Just Words

Law, Language, and Power

Third Edition

John M. Conley, William M. O'Barr, and Robin Conley Riner

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CHAPTER ONE

The Politics of Law and the Science of Talk

Almost forty years have passed since we (O'Barr and Conley) began our own collaborative work at the intersection of law and language, and there is little in the field that is much older. The body of work that we consider here did not begin as the product of some theoretical master plan. Rather, it initially coalesced as scholars of diverse intellectual backgrounds arrived from many directions at the common realization that the language of the law is profoundly important. Some whose primary interest is the law have been struck by the centrality of language in almost every legal event, while others whose main interest is language have discovered the law as an extraordinary research setting. Collectively—if often unaware of each other—the members of this sometimes accidental alliance have produced the subject matter of this book.

When we first turned our attention to the subject in the mid-1970s, most scholarship that considered law and language focused on written legal language, especially the arcane language of statutes and legal documents. Although we found many articles and books that noted in passing the importance of the linguistic base of the law, we found only a single source that dealt with law and language in any real depth. This was David Mellinkoff's monumental *The Language of the Law* (1963), which analyzes the structure of written legal language and explains the Latin, French, and Anglo-Saxon origins of contemporary usages. It took a new generation of language-oriented fieldworkers with sociological, anthropological, and sociolinguistic backgrounds to initiate a broader study of the language of the law as it operates in the many venues of daily practice. Beginning in about 1970, this new generation of researchers went to the places where people actually talk about their troubles and express their claims and began to study what happens there. It is their scholarship that pro-

vides the foundation for our argument about the importance of language and discourse in understanding law and legal processes.

In the first edition of this book, we grouped those who have studied law and language in this latter way into three general categories. One group focused explicitly and self-consciously on language as the medium through which law does most of its work. Early research in this category was exemplified by Brenda Danet's (1980a) demonstration of the strategic significance of alternative ways of naming and categorizing objects and actions,[1] as well as by our own investigations of the practical legal consequences of differences in courtroom speech styles (Conley et al. 1978; O'Barr 1982). A second category consisted of people interested primarily in language itself who found that legal and quasi-legal settings are a rich linguistic resource. Important early examples included four ethnomethodologists: Gail Jefferson (1980, 1985, 1988), who began to study talk about troubles in everyday contexts as a part of a more general investigation of conversation; Anita Pomerantz (1978), some of whose early research focused on how blame is managed in conversation; and Max Atkinson and Paul Drew (1979), who studied English court proceedings as specialized exercises in the management of conversation. The third group comprised researchers who were less self-conscious in their focus on linguistic issues but ended up paying close attention to the language of legal processes in order to explain the workings of the legal system. For example, in Susan Silbey and Sally Merry's (1986) ethnographic study of community mediation, language emerged as a central issue even though the researchers themselves had little formal background in linguistics.

The particular body of work that is our focus here has introduced another important variable into the law-language equation: power. This research looks at the law's language in order to understand the law's power. Its premise is that power is not a distant abstraction but rather an everyday reality. For most people, the law's power manifests itself less in Supreme Court decisions and legislative pronouncements than in the details of legal practice, in the thousands of mini-dramas reenacted every day in lawyers' offices, police stations, and courthouses around the country — and, as we are becoming increasingly aware, in the streets, during traffic stops and other kinds of police-civilian interactions. Language is a critical element in almost every one of these mini-dramas, even those that escalate to violence. To the extent that power is realized, exercised, abused, or challenged in such events, the means are in large part linguistic. This book is a search for those linguistic means.

Focusing simultaneously on law, language, and power can give us new insight into what has been the fundamental question in American legal history: how a legal system that aspires to equality can produce such a pervasive sense of unfair treatment. In the one hundred fifty years since the ratification of the Fourteenth Amendment to the Constitution and its guarantee of equal protec-

tion, normative legal reform has succeeded, at least on some levels, in eradicating the most obvious forms of discrimination. The law permits all citizens to vote and hold public office. Federal and state laws prohibit employment discrimination on grounds of race, religion, gender, disability, age, and sometimes sexual orientation. No one may be excluded from public benefits for discriminatory reasons. In the courtroom, all criminal defendants are entitled to be represented by counsel. All citizens are eligible for jury duty, and lawyers may not rely on race or gender in selecting jurors for particular cases. Race is not a legitimate factor for judges to consider in sentencing.

Yet in the face of such undeniable progress in the law's ideals, there is still widespread unease about the fairness of the law's application. One can sense the problem just by spending time in a courthouse and paying attention to the daily routine. Listen to the way that police officers and judges speak to women seeking domestic violence restraining orders. Listen to the way that mediators interact with husbands and wives in divorce cases. Observe the reactions of judges and jurors to the testimony of different kinds of witnesses. Talk to small claims magistrates about what constitutes a persuasive case. Nobody is doing anything that the Supreme Court would condemn as a violation of equal protection. But it is hard to escape the feeling that the law's power is more accessible to some people than to others.

What is it that gives rise to this feeling? Why do many people continue to think that the law does not treat them fairly? The answer cannot be found just in the study of legal norms. The law no longer returns fugitive slaves, treats women as the property of their husbands, or excludes African American citizens from juries. If the law is failing to live up to its ideals, the failure must lie in the details of everyday legal practice — details that often consist of language.

In the chapters that follow, we take up a number of compelling instances in which linguistic analysis[2] has shed new light on the nature of the law's power and the inequality of its application. In chapter 2, we address the frequently asserted claim that rape trials revictimize women who attempt to prosecute their assailants. We argue that the feeling of revictimization has little to do with the rules about introducing the victim's prior sexual history, which so-called rape shield laws have attempted to reform. Rather, the reality of revictimization is to be found in the linguistic details of common cross-examination strategies that are taken for granted in the adversary system. Reformers, we conclude, have been looking in the wrong places, and the prospect for real improvement is uncertain.

In chapter 3, we focus not on a substantive area of the law (such as rape) but on a legal *process* that is brought to bear on a wide range of disputes: mediation. We look specifically at the current trend of resolving divorce cases through mediation rather than traditional adversary trials. According to the legal literature, this change is having two apparently contradictory effects: women tend

to prefer mediation, but, from a financial standpoint, they do not do as well as they did under the adversary system. Collecting linguistic data from a variety of legal and social science sources, we attempt to discover the precise mechanisms through which these effects might be produced.

Building on the details of the previous two chapters, chapter 4 poses a more general question: Is there any linguistic substance to the claim that the law is fundamentally patriarchal? Legal writers often cite the revictimization phenomenon and the allegedly unfair treatment of women in divorce as evidence that the values of the legal system are the values of a historically male power structure; as a result, they argue, the law is insensitive to the social reality of women's lives. We assess this claim linguistically. Going beyond the examples of rape and divorce, we reanalyze some of our own earlier work to make the case that the law displays a deep gender bias in the way it performs such basic tasks as judging credibility and defining narrative coherence.

The subject of chapter 5 is the natural history of disputes. We draw on research about individual components of the disputing process, from initial injury to trial, to create a linguistic model of the evolution of a dispute. The theme of power emerges again, in a subtle yet significant way. As they progress from wrong to resolution, disputes undergo multiple transformations. Each transformation is interactive, the product of negotiation between a disputant and another person — the adversary, a friend, a lawyer, a court clerk, a judge. And every such negotiation is in large part a contest for power whose outcome will shape the rest of the dispute.

Chapter 6 extends the basic argument of the book across places and cultures. There we argue for the importance of a linguistic orientation in the comparative study of law. We introduce work in legal anthropology, both older and newer, to make the point that some of our most venerable assumptions about the law of non-Western societies may derive from inadequate attention to linguistic detail. In chapter 7, we consider the concept of language ideology, defined as shared beliefs about language and how it works. We analyze several studies that reveal how language ideologies (and their manipulation) can affect power relations in legal proceedings, with profound implications for access to justice. Chapter 8 reviews developments in forensic linguistics — broadly, the use of linguistic analysis in legal contexts. We assess the work of several linguists in court cases and reflect on the potential for linguists to influence law and the legal system.

Chapters 9 and 10 are new to this third edition. Chapter 9 examines the contemporary linguistic concept of "multimodality" in legal contexts. Linguists have come to realize that live communication involves more than the sounds being uttered. It also involves such elements as spatial and visual relations among the participants, including gesture and interactions with objects in the world. Chapter 9 explains the multimodal aspects of communication and illustrates their potential significance in legal environments. Chapter 10 considers the

relationship between race and legal language, drawing on linguistic analyses of the murder trial that ensued after the tragic death of African American teenager Trayvon Martin. Finally, in chapter 11, we offer some thoughts about the past, present, and future of law and language scholarship.

Why We Wrote This Book

In the late 1990s, we were motivated to write the original edition of this book by a growing sense of need. We believed that the law and language field, as theoretically diverse as it was, was sending a coherent message about law, language, and power. But this message had to be dug out of individual books and articles scattered here and there across the scholarly spectrum. We decided that the time had come for a single accessible source that organized some of the most significant law and language research around a unifying theme.

There were at that time a number of useful review articles and collections. Brenda Danet (1980b) and Don Brenneis (1988) had written comprehensive review essays about law and language, but even then both were out of date; Elizabeth Mertz (1994) had done a more recent survey. Among the then-available anthologies, the most helpful were Allen Grimshaw's *Conflict Talk* (1990), Judith Levi and Anne Graffam Walker's *Language in the Judicial Process* (1990), and David Papke's *Narrative and the Legal Discourse* (1991). Grimshaw collects linguistic analyses of disputes and arguments from a variety of interesting cultural settings, including American and Italian nursery schools, psychiatric examinations, and labor-management negotiations. In Levi and Walker's book, a set of conference papers, the contributions all endeavor to show the value of linguistic methods in understanding the American legal process. In Papke's book, as its title indicates, the organizing theme is narrative, which the contributors study in contexts ranging from legal education to appellate opinions. None of these, however, is organized so as to tell what we believed to be the emerging theoretical story of the field.

The inadequacy of the late-1990s literature became especially evident in the dozens of courses that, between us, we had taught under the general rubric of law and society. In most instances, we brought together students from law schools and social science departments. Law and language was the exclusive topic of many of these courses; in the others, it was one of a few major topics. In both cases it was very difficult to find materials suitable for a class of students from varied disciplines. Much of the best work was in monograph form, substantial books devoted to a single, relatively narrow research project. (Moreover, some were available only at exorbitant cost.) The teacher thus faced a Hobson's choice: take an excerpt short enough to pass copyright clearance, which would probably be insufficient to convey the point of the book, or make the students buy the book and devote a major segment of the course to a single

topic. In addition, much of the important writing in the field was highly technical. This slowed the progress of the course to a crawl, if it did not cause the students to give up entirely.

For reasons such as these, we had long felt a need for a book that lays out the major issues in the field in a readable form. Our objective in the first edition was — and still is, in this third edition — to capture the theoretical import of the work we discuss, while reducing the technical aspects to what is absolutely essential. We continue to strive for accessibility in every sense of the word, to create a readily available book of reasonable length that uses a minimum of jargon and makes few assumptions about the prior knowledge of readers. Our hope was, and remains, that the entire book can serve as the core of a law and language course, while individual chapters may prove useful as freestanding linguistic readings in broader law and society courses.

As we write this third edition, the problem of a scant literature has disappeared. Articles, monographs, and especially collections have proliferated. To mention just a few of the more recent collections, see Lawrence Solan and Peter Tiersma's *Oxford Handbook of Language and Law* (2012), a wide-ranging survey that covers such diverse topics as the history of legal language, the interpretation of statutes and other legal texts, courtroom discourse, and forensic linguistics; Deborah Tannen, Heidi Hamilton, and Deborah Schiffrin's *Handbook of Discourse Analysis* (2015), with a section devoted to legal, political, and institutional contexts; Chris Heffer, Frances Rock, and John Conley's *Legal-Lay Communication* (2013), with multiple chapters on courtroom interactions, police-citizen encounters, and written legal texts; and Susan Ehrlich, Diana Eades, and Janet Ainsworth's *Discursive Constructions of Consent in the Legal Process* (2016), which considers that fundamental concept across the spectrum of legal applications. But we still see a need for a book like this one, appropriately updated. The scholarly community has reinforced that judgment by continuing to buy and assign the earlier editions. The general purpose of the book remains what it has always been: to present to the reader a variety of specific research projects that illuminate the significant if subtle relationship among law, language, and power, and to do so in a way that can be understood by a broad legal and social science readership.

While updating the book, we have found that almost all of the research examples we discussed in the first edition remain relevant and illuminating. Though we may now know more about the issues being investigated, the original studies are still salient and vital to an understanding of their respective topics. So we have kept them, with updating comments as appropriate.

As we have considered more recent research for inclusion in this edition, three themes have emerged as particularly compelling and worthy of development. We hesitate to call these themes new, because they are not, but their significance can be fairly described as newly appreciated. The first is the central

role of language, and communication generally, in the currently toxic political and legal climate. In a variety of contemporary controversies — ranging from the 2016 presidential campaign to violent encounters between police officers and civilians, from the fate of Confederate monuments to political activism by professional athletes — much of the public argument seems to be about actual and intended communication: What did people say (in the broad sense), and what did they mean to say? The second theme, closely related to the first, is that the details of language are especially important to understanding the dynamics of racial encounters, particularly in the realm of criminal justice. The third theme is the dramatic expansion in how linguistic scholars conceive of *language*. In earlier editions, our consideration was limited to spoken and written words. Now, consistent with the evolution of language research, we pay more attention to the visual, spatial, and tangible components of communication that are part of any live linguistic interaction. These three themes are prominent in the updating we have done throughout the book and are the subject of the two new chapters.

In explaining how we selected the research we have discussed in the three editions, it is important to be explicit about what this book is *not*. It is intended to be neither a textbook nor a comprehensive survey of the field. The fact that we do not mention some body of work does not mean that we do not think it is important. This is rather a book organized around what is, in our judgment, the most important theoretical issue in law and language: the use of linguistic methods to understand the nature of law and legal power. We chose the items that we have included primarily because each combines rich linguistic analysis with an interest in broader social issues. Taken together, they make the strongest possible case for the importance of law and language research to both the social sciences and the law.

In the remainder of this chapter, we introduce some background issues that are essential to an appreciation of the work that we discuss in the substantive chapters. First we examine three concepts that are at the core of law and language research: language, discourse, and power. We then review in some detail the intellectual traditions from which the field of law and language has emerged.

Basic Concepts: Language, Discourse, and Power

Many scholars still use the terms *language* and *discourse* without explaining what they mean by them. This can be confusing because these related terms have multiple meanings in the academic world; they are synonymous for some purposes but distinct in other significant ways. *Language* is the more straightforward of the two. Language includes sounds, units of meaning, and grammatical structures, as well as the contexts in which these occur. Language is also now understood to be inseparable from such multimodal aspects of communi-

cation as gaze, gesture, spatial relations, and speakers' interactions with their physical environment. Events that count as law in people's lives — making a will; getting a divorce; going to small claims court; serving as a juror, witness, or defendant — consist primarily of language. In a practical, everyday way, law is language, in either its spoken or written variety. Language is the stuff of contracts, statutes, judicial opinions, and other legal documents, as well as the essence of the daily dramas that unfold in trial courtrooms, lawyers' offices, and mediation centers.

The term *discourse* has two senses, one linguistic and one social. The former sense, which overlaps with *language*, is illustrated by phrases such as *everyday discourse* and *courtroom discourse*, the latter by phrases such as the *discourse of psychoanalysis* and the *discourse of human rights*. In the linguistic sense, discourse refers to connected segments of speech or writing, in fact to any chunk of speech or writing larger than a single utterance.[3] It thus includes conversations, sermons, stories, question-answer sequences, and so forth. Discourse analysis is the study of how such segments, or texts, are structured and how they are used in communication. In the context of law, discourse in the linguistic sense refers to the talk that constitutes courtroom testimony, closing arguments, lawyer-client interviews, arguments between disputants, mediation sessions, and the like. Over the last four decades, many researchers have turned their analytic attention to the linguistic structure of these events and have attempted to understand how such events accomplish the legal work that they do. In recent years there has been an increasing focus on the strategic aspects of these events and the implications for the exercise of legal, political, and economic power; this work is often referred to as *critical discourse analysis*. Discourse analysis scholarship forms the basis for many of the arguments that we make in this book.

The use of *discourse* to refer to more abstract social phenomena owes its currency to the influence of Michel Foucault. In *The Order of Things* (1970) and *The Archaeology of Knowledge and the Discourse of Language* (1972), Foucault lays out his notion of discourse as the broad range of discussion that takes place within a society about an issue or a set of issues. Examples include the *discourse of punishment* and the *discourse of sexuality*, which became, respectively, the subjects of two of his later works, *Discipline and Punish* (Foucault 1977) and *The History of Sexuality* (Foucault 1978, 1985a, 1985b). We will sometimes refer to discourse in the more abstract, Foucauldian sense as *macrodiscourse*, to distinguish it from discourse in the linguistic sense, which we will call *microdiscourse*.

Discourse in Foucault's sense is not simply talk itself but also the way that something gets talked about. Logically, the way that people talk about an issue is intimately related to the way that they think about it and ultimately act with respect to it. Discourse is thus a locus of power. Different discourses compete for ascendancy in the social world; one is dominant for a time and then may

be challenged and perhaps replaced by another. The dominance of a particular discourse inevitably reflects the power structure of society. At the same time, however, the repeated playing out of the dominant discourse reinforces that structure. Discourse, as Foucault put it in *The History of Sexuality*, "can be both an instrument and an effect of power" (1978:101). In the end, though, because dominance is the product of competition and negotiation, dominant discourse plants the seeds of its own undoing. In effect, as people talk about an issue over and over again, they learn too much. Even as the participants in the social discussion are being constrained by the dominant framework, they are acquiring the resources to subvert it. In Foucault's words, "Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it" (1978:101).

Foucault's theory of discourse has shaped research in a variety of disciplines where scholars have come to share his concern with specific historical processes and the connection of discourse to power. Although Foucault does not present a unified theory of law, his concept of discourse has influenced contemporary legal scholarship profoundly. His principal contribution has been to emphasize the multiplicity and complexity of legal discourses (Hunt and Wickham 1994:39–49). Whereas traditional scholarship has tended to treat "the law" as a single, coherent entity, Foucault analyzes it as "a multiple and mobile field of force relations, wherein far-reaching, but never completely stable, effects of domination are produced" (1980:102). Law works both in opposition to and in concert with such "disciplines" as penology, psychology, and education, which operate "'on the underside of the law' to 'naturalize' the legal power to punish at the same time they 'legalize' the technical power to discipline" (Hunt and Wickham 1994:46, quoting Foucault 1977:223). Foucault thus encourages legal scholars to seek power in practice, to construct meaning from the bottom up rather than the top down.

As we have examined the varied uses of the term *discourse*, we have come to understand a fundamental relationship between its two principal meanings. We have become convinced that the linguistic and social notions of discourse are merely different aspects of one and the same process of expressing social power. In fact, the central argument of this book is that the concrete linguistic technique of discourse analysis is an indispensable tool for explaining discourse in the more abstract, sociological sense. For example, we argue in the pages that follow that the claim that the law is patriarchal — a statement about dominant legal discourse — can only be fully evaluated by examining the details of talk in the courtroom and other legal sites. Discourse at the macrolevel — discourse as Foucault understands it — must manifest itself at the microlevel, as talk. It is only through talk, after all, that dominance can be expressed, reproduced, and challenged. Seen from this perspective, the multiple meanings of discourse are quite natural, indeed inevitable, and a resource rather than a source of confusion.

Finally, *power* itself — although its meaning is in some respects self-evident — also requires some explanation. Harold Lasswell (1936) once defined politics as "who gets what, when, how." *Power* is the answer to the question of *why* some people get things, while others do not — why, in other words, the haves have what they do. Stated in this way, the study of power must deal with the fundamental issue of inequality, asking why it exists and how it is maintained. This sense of power is encompassed in the notion of *hegemony*, which means preponderant power in a political context, or the ability of some groups to subordinate others. We are concerned here with power in legal contexts. Legal power, like other forms of power, has an intimate relationship with inequality, but it is an ambiguous and sometimes ironic one. Throughout history, the power of the law has been a two-edged sword, simultaneously enabling some people to attack social inequalities and enabling others to defend them. People have used the law's resources in order to undermine a status quo that the same law has created and maintained. Thus, during the American civil rights struggle of the 1950s and 1960s, both opponents and defenders of segregation claimed the law's protection.

The work of Foucault is again helpful in sorting out the complex relationship between legal power and inequality. He reminds us that power involves more than the authority of the state. Indeed, the modern world is characterized by the importance of power exercised locally at myriad sites far removed from political centers (Hunt and Wickham 1994:16–17). Foucault (1977:12) emphasizes the need for attention to the mechanics or "microphysics" of this dispersed power. When we examine the exercise of power in detail, we discover that it not only excludes and prohibits but also produces: "it produces reality, it produces domains of objects and rituals of truth" (Foucault 1977:194). The very exercise of power thus reinforces it. Inevitably, however, power also produces resistance to itself. Power may exclude, but those who are excluded remain on the scene, ready to turn local-level episodes of oppression into moments of resistance. This resistance is not the large-scale revolution promoted by Karl Marx but rather the occasional yet still significant hijacking of local power by individuals who are usually on the receiving end. It is thus in the details of daily practice that the nature, the maintenance, and the subversion of power are all to be understood.

Foucault's ideas are especially relevant to the concept of legal power. Legal power occasionally manifests itself as the power of the state, as when Congress legislates or the Constitution is amended. But the manifestations of legal power that have the most direct impact on individuals are usually local: decisions by police officers to arrest and by prosecutors to bring charges, jury verdicts, sentences handed down by judges, and so on. In Foucauldian terms, the purpose of this book is to explore the microphysics of legal power by examining such events at the microlinguistic level.

The Origins of Law and Language Research

As we noted earlier, in the 1970s and 1980s the findings of a variety of researchers from different backgrounds began to converge in that area of scholarship we term *law and language*. The resulting body of work has contributed much to our understanding of the linguistic enactment of law's power. When we look back over more than four decades of research, two preexisting fields — sociolinguistics and law and society — stand out as having set the stage on which the joint study of law and language could proceed. Although each developed independently, their convergence helped produce the body of research on which this book is based. Sociolinguistics in its many forms taught us how to study the details of language, while law and society produced the critical perspective that this book employs. In terms of the three categories of our subtitle — law, language, and power — sociolinguistics gave us the tools for a deeper study of language, while law and society shaped our understanding of law and power. It is perhaps appropriate to consider each field individually before asking how their combined interests gave rise to our present concerns.

Sociolinguistics

Many contemporary linguists are concerned in one way or another with the fact that language is a social phenomenon. In contrast to earlier generations of linguists, they do not study the structure of language in isolation from society. Sentences do not exist in the abstract, they argue, nor are words usually spoken without a purpose. *Sociolinguistics* is the branch of linguistics that studies the relationship between language and its social context.[4]

It is perhaps not too great a simplification to say that the major impetus to the development of sociolinguistics was an effort to expand on the linguistics practiced in the 1950s. The primary concern of sociolinguistics has always been the integration of social variables into theories of language. Until the 1960s, it was common for theories of the structure of language to be based on ideal, perfectly formed utterances,[5] which typically existed only in the imaginations of linguists. The nonideal utterances[6] that real people actually speak (and write) were downplayed or ignored. Actual language is filled with sentences that seem to change their direction in the process of production and with variable forms of pronunciation and modes of expression. The very variation that was seen as a complicating factor in structural linguistics became the primary focus of sociolinguistics.

William Labov did some of the earliest significant work in sociolinguistics and remains one of the most prominent names in the field. He was able to show that social factors such as age, race, ethnicity, gender, and context are integral parts of language and its use. For example, he demonstrated that speech varia-

tions among New Yorkers correlate with class and social setting (Labov 1966). Although Labov's stated interest has always been in explaining how language works, rather than how society works, he has been convinced from the outset that social factors must play a central role in such explanations. This orientation has enabled Labov and others who share his vision to expand the understanding of language significantly beyond the limits of classical theory.

This concern of linguists with the language-society relationship has had parallels in other academic fields. For example, sociologist Erving Goffman (1959) initiated the study of how members of a society negotiate their way through everyday interactions — the field later named *ethnomethodology*. Some of Goffman's followers began to focus specifically on linguistic interactions, or conversations, and the field of *conversation analysis* developed. Its major premise is that, since conversation is one of the most basic human activities, the rules for organizing it must be among the most fundamental principles of social organization. Abjuring such abstract questions as why people *really* do things, conversation analysts search within the details of actual conversations for evidence of the rules that participants appear to "attend to" or "orient toward." We describe conversation analysis in considerable detail in chapter 2; we mention it here as a variant on the fundamental sociolinguistic concern with the concrete analysis of language in real-world contexts.

Similarly, in the 1960s, more and more anthropologists began to include language as a topic of study, rather than merely treating it as the medium through which culture can be studied. Dell Hymes captured this emerging concern in the phrase "the ethnography of speaking," which he defined as the concern with "the situations and uses, the patterns and functions, of speaking as an activity in its own right" (1968:101). Inspired by Hymes, anthropologists turned increasingly to questions of who speaks particular varieties of language when, where, and to whom.[7]

Legal anthropology in particular has become increasingly focused on the details of language. When we (Conley and O'Barr 1990) published our first collaborative book on the ethnography of legal language, the bibliography of comparable work on the law was relatively short. Such work has subsequently proliferated. In fact, in a current introduction to legal anthropology by Mark Goodale (2017), the first chapter is titled "Speaking the Law." Illustrative contemporary research cited by Goodale includes Larry Nesper's (2007) legal ethnographic work among the Ojibwe tribe, Justin Richland's (2008) ethnographic study of language ideologies employed in Hopi Tribal Court proceedings, and Elizabeth Mertz's (2007) multi-sited ethnography of US law schools.

But even as many legal anthropologists rapidly adopted a more explicitly linguistic orientation, linguistic anthropology — loosely defined as the study of language from a cultural perspective, and thus a form of sociolinguistics — has been slow to focus on law as an object of study. In a recent review chapter, one of us (J. Conley 2016:393) characterized linguistic anthropology as "a relative

latecomer to the legal arena." Nonetheless, this situation is also showing signs of change, as illustrated by the recent work of Riner (chapter 9), Shonna Trinch (2013), and Hadi Deeb (2013).

Taken in conjunction with the new social orientation of many linguists, these developments mean that a great deal more attention has been paid to language in social contexts than previously had been the case. The pervasiveness of communication in social life meant that every discipline concerned with society would have to come to terms with language. As in the early days of cultural anthropology, there was a world of language use and variation to be documented and explained. But the very success of the sociolinguistic agenda gave rise to a new problem. As more and more observations were made about the social contexts of language, critics began to ask, So what?

Before we examine some of the answers that law and language researchers have given to this question, let us first consider some aspects of the parallel development of law and society scholarship from the 1960s.

Law and Society

Law and society is an interdisciplinary field that attempts to understand the connections between law and its social context. Researchers who identify themselves with this label come from a wide variety of fields — every one of the social sciences, many humanistic disciplines (especially history and philosophy), and academic law. Despite the diversity inherent in so broad a sweep of the academic world, law and society scholars seem united about their basic concern — showing how law really works in practice. For these scholars, deviation from the ideals of the law is the primary object of study, not something to be dismissed as mere noise in the system. Despite this shared interest in law in action, law and society is characterized more by a general research orientation than by a specific research agenda. In a 1994 collection of some of the most influential papers in the field, Roger Cotterrell makes a still-accurate observation:

> In legal studies in the English-speaking world "law and society" does not designate a unified field of scholarship, a distinct subject or an academic discipline. It is a label for very varied researches which need to be categorized in this special way only because of pervasive failures of imagination in traditional legal scholarship. (1994:xi)

Law and society researchers look skeptically on law's claim of equal treatment for all. They ask questions about who gets arrested and why (Black 1971). They seek to understand the gender biases that may result from the legal regulation of domestic and work relationships (Fineman 1991; McCann 1994; Edelman 2016). And they are interested in whether concerns about the process of making a legal decision can overshadow the outcome (Lind and Tyler 1988; Tyler

1990; Sunshine and Tyler 2003). Investigating these issues often means turning taken-for-granted assumptions on their heads in order to understand how law is complicated by the social context in which legal principles must be realized.

Like sociolinguistics, the law and society field developed its momentum in the 1960s, although skepticism about the law living up to its ideals dates back at least to the legal realist movement in the early decades of the twentieth century. Many of the founding members of the Law and Society Association were sociologists, but they were soon joined by anthropologists, historians, philosophers, political scientists, and some legal scholars. The association's journal, *Law & Society Review*, began publication in 1967. From the outset, law and society has not prescribed a particular theory, method, or application of its findings. Rather, the field has existed as an area of scholarship united by a concern with law and the complications caused by the social context in which law always exists.

More than five decades after the founding of the Law and Society Association and the *Review*, the field retains its interest in the law's failures to live up to its ideals. Law and society researchers are broadly empirical in their respective methods, and the articles published in the *Review* have always been preponderantly empirical. But qualitative, language-focused law and society research has been relatively rare. Anthropologists, linguistic and otherwise, have complained that recent editors of the *Review* have equated "empirical" with "quantitative" in their selection of reviewers and publication judgments.

Shortcomings of the Fields in Isolation

This section is carried forward from the previous editions. Readers will see that some of the criticisms we offered are out of date. But rather than updating it, we decided to reproduce it as it was and then comment on it in the conclusion that follows.

Despite the success of the research programs of both sociolinguistics and law and society, each field has, when working on its own, ultimately failed to address a fundamental issue. For sociolinguistics, the problem is this: after decades of empirical studies, it is now well known that language variation is not unsystematic, as some earlier linguists had assumed, but rather socially patterned. In fact, we now know a great deal about how social differences are encoded within language. What the field has often neglected to do is to connect the variation it has documented with broader issues. Much sociolinguistic research has failed to ask whether language variation is truly consequential in social life, as opposed to being merely an interesting curiosity. Some question how productive it is to continue to document instance after instance of socially patterned variation. Since the basic principle of sociolinguistics was established, many people outside the field (and even some within it) have felt that we have been learning more and more about less and less.

In conversation analysis in particular, researchers and theorists have frequently shied away from making a connection between conversational organization and the dynamics of power. The great strength of conversation analysis has been its attention to ordinary people speaking in everyday contexts: friends on the telephone, people around the dinner table, and the like. The product of this research — the preeminent achievement of conversation analysis — has been a grammar of conversational interaction. It is appropriate to call it a grammar because it explains the strategies that people employ in a conversation solely by reference to other events within the conversation. External factors, such as status inequalities or preexisting relationships among the parties, have rarely been taken into account.

But this focus on the ordinary, necessary as it was, has had a constraining effect. Most important, it has resulted in an overwhelming concentration on interactions between people who are (or are assumed to be) of roughly equal social status. To be fair, conversation analysts have not been unaware of such factors as status and power but have chosen not to consider anything external to the language of the conversation itself. Nonetheless, the fact is that there are few conversations in which status and power are not relevant; think, for example, of exchanges between parents and children, senior and junior coworkers, or even men and women. Far from being the norm, relationships of true equality are so rare as to be treasured. Although some recent work on gender issues in language has dealt with power and its consequences,[8] for most of its history conversation analysis has excluded this elemental issue from consideration. Even the research that has been done in institutional settings where power imbalances are explicit has been modest to the point of diffidence in dealing with the question.[9]

The problem with law and society scholarship is one of methods rather than goals. The primary objective of sociolegal scholars has been to document the law's failure to deliver on its biggest promises, especially the equal treatment of all citizens. Where the field has sometimes come up short is in its explanation of how such failures occur. For example, we have known for a long time that the haves come out ahead and that race and gender can make a difference in legal access and outcome. But law and society scholarship has been less successful in exposing the mechanisms that produce these inequalities. What is it exactly that the haves do for themselves or to others that results in their greater success before the law?[10] What happens to women and minorities in legal contexts that results in their positions being undervalued and underrewarded?

Conclusion: Combining Concerns

For more than four decades, it has been evident that the most effective way to overcome the weaknesses of the two fields is to merge their strengths. Sociolinguistics can benefit from law and society's focus on who gets what and when,

whereas law and society can turn to sociolinguistics for a deeper understanding of how they get it. The two disciplines already share a common concern with social divisions along lines of class, race, ethnicity, and gender. Sociolinguistics explores how language variation correlates with these variables, while sociolegal scholarship argues that they influence access to justice. Nothing could be more logical than to investigate the places where language and justice converge. From a sociolinguistic perspective, the question is whether language variation has social consequences in legal settings. The sociolegal version of this question asks whether we can discover in language the precise mechanisms — Foucault's microphysics — through which injustice happens. Since law-in-action consists almost exclusively of linguistic events — trials, agreements, conferences with lawyers, and the like — the two disciplines have always had ample ground on which to meet.

The advocacy of this merger was a fundamental motivation for the original edition of this book. By analyzing a number of instances in which that merger had already occurred and greatly benefited our understanding of both language and law, we sought to make the case for even deeper collaboration in the future. Our objective was and remains to discover how the power of the law actually operates in everyday legal settings. Drawing on the work of an intellectually diverse group of law and language scholars, as well as some of our own research, we seek to identify the linguistic mechanisms through which power is realized, exercised, sometimes abused, and occasionally subverted. In the course of answering questions such as these, we also learn a great deal about the nature of power itself. We see, for example, how the linguistic details of particular legal events can simultaneously reflect and reinforce power relations that cut across society. We also discover the critical role of language in resisting and reforming existing power arrangements.

The increased collaboration we promoted in previous editions is, in significant respects, the current reality. Sociolinguists, without sacrificing the intensity of their focus on language itself, have paid more attention to questions of power, often under the rubric of critical discourse analysis. Legal anthropologists have made more and better use of linguistic evidence. More recently, some linguistic anthropologists have begun to see law and power as appropriate and important subjects for their method.

After twenty years of further research by ourselves and others, we reach the same conclusion that we had in 1998: language is not merely the vehicle through which legal power operates — in many vital respects, language *is* legal power. The abstraction we call *power* is at once the cause and the effect of countless linguistic interactions taking place every day at every level of the legal system. Power is thus determinative of and determined by the linguistic details of legal practice, and it is those details that are the subject of this book.