal evidence, but also on their own familiarity with “human nature,” “common sense” and the everyday realities that surround the case (Starr 1978, pioneered the analysis of courtrooms as loci of overlapping layers of formal and informal action). This does not necessarily mean that relationalism is an intentional strategy. By employing it, litigants manifest their underlying conceptions of law and justice, rather than follow a calculated plan of action.

Yet the term “relational litigants,” used occasionally in research, proved imprecise and over-categorical. As noted above, this study approaches the rule and relational speech orientations as characterizing action rather than defining categories of persons. In other words, the terminology applies to performative strategies of argumentation and persuasion, not to the performers. This will allow the analysis to show how litigants
sometimes shift from relatively relational to relatively rule-oriented language as part of their monopolyphony (although I occasionally use Conley and O’Barr’s terminology for convenience).

III. Small Claims Courts and Courtroom Ethnography

The small claims courts surveyed in this study work somewhat differently than those studied by Conley and O’Barr.\(^7\) One obvious difference is the relatively quick paced, inquisitorial style of the hearings and the judges’ general preparedness for the case (and resultant impatience with elaborate or repetitive narration). All judges are former lawyers, and the judges whose courtrooms were surveyed performed small claims duties as part of the court’s internal rotation, otherwise acting as regular judges in courts of first instance.\(^8\)

In the courts surveyed, very few litigants were allowed to present an organized narrative, although most litigants reported expectations to the contrary (this expectation is true mainly of first-timers). A hearing may start with the judge delving immediately into details of the case, asking for clarifications from either litigant. Even when allowing litigants to present their case, the judge may frequently interrupt, steering talk away to mostly to factual, rather than normative or relational, concerns.

The next two sections present cases from the research sample that emphasize different linguistic aspects of polyphony and monopolyphony. The selection illustrates the dialectic between discursive categorization and the concrete instances when life meets law. Later, I generalize from these and additional cases to typify the inherent tensions involved in linguistic expression before the law. In the present study, I chose to

\(^7\) For the legal framework in which small claims courts in Israel operate and descriptive detail of the formal litigation mechanism as well as an important critique of structural biases and inequalities when corporations and repeat players are involved, see Becher and Klein 2010.

\(^8\) Magistrate’s Courts are general jurisdiction courts of first instance, spread throughout the country’s five counties or “districts.” District courts – the intermediate level – review appeals from magistrate’s courts (district courts also have original jurisdiction over graver offenses, higher value civil actions, real estate cases and some administrative matters).
present and discuss the findings interpretatively and qualitatively, as instances and opportunities for analysis and reflection (Latour 2010; Conley & O’Barr 1988). This requires some detail and an application of a “close reading” or “close listening” methodology, as follows.

IV. The Case of the Missing Contract: Linguistic Flexibility and “Horse Switching”

The plaintiff in this case was a Moroccan-born, retired Jewish police officer from Shlomi, a small hard-up town not far from Israel’s northern border. He filed a lawsuit with the Acre court arguing that the defendant, an Arab carpenter in his late twenties from the nearby village of Kabul, had failed to adequately construct a cabinet in the plaintiff’s house, using an inferior industrial material known as MDF, instead of the sturdier, more expensive plywood, which both litigants referred to using the vernacular term, “sandwich.” There are no lawyers in Shlomi, and prior to filing the complaint, the plaintiff had an attorney from Nahariya, a nearby and relatively well-off resort town, 9 send a letter to the defendant demanding restitution of the price paid for the cabinet plus interest,10 plus a small sum to cover “legal expenses,” threatening a lawsuit. There was no reply, and five weeks later the plaintiff filed a suit in the Acre court. The complaint, handwritten, states the facts laconically, adding that the defendant failed to return phone calls or respond to the lawyer’s letter. In the entry interview, the plaintiff stated that he had never been in court before and that he did not seek professional consultation prior to the hearing, a statement he later amended to the effect that he consulted privately with a “law student.”

9 This practitioner kept a one-lawyer firm and acted also as a notary public. Nahariya is about 12 miles to the west of Shlomi, on the Mediterranean coast.

10 The sum required was “adjusted for inflation.” On top of interest, debts—including judicial awards—may be adjusted according to the consumer price index, a practice prevailing from the early 1980s, when mega-inflation rose to hundreds of percent per annum, even when the index later stabilized (current inflation fluctuates between 2% to 3.5%). While many businesses adjusted to the new reality, a good amount of standard practice—including all collection—still invokes index adjustments, as indeed does the default legal rule (Law of Setting Interest and Inflation Adjustments, 1988).
In his answer, handwritten as well, the defendant denied all claims, arguing that the job was completed to the plaintiff’s satisfaction and that MDF was the right material. Formally referring to himself in the third person, he added that “it is not clear to the defendant why the plaintiff chose to submit a claim when he had performed the work as was agreed.” The defendant’s language, on the whole, was more elaborate than the plaintiff’s, referring to the court as the “honorable court” (Beit hamishpat hanikhbad, a customary legalese used by lawyers; beit hamishpat literally means “house of law”). He moved that the lawsuit be dismissed, demanding reimbursement for “legal expenses” (none of which were itemized). The answer further made the point—later repeated orally—that the plaintiff had no cause for grievance, because he got a good bargain anyway. The documents were in Hebrew.

Throughout the hearing, the plaintiff visibly clutched a copy of the Book of Psalms (it is customary among many traditional Jews to carry a small copy of the Book of Psalms, fingering the pages and reading from it occasionally). The defendant was late in arriving in court. As he rushed in, the judge—an Arab male—had already began examining the plaintiff about the sum of the claim. The entire hearing was conducted in Hebrew.

Judge: Why is the sum NIS 8,000 Shekels?
Plaintiff: I paid 3,000, he didn’t finish the job. We called a thousand times... I have photographs.
Judge: So you deserve 3,000, why do you ask for 8,000?
Plaintiff: That’s what a new cabinet costs.

[At this point the defendant entered.]
Judge: [To defendant] Why were you outside?

11 No formal procedure is required for motions for dismissal or summary judgment. An examination of all the pleadings involved in the sample showed that the large majority of answers prepared by counsel—as well as a few lay answers—included both pleas as alternatives, making the substantive defense “for caution’s sake only.” In most cases this seemed a ritualistic expression of indignation over the submission of the complaint, as we witnessed no case in which such motions were granted and only one case where a motion to dismiss was actually repeated in court (and denied).
Defendant: I was speaking with my brother.

Judge: In ten seconds I would have entered a judgment against you. Come, Mr. (-) [plaintiff], go on.

Plaintiff: I agreed with him on a cabinet and a drawer—sandwich—and he built it all MDF... the drawer is broken until this very day and he won’t come to fix, and I have photographs of all his work that he has done.

The defendant proceeded to relate how he came to the plaintiff’s house and concluded the work in MDF. The plaintiff then argued that on that very occasion, the defendant already admitted to having used the wrong materials and promised the plaintiff’s wife a replacement cabinet. Up to a given point the exchanged was characterized solely by reference to the history of relations between the parties. The judge was especially concerned with determining the exact amount of the sum involved, a matter mostly glossed over and ignored by the parties. However, when directly addressed by the judge as to his version, the defendant introduced a new argument:

Judge: So what do you say to that?

Defendant: I came to this person’s home, wanted the cabinet... There’s a contract between me and him. Says painted MDF and from the inside sandwich. All the damage amounts to is tightening a few screws.

Judge: What was the job’s worth?

Defendant: I don’t remember.

Judge: How much did he pay?

Defendant: Three thousand and something. There’s a balance of one thousand.

Plaintiff: He promised my wife to change it all. Here this is the photo, look at the cabinet, we didn’t like it at all.

While not relinquishing his relational claim that the defendant got a bargain, the defendant’s shift was to invoke, for the first time by anyone involved either orally or in writing, a “contract,” employing a legal entity as a source of obligation. His language switched momentarily from relational to rule-oriented argument. This is an observable pattern. Once a certain type of argument or narrative strategy fails, some litigants are
able to switch to another and try its rhetorical efficacy on the court. That is why “relational” talk and “rule-oriented” talk are better conceived of as linguistic categories and not categories of person. If inflexible linguistic patterns encumber lay litigants, then rhetorical flexibility should presumably come through as a distinct advantage. However, such “horse switching” (in deference to Dell Hymes’ term “code switching”) may be a risky move, as it turned out in this case. The defendant, who apparently did not prepare for this switch, could not produce “the contract” in its tangible, text-artifact sense: he didn’t bring it with him. For a moment his argument seemed worthless: he moved from relational talk of the fairness of the bargain to one about a text, yet without the text to back it up. What happened next was a series of ironies. The plaintiff—who retained a relational approach throughout (“we didn’t like it at all”) — produced the written contract from among his papers and handed it to the judge, who read it aloud, functioning as the authoritative voice of “the contract.” However, contrary to the defendant’s claim, the text actually stipulated “sandwich” as the material to be used. Switching from a description of relations to reliance on the contract backfired. Yet the move itself initially followed impeccable logic. Against the plaintiff’s artifacts, i.e. the photographs of the cabinet in dispute, that he kept flinging in front of the judge, the defendant attempted to mobilize an artifact of his own. But the text turned against him. He then claimed that the text-artifact was a forgery: having introduced a Trojan horse, he subsequently attempted to neutralize it through delegitimization of its authoritativeness. The plaintiff retained his relational talk, but now he applied it to the text-artifact, invoking not the evidence’s legal status, but his dismay at the mere suggestion of wrongdoing. There’s also a matter of common sense:

Plaintiff: How can I forge? Here is your signature, I can forge a signature?

None of this exchange is recorded in the court’s pseudo-stenography, colloquially referred to as the “protocol.” The judge ruled for the plaintiff, yet, for all his emphasis

12 The “protocol” is not a verbatim transcript nor stenography, but an abbreviated summary of the parties’ respective positions and the main statements made, most often summarized and dictated to a stenographer by the judge. The parties receive copies.
on precise calculations, added up the sum of damages slightly wrong.

During the exit interview, even after the contract-artifact was produced to vindicate his claim, the plaintiff still insisted on the relevance of relations: “I and my wife and I called, a friend of mine called, he promised to change [the materials].” Although being the party in possession of the contract-artifact all along, the relations with his antagonist supplied the rhetorical drive and framework for his argument. Had his opponent not switched to a rule-oriented argument, he would probably, he said, not have brought up the matter of the contract at all. He added that the defendant was a liar and a fraud. When asked why he never claimed as much in court, he expressed confidence in the court’s powers of observation, commenting, “Isn’t it obvious? The judge is no fool.”

Like many others, this case invoked contractual obligations in relational contexts. “Contract” is a tricky term, having several distinct senses in normal talk used by lawyers and other speakers alike. Of these senses—ranging from the abstract to the corporeality of texts—none can claim an *a-priori* precedence over the others. In its most abstract sense “contract” means a normative, obligatory framework—the mini-legal-system constituted between the parties and binding on them. As all contracts involve communicative acts, “contract” is also a linguistic entity in two non-converging

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13 Theorists of relational contract theory, who focus on relations, communication and “exchange projectors” rather than sets of prescriptive rules that govern risk allocation, frequently see their work as cluing into broader legal-realistic and sociological notions of contract as exchange. “By contract I mean no less and no more than the relations among parties to the process of projecting exchange into the future,” Macneil 1980: 3-4. See also Macaulay 1985, 1977; Gordon 1985. Some of these insights have famously found their way into the Uniform Commercial Code, see UCC §§1-201(3) and (11), 2-508 and others. On the Code’s legal-realistic character (and that of Articles 1 and 2 in particular), see Danzig 1975; Schwartz 2000; White 1994 and Dagan 2007.

14 On textuality as a practice, see Said 1980:89 and references cited there. Mertz (2007) compellingly argues that texts are never “complete”; they are always components in instances or textual interactions that metapragmatically construct their meaning. This becomes a matter of linguistic/textual ideology when agents are trained in what becomes a “legitimate reading” of texts. This insight builds on and complements Derrida’s general critique of speech act theory, which -- he claims -- identifies iterability of language with carrying fixed meanings across contexts.” Textual reiterability underlies much of the linguistic ideology of legal practices, but so are practices of vesting texts with different types of meaning through recontextualization.
senses: it signifies the language expressing the normative framework (hence the colloquialism “the contract says,”) and because many contracts are written or have salient written components, “contract” also signifies a text or textual practice. Due to the material attributes of texts, “contract” may additionally mean the physical artifact holding the text, the sheets of paper, as in “you left the contract on the table.” These senses were played out in an interlayered mode once horse switching was performed and “contract” invoked, went missing, was retrieved and handed over, then read aloud.

Such sense-ambivalence can be featured in various relational contexts. In cultures dominated by textuality and its promise of objectification, the text-artifact sense holds considerable attraction over the abstract-conceptual sense, as expressed also in the following case. Here, the judge’s insistence on the text-artifact sense of “contract”—as well as his requirement for additional artifacts (photographs) – completely dominated the plaintiff’s relational claim in the “battle over language.”

To return to a point of rhetorical flexibility made above, within the framework of monopolyphony, the ability to switch from one speech orientation to another may be a key factor in self-litigation. “Horse switching” can be broadly divided into two categories: tactical horse switching is designed to improve a party’s argumentative position, but is not caused by any clear speech or other event in the courtroom. Reactive horse switching appears reluctantly, in response to an argument made by an opponent or an unwelcome line of questioning by the judge. It can thus be a product of power relations as linguistically expressed in the courtroom as much as a manipulation of them. “Speech flexibility” is the term chosen here to capture the particular capacity to perform horse switching. This study encountered more rhetorical flexibility among lay litigants than documented by Conley and O’Barr. Significantly, litigants employing chiefly relational language were more prone to use also rule-oriented talk (either tactically or reactively) than the opposite case. Litigants employing rule-oriented language tended to ignore relational arguments and opportunities to use it. Both these observations countered our initial assumptions.
V. **Contract v. Polity**

This case presented layers of relations between the litigants, constantly invoking their extralegal, communal and political relations. These were, however, disregarded by the court, which insisted on treating the case as a clear-cut contractual one. The plaintiff’s inability to switch to this framework left his language not just ineffective, but almost incoherent. Being a repeat player in court did not seem to remedy his inability to perform “horse switching.”

The plaintiff, a 34-year old Arab man from the village of Nakhaf, was a high-school graduate who reported having appeared in various courts seven times over the past five years, and that this was his second appearance in a small claims court. His Hebrew fluency was average or less, checkered with grammatical mistakes, although they did not undermine the flow of his talk.

The defendant was the Nakhaf municipality. It had built a concrete wall between the plaintiff’s property and the public road—with his consent—which became the cause of this case. From the external perimeter, the wall was slightly over ten feet high. The ground on the plaintiff’s parcel was elevated and from within it the wall was slightly over two feet high. The plaintiff petitioned the municipality to add a railing to the wall to prevent anyone on his side of it from tripping and falling over. When faced with local red tape, he had the railing built at his own expense and sued for reimbursement. His claim had two distinct grounds, although he presented them as one claim, making no formal distinction. One was the municipality’s duty to prevent accidents once it had created a hazard. Another was that various municipality officials promised him reimbursement both before and after he built the railing. Technology and time underlined the distinction: the first was the only claim he made in the textual complaint, the second dominated the oral argument.

The municipality was represented by one of its officials as well as an Acre lawyer (on retainer), who practiced in a one-lawyer firm. Both were Arab men, Muslims, and both professed to having considerable court experience. The municipality official, a year older than the plaintiff and holding an academic degree, could not recall the number of
time he had been to small claims courts on behalf of the municipality— “over ten times in the last five years.”

Significantly, before the hearing, the defendant’s representatives offered the plaintiff a settlement amounting to about 40% of his claim, which he promptly rejected.15

The Judge, the only Jew present, was characterized by us as a “slack authoritarian”: while his demeanor was formal, he did not in fact insist that things run his way. A persistent agent—in this case the defense attorney—effectively got around the judge’s interim rulings.

The first issue of the day was representation. Following small claims procedures, the defendant’s lawyer requested permission to represent (the court has a prerogative power to allow representation in suitable cases). The plaintiff objected and, initially, so did the judge, although that did not quite hold, as the lawyer continuously interjected arguments as the hearing proceeded.

Plaintiff: I ask that the clerk speak and not the lawyer.

Judge [To lawyer]: You got permission to represent the defendant?

Lawyer: No sir, but I appear on its behalf.

Judge: The other party must be represented by a lawyer too... I don’t allow insurance companies to appear through lawyers. You’re not a municipality employee, you work per case... The court will allow representation only if there is balance. [To plaintiff:] Do you want to be represented by a lawyer?

Plaintiff: No, sir.

Judge: I need to maintain balance. Either both are represented or none.

[Discussion between judge and lawyer.]

Judge: I want the municipality official to argue rather than you. [Dictating:]

15 The damages/restitution sought amounted to NIS 4,000 (approximately USD 1,000), composed of NIS 3,000 for out-of-pocket expenses for the railing materials and NIS 1,000 for the cost of mounting. The proposed settlement was for NIS 1,500.
Ruling: In order not to disrupt the equilibrium that must exist between parties, as the plaintiff refuses to be represented, I deny the defendant’s lawyer’s motion to represent the municipality.\textsuperscript{16}

The plaintiff could prove the wall and railing. Proving the promise of reimbursement was a different matter. The promises allegedly made to him by municipality officials (and denied by the defendant) were oral. Basing his argument on promissory interactions was undermined by his inability to produce any probative text-artifact:

Judge: Do you have an agreement in which the municipality undertakes to pay you the expenses? You have pictures? I want to get an impression of what it’s all about.

Plaintiff: No sir I don’t.

Judge: You write, ah, 3.5 meters high. Where is such a wall, I want to see... Did you write the complaint?

Plaintiff: No, that’s a lawyer from our village, he lives nearby.

[...]

Plaintiff: They said they’ll build a stone hedge. So I told them I ask for it to be high, so they said they’d put a railing like in the rest of the village, and at the neighbor’s too.

Judge: Who told you? Was there an agreement? You had it written down on paper?

Plaintiff: No, I was just told, we didn’t write.

Judge: Which neighbor has a railing?

Municipality Official: His brother.

[Judge asking for technical details.]

\textsuperscript{16} The curious thing about the language of the ruling is that it portrays the plaintiff’s “refusal” as obstructionist, preventing a new equilibrium. And the ruling symbolically performs what it purports to deny, by using the reference “the defendant’s lawyer’s motion.” The motion, of course, was the defendant’s, not the lawyer’s; the lawyer’s standing was incongruously acknowledged by the very language that denied it. This slip of tongue predicted the ensuing exchange, as the lawyer in fact remained in court and occasionally addressed it.
Judge: So what did you do? When was the last time you went to the municipality?

Plaintiff: I went many times and nothing happened. Finally they told me to build it at my own expense and they’d pay later.

Judge: Why didn’t you ask them to write down what they told you?

Plaintiff: I believed the man.

Judge: There is no faith in such matters. It’s not a matter of respect and faith. Doesn’t matter. Put it down in writing. Let it be written and then you come with it in writing. Who did you have the talk with?

Plaintiff: With X, the deputy chairman of the Council. 17

Judge: You’ll bring him to testify, yes?

Plaintiff: Yes. Why not, as long as he doesn’t refuse.

The judge’s insistence on a written contract, a text-artifact, shuffled the plaintiff’s vocabulary from grounding his claim in the nuisance crated by the municipality and its moral duty to remedy it (especially after promising to do so), to something entirely different: a contractual claim. He treated the fact of the promise not as an independent source of obligation, but as an admission of moral responsibility on part of the municipality.

Plaintiff: I’ll also bring Y.

Judge: You made an agreement with him too?

Plaintiff: No, but he promised me, too.

Although he rejected this, the plaintiff in fact argued on the basis of an oral agreement—a seemingly perfectly legal one, if difficult to prove. 18 Moreover, the defense failed to make any probative counterclaim. Again, senses get mixed and overlap. For both the municipality official and the lawyer as much as admit to the

17 The chairperson of a municipal council is an elected, executive position parallel to that of mayor.

18 Under Israeli law, contracts are formed by offer and acceptance, liberally construed. There is no requirement of consideration and no general statute of fraud or other formal requirements (such exist in particular categories, e.g. real estate transactions).
“agreement,” although the lawyer claimed it was “signed” “ultra vires” (i.e. without proper authority)—a formal defense based on a specific rule. Of course, no one had signed anything as there was no text. Nevertheless, this language became the focus of argument. It was, however, the lawyer’s mistake to overplay the judge’s rule-oriented commitment.

Lawyer: [Interrupting the official] The person who signed the agreement wasn’t authorized to do this.

Judge: A regular person, when he sees someone holding a position in the municipality and signs, he doesn’t begin to doubt his authority. Who signed on behalf of the municipality?

Municipality Official: He is the head of personnel.

To recall, the plaintiff’s main concern was to separate the text-artifact sense of agreement from the obligatory sense. He gets utterly lost in a talk over the authority to “sign” something he could not prove existed. As long as “promise” meant “agreement” and that meant “text,” the plaintiff had no claim. All he could do was retreat to another proof of the municipality’s admission of guilt:

Plaintiff: The lawyer offered me 1,500 shekels and I didn’t want.

Judge: I’ll give you 1,500 NIS by court order. Do you agree?

Plaintiff: Yes.

The plaintiff’s relational argument, although elaborated in his written complaint, was completely ignored because relational language was mostly repressed in the courtroom. His claim had nothing to do with any notion of agreement: in the exit interview he explained that the municipality had created a dangerous nuisance on his property and needed to fix it. He repeated the point that the alleged promises or “agreements” with municipality officials -- initially to fix the nuisance and subsequently to reimburse him -- were brought as evidence for the municipality’s own admission of relational liability, not to prove the existence of an oral contract.

The lawsuit was brought to compel the municipality to desist from preferential treatment in reimbursement for fixing nuisances, not to enforce a contract. The
plaintiff’s claim was grounded in a conception of civic community and the proper relations between the local municipality and the individual. That claim did not find any narrative or argumentative space in the courtroom, trumped by the rule-oriented language of contract and its probative handicap (for the plaintiff). The plaintiff was never allowed to narrate his story nor introduce the argument made in the complaint, and from a certain point on, he gave in to the court’s language and ended up with the same settlement that he had rejected earlier in the day. Only now it somehow became a settlement in a contractual case, not “his” case. He didn’t quite lose the case, but the case certainly got lost.

Yet the exit interview suggests an entirely different, broader relational dynamic that we could not observe simply by coding the hearing and the pleadings. Although this plaintiff refused an offer to settle as long as it came from the defendant (we observed him adding to this a traditional gesture as if shaking off filth from his right hand), he immediately and without negotiation accepted the exact offer when made by the court. Our initial interpretation was that, confounded by the alienating turn the hearing took, he was subjectively in no position to argue with the authoritarian judge. In the exit interview, however, he expressed that he had won the case. When confronted with his rejection of an identical settlement some moments earlier, he said “but not that way, I end up winning and didn’t give in to their demands but to the judge’s decision.” The point he was making was that the court proved more powerful than the oppressive municipality, and his victory counted in terms of mobilizing that institutional, outside power against his long-standing opponent. This was justice as a power struggle, as mobilization, as managing to break the geographical boundaries of relations. It was not a “day in court” satisfaction that generated his position, and he did not regard the settlement as a helpless concession to a biased or alienated court. “Victory” did not depend on the amount of damages awarded, but on the unusual accomplishment of submitting his traditional, more powerful opponent to the court’s superior power.19

19 In his exit interview, the plaintiff reported having been “surprised” by the process of
This case featured a pattern that may be less atypical than assumed. On the one hand—the normative, transparent aspect of legal discourse—it appeared even-handed. The court went to rhetorical pains to protect the plaintiff’s procedural rights by denying the defendant legal representation (although that didn’t hold), and disposed of legalistic arguments when they were made by the insistent lawyer. The judge has thus ostensibly avoided replicating the power inequalities that dominated the plaintiff’s everyday relations with the municipality. However, none of this meant that the court would actually consider the plaintiff’s relational argument *qua* legal one. Once the dispute was formed in contractual terms—to the plaintiff’s obvious disadvantage—the judge had no more use for the relations between the parties, even though those constituted a perfectly valid, independent legal claim. An analysis of the language of the exchange reveals the structural disadvantage suffered by plaintiff. Did he win? Was he shortchanged? As these questions deal in different currencies, both affirmations may coexist.

The ethnographic methodology proved crucial in uncovering these concerns and dynamics. The textual products and representations of the hearing—the protocol and the decision—do not express this complexity. Audiences who will only read the texts that the process produces—as opposed to observing the actual process—will have little access to witnessing the true dynamics of the case. What law produces is a lot more of what its textual products reveals. Unlike what can be assumed reading standard legal scholarship (as well as law school curricula), law is not merely a machine for the production of texts.

**VI. Interpretative Analysis of Findings and Conclusions**

The broader research, of which this article is a partial report, looks into the operation and significance of polyphony and of monopolyphony in self-litigation both qualitatively...
and quantitatively. Qualitatively, we typified the role of polyphony and of monopolyphony in shaping the structures of legal discourse, absent the mediation and intervention of professional counsel. We observed monopolyphony in cases where speakers shifted from one argumentative structure to another or mixed them. This was not generally noted by previous scholarship and drove us to refrain from typifying litigants as either “relational” or “rule oriented,” reserving those for speech strategies or better, to the actual performances observed, rather than to the performing agent.

Some findings differed from findings from other societies and cultures, primarily to some by the pioneering work of Conley and O’Barr. While quantitatively we found similar correlations between linguistic structure, demographic characteristics and courtroom performance, qualitatively we found – at least in some contexts – different parameters framing the relations between expression and interest (both in the broader sense of “human interest” (Habermas 1971) and the narrower contextual sense of successful litigation) in the linguistic performance of self-litigation.

The main linguistic tension expressed in lay litigation is between authentic expression (in terms of expressing oneself in front of the court and its many symbolic significations) and rhetorical effectiveness (in terms of swaying the court and winning the case). The former involves expressing pre-legal, nontranslated relational concerns as they figure in relations, talk and consciousness. Its main attribute is its idiosyncrasy. The latter involves the institutional function of effectively mobilizing the court for desirable action. The two may require entirely different, competing or mutually exclusive rhetorical approaches that, according to previous research, may be subject to conscious tradeoffs. However, a central interpretative finding of this study concerns what may be termed the “tradeoff double-bind” that characterizes relational litigants (in the qualified sense) when they face the possible incommensurability of authentic expression and persuasive rhetorical efficacy. According to Conley and O’Barr (1990, 1998b), when winning the case requires a tradeoff between the two goals – invariably, giving up on authentic representation in favor of linguistic efficacy – the tradeoff is both recognized and accepted (whether litigants have the linguistic competence to perform it is another
question). Our main finding in this respect was significantly different. A majority of our “relational” informants either did not recognize the tradeoff or, more significantly, expected the court to recognize their relational talk as rhetorically effective, while resisting the shift to rule-oriented talk that the court had either introduced or accepted when introduced by the other party. In other words, relational litigants were reluctant to relinquish authentic expression for the sake of perlocutionary felicity (in Austin’s terms), yet resented – indeed, challenged the legitimacy – of any disadvantage this reluctance might entail. In fact, their conception of justice hinged precisely on the court’s merging of the two.

Nevertheless, a small proportion of litigants who started off using relational language, when faced with a communicative impasse, did shift to rule-based talk, thus tacitly recognizing the tradeoff. An interesting finding regarding the controlling factor for this monophonic performance, “horse switching” ran contrary to our initial assumption. Rather than education or income level, it was age. Litigants over their early thirties rarely manifested this ability, and those who performed it tended to be male.

Like much of the law and society tradition, this work emerges from an approach that is deeply troubled by law’s failings on many of its promises, chiefly its perpetuating and reinforcing social and political inequalities. Given the centrality of language to the organization of society in both institutional and non-institutional contexts, the claim that language is a central focus for exploring such biases can no longer be considered surprising. The sample taken in this research tends to fall in line with Conley and O’Barr’s basic critical claim (allowing for the differences in social, ethnic and demographics), to the extent that litigants tend to employ rule-oriented language when they are “stronger” in social terms of ethnicity, gender, education and income levels and conversely in regard to relational language. Where findings vary from those of Conley and O’Barr is on the crucial issue of the double bind of tradeoff and on the relative significance of rhetorical flexibility, discussed above.

I have attempted to match argumentative structures with sets of demographic characteristics and then evaluate their relative effectiveness in court. The former is
relatively straightforward. The latter is always suspect, as no two cases are exactly alike, and as it is impossible to be certain that linguistic factors, rather than other elements, controlled outcomes of cases. This is always a problem of transitive interpretation of findings, and ours are no different. There are no precise control groups in empirical research outside the lab. Nevertheless, language is unquestionably the primary mediator of action and relations between the several agents performing in legal settings. We did not attempt to speculate why rule-oriented talk was found generally more effective in the courts we sampled than relational talk. Conceivably, the reason could be that argumentative structures signify to the court sets of people, just like dialects and other social identity markers do. This would mean that judges are biased not in favor of the language employed, but in favor of the persons who employ it, the language being a signal for the court to identify the bias-beneficiaries and bias-losers. But if they were, they hid it well; even judges who went out of their way to preserve procedural rights of “relational” litigants, seldom, if ever, accommodated or adopted their relational talk. Indeed, to the extent that our analysis shows systematic bias – and it does – this bias can only, at least based on these findings, be attributed to the linguistic elements that were identified.

The cases examined in this study indicated some genuine efforts by the overworked judges to open up to relational language within the institutional confines. Frequently, however, language shifts back to its default legalese. The pattern is structural. Institutional ideology and judge’s legal training circumvent good intentions. The substantive due process concerns expressed here require more than a benevolent attitude. They call for a shift in awareness, modes of listening and translation. Lay litigation, after all, is designed to enhance access to justice, make it more relevant in our lives, not circumvent it through institutional habit and linguistic bias.

The last point does not regard the study itself, but possible policy projections. When presenting these findings to legal audiences, discussion frequently shifted from the scientific and descriptive to institutional revision of self-litigation that could mitigate the perceived bothering implications of polyphony. This is an issue that extends beyond
the present article, yet a clarification is required at least as to what I think does not follow from this analysis.

Specifically, it would be a mistake to consider wider professional representation as a policy step toward mitigating power inequalities in self-litigation and “saving” people from their own struggles with polyphony and monopolyphony. Such mediation would perhaps help lawyer underemployment, but not the constitution of effective, litigants-as-citizens, who project their concerns in the place of justice on equal footing. Professional representation will translate and transform concerns and suppress the opportunities for authentic expression that are so fundamental to these forms of dispute resolution, where law is not as removed from the community as in other institutional contexts. Professional representation extracts a serious toll on expression and thus on the law’s ability to deal with the actual, pre- and non-translated concerns of the persons whom it hosts.

The more promising—but also more difficult course—is for institutional self-litigation, rather than to suffocate polyphony and monopolyphony, to embrace and bring them within the boundaries of a full, relational approach to due process. What this demands from institutional justice and its openness to linguistic variation goes beyond current notions of standard judicial training. As indicated, this is a matter that must be addressed within a different framework.20

20 For a limited discussion of the claim that “one cannot expect to turn every judge into an anthropologist” capable of “hearing” every form of relational or idiosyncratic talk, see Yovel 2000.
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