Language and Power in a Place of Contingencies: Law and The Polyphony of Lay Argumentation

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“But I got to use words when I talk to you.”

_T.S. Eliot, Sweeney Agonistes_

**ABSTRACT**

This article analyzes legal language through the rhetorical, argumentative and narrative structures employed by non-represented litigants, whose linguistic interaction with the court is not mediated by professional counsel. It identifies 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 extra-legal parameters. Existing research correlates these concerns, roughly, with rule-oriented and relational linguistic approaches, respectively, and acknowledges tradeoffs that lay litigants perform between them. In this research, however, litigants were observed to resist such tradeoffs, requiring that their relational concerns count as rhetorically legitimate. In this they express a conception of justice that is removed from the formal structures of rule-breach-remedy familiar to law. This essential tension of linguistic performance, between authentic expression and institutional efficacy, in fact becomes a definition of justice. As the standard rule-orientation bias of courts is generally not equipped to accept such linguistic strategies, the tension remains unresolved. The work then moves away from this context to examine the tension in institutional justice in general, building on the critique to discuss relational v. institutional structures as jurisprudential types. The last section of the work returns to the prior discussion of the linguistic performance in the place of justice to expound a model of “situational tragedy” (as a category of the human condition) that underlines the special position of justice; this portion builds on Hegel’s notion of the centrality of tragedy as a rival category to politics.

Data for this study was collected in small claims courts in Israel’s northwestern region. The study focuses on ethnic, generational and other cultural parameters.
rather than on social stratification of class and economic situation emphasized by most prior research. It employs ethnographic as well as interpretative methods, and is informed by work in philosophy and linguistics including by J.L. Austin, Dell Hymes, Michael Silverstein, John M. Conley and William M. O’Barr and on interpreting the kollision between interests of action and expression, both relies on and draws away from on Hegel’s philosophy of tragedy.

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I. A Place of Contingencies: Lay Litigants in Small Claims Courts

Small claims courts are extraordinary places to examine persons’ first-hand interaction with 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), lay litigants bring into the courtroom the language, narrative modes, relevance criteria and argumentative strategies that they are otherwise familiar with. 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 represses the litigant as a distinctly contingent subject in order to reconstruct it in rhetorically effective ways. But lay litigants who attempt to do the same get involved with their own language, identity, and relations. Rather than obscure who
they are, the language available to them works to express them closely to 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 posses 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.

Small claims courts are junctions for people to meet, who may otherwise have little occasion to interact. This may depend on the kind of dispute. While contractual claims presuppose some level of initial voluntary exchange between the parties prior to the legal 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 into the same intersubjective linguistic space (i.e., the courtroom) persons from different speech communities that might otherwise be unlikely to form exchanges.

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 poses a problem, a challenge to otherwise glossed-over requirements of an equal distribution of attentiveness and respect for all litigants. But 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, this can be termed law’s “polyphony” (Bakhtin 1934-5, 1981).¹ Polyphony expresses not merely the diversity of voices among the group of lay litigants, but also the shifting between different linguistic modes expressed by single speakers. Polyphony, then, is not just the sociolinguistic aggregate generated by multiple speakers each expressing her uniqueness, but also the different voices logged, so to speak, within each speaker and lay litigant.

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 be recounted by a single authoritative voice. Bakhtin 1934-5.
While linguistic diversity is usually approached in terms of cultural diversity, it can be expressed by speakers when confronted with contexts and challenges that require her to mobilize and shift between different linguistic modes. In the context of this paper, polyphony is directly linked to the constitutive tension underlying all lay litigation, which involves both a drive for authentic expression and rhetorical effectiveness—both which must be accommodated within a single linguistic interaction, sometimes by a single speech act. To wit: on the one hand, lay litigants must make use of the social variety of discourse 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 \textit{ad nauseum}—"a form of life" (Wittgenstein 1953:§19), and in such courts litigants are faced with the challenge of appropriating law, making it—through language—a part of their own life and experience, in ways that in their terms would 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, normal 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 lay 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 & 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 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.

² By “normal language” I mean 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).
Polyphony both allows and results from to the basic tension explored in this study, between authentic expression—rhetorically effective in respect to the case or not—and what Conley and O’Barr’s term “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 them to court to begin with. Framing relations, moral beliefs and social “upstandingness,” expressing expectations for distributive and possibly more holistic forms of 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. 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 in Conley and O’Barr’s findings stress lay litigants drive to “satisfy the court,” (p. 19) which does not mean that they are always equipped to do this. 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). Polyphony, 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 offer themselves – in terms of forsaking one linguistic approach for another, more geared towards “satisfying the court,” lay litigants overwhelmingly prefer the rhetorical function. The present study, however, finds that lay litigants frequently do not treat this as a matter of tradeoff at all, instead expecting that their relational talk count and be treated as rhetorically effective.

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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. One such case is presented below.
II. Rules and 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 part in small claims courts in five different localities in Israel’s ethnically diverse northern region and collected data from some 300 cases over 18 months. It centers on the interplay of identity signifiers (socioeconomic, ethnic, gender, age, language and language competence (in the performative rather than Chomskian sense), 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

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 mostly used by judges for summarizing the litigants positions and for mnemonic functions). In few 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. During 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.
elsewhere. Applying quantitative narrative analysis, the present paper makes use of only a small sample of cases for exploring and supporting insights relating to the significance of polyphony to conceptions of justice in legal and social interactions. Thus this part of the larger research project, while opening with ethnographic approaches, maneuvers to philosophical and jurisprudential reflection. Consequently, it only glosses over several of the methodological exegesis that are appropriate for the more social-scientific parts of the program. Nevertheless, it still provides demographic and other identity signifiers relevant to the protagonists in the case studies, if only in an attempt to concretize 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—frequently focus on language as a type of social action and thus on language’s performance rather than on matters of grammatical structure or questions of meaning (Bauman & Briggs 1990). If the subject matter of much of standard linguistics is what de Saussure (1916) termed langue—the dimension of language as a grammatical system of interconnected meanings—sociolinguistics looks more to parole, the actual social utterances and uses of language, not as a mere actualization or application of langue but as a complex,

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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 look at language as a matter of action and performance; see Searle 1969, 1973; Derrida 1972.
multifunctional medium of action in the social world.\(^6\)

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.\(^7\)

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\(^6\) For theoretical background see Hymes 1962, 1974. Note, that Chomsky’s definition according to which “a grammar of the language L is essentially a theory of L” (Chomsky 1957:49) is actually used in at least two, non-converging senses. According to the more popular use, “grammar” is that system of linguistic rules that prescribe how to appropriately arrange words into sentences and other meaningful language segments, and generate new ones from those; “grammar” is thus distinct from language’s other major components, such as its vocabulary (or “lexicon”) and phonology, or sound system. However, in this study, “grammar” has a less differentiated sense, that encompasses the whole system of rules and procedures that make up a given language, including syntactical, lexical and phonological patterns, performative modes and sometimes even linguistic ideology. When linguists talk of describing a language in terms of its grammar it is the latter sense that they usually employ.

\(^7\) As a concept, language ideology builds on two separate sources, joining continental critical theory with metapragmatics. It expresses the It is ideological because it responds to such questions as “what 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. Alan Rumsey, “Wording, Meaning and Linguistic Ideology”, 92American Anthropologist: 346 (1990); Michael Silverstein,, “Language Structure and Linguistic Ideology”, in Paul R. Clyne, William F. Hanks, Carol L. Hofbauer (eds.), The Elements: A Parasession on linguistic Units and Levels 193 (Chicago: Chicago Linguistic Society 1979); Woolard, Kathryn A. “Language Ideology: Issues and Approaches”, 2 Pragmatics 249. Using some of Silverstein’s theoretical work and developing semiotic lenses of her own, Mertz shows how linguistic ideology is impressed on law school students as, effectively, the major pedagogical issue in the early stages of initiation into legal discourse. Elizabeth Mertz,
Rule-oriented litigants typically “describe their problems in terms of specific rule violations and seek concrete legal remedies, demanding remuneration” (Conley & O’Barr 1990:xi; 1988; Conley, O’Barr & Lind 1978). Such litigants are more likely to use legal terminology, follow relevance criteria familiar to the court, and frame their narratives on structure of legal claims, expressing the rule-breach-remedy structure of legal claims. Relational litigants “describe their problems in broad social terms and seek remedies that would mend soured relationships and respond to personal and social needs,” (Conley & O’Barr 1990:58) and would frequently express a broader view of the court’s mandate in dispensing justice, in particular in terms of distributive 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 that occurred before the accident. 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.

In the present study, we observed lay litigants argue from broader conceptions of justice, sometimes refusing or failing to limit their claims to the “relevant” specifications of the present dispute. Relational speech may attempt to establish the speaker’s own as well as her 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 have also mattered to the court. Generally, Conley and O’Barr treated this as an argumentative handicap. Rule-

Learning to Think like a Lawyer (2007).
oriented rhetoric, on the contrary, typically limits its claims within 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 employs legal or quasi-legal jargon and terminology (such as contracts, leases, liability, third-parties etc.), albeit sometimes mistakenly 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 magistrates 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 provides an 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. 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 own polyphony.

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. 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 first instance judges.\textsuperscript{8}

In the courts surveyed very few litigants were allowed an organized narrative presentation, 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 often interfere and steer talk away, mostly to factual rather than normative or relational matters.

The next two sections present cases that emphasize different linguistic aspects of polyphony. The selection illustrates the dialectic between discursive categorization and the concrete instances when life meets law. Later, in sections VI and VII I generalize from these and additional cases to typify the inherent tensions involved in linguistic expression before the law in terms of “situational tragedies” of the human condition. I chose to present and discuss the findings interpretatively and qualitatively, as instances and opportunities for analysis and reflection.

IV. The Case of the Missing Contract

The plaintiff in this case was a Moroccan-born Jewish retired policeman 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, a younger Arab carpenter from the village of Kabul, complaining that the defendant failed to adequately construct a cabinet in his house, using an inferior industrial material known as MDF instead of sturdier, more expensive plywood, to which both litigants referred by the vernacular term “sandwich.” There are no lawyers in Shlomi, and prior to filing the complaint, the plaintiff had a lawyer from Nahariya, a nearby and relatively well off resort town,\textsuperscript{9} send a letter to the defendant

\textsuperscript{8} Magistrate’s Courts—called \textit{beit mishpat hashalom}, literally “court of peace”—are general jurisdiction first instance courts, spread throughout the country’s five counties, or “districts.” District courts – the intermediate level – review appeals from magistrates courts (district courts also have original jurisdiction over graver offences, higher value civil actions, real estate cases and some administrative matters).

\textsuperscript{9} This practitioner kept a one-lawyer firm and acted also as a notary public. Nahariya
demanding restitution of the price paid for the cabinet in the sum of 3,500 New Israeli Shekels (app. US$900)) plus interest,10 plus 500 NIS to cover “legal expenses,” threatening a lawsuit. There was no reply, and five weeks later the plaintiff filed a suit in the Acre court for the sum of 8,000 NIS (app. US$2,000), at the time the cap set for small claims.11 The complaint, handwritten, states the facts rather laconically, complaining that the defendant failed to return phone calls or answer the lawyer’s letter. In interview, the plaintiff stated that he was never 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.”

In his answer, handwritten as well, the defendant denied all claims, arguing that the job was completed to plaintiff’s satisfaction and that MDF was the material agreed upon. Formally referring to himself in the third person he added that “it is not clear to the defendant why plaintiff chose to submit a claim although he has performed the work as agreed.” 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 as well; beit hamishpat literally means “house of law”). He asked that the lawsuit be wholly dismissed,12 and demanded reimbursement for “legal

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 standard of living index, a practice prevailing from the early 1980’s when mega-inflation rose to hundreds of percents per annum. In 1998 the annual inflation rate was 8%, considered moderate in a decade that saw inflation fluctuate at 7%-12% per annum. The inflation rate for the years after 2000 fell to approximately 1.5% and during much of 2002 Israel experienced deflation. Current inflation rate fluctuates between 0.5% and 2%. While many businesses adjusted to the new reality, a good amount of standard practice – including all debt collection – still invokes index adjustments, as indeed does the default legal rule (Law of Setting Interest and Inflation Adjustments, 5648-1988).

11 That cap has since been raised to 17,800 NIS, the equivalent of about $4,500 in Dec. 2007 terms.

12 No formal procedure is required for motions for dismissal or summary judgment.
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.

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

Judge: Why is the sum 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?
Defendant: I was speaking to my brother.
Judge: In ten seconds and 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 doesn’t come to fix, and I have photographs of all his work.

The defendant proceeded to tell 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 seemed more concerned with fixing 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

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).
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.

The defendant’s move was to invoke a “contract,” employing for the first time in the case a legal entity as a source of obligation. His language switched 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’ “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. For a moment his argument seemed worthless: he moved relational talk of the fairness of the bargain and a factual argument about agreement to one about a text, yet without the text to back it up. What happened next was that first of 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.” 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 has initially followed an 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 employ 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 features in the court’s pseudo-stenography, colloquially referred to as the “protocol.” The judge ruled for the plaintiff yet, for all his emphasis on precise calculations, added up 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 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 brought up the matter of the contract at all. He added that the defendant was a liar and a sham. 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 in normal talk several distinct senses used by lawyers and other speakers alike. Of these senses—ranging from the conceptual to the

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13 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.

14 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-realist 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
corporeality of texts\textsuperscript{15}—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. Because all contracts involve communicative acts, “contract” is also a linguistic entity in two non-identical 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, as in “you left the contract on the table.” All these senses were played out in an interlayered mode once horse switching was performed. 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 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.”

\textsuperscript{15} On textuality as a practice see Said 1980:89 and references cited there. Mertz (2007) shows is 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.
V. Contract v. Polity

This case presented complex layers of relations between the litigants, constantly invoking their extralegal, communal and political relations. These were, however, disregarded by the court that 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.

The Plaintiff, an Arab male from the village of Nakhaf, was a 34-years old high-school graduate who stated his income as below average. He reported that he had appeared in various courts seven times in the five years prior to this case, and this was his second appearance in a small claims court, twice in the Magistrates Court of Acre. His Hebrew fluency was average or less, checkered with grammatical mistakes that nevertheless did not seem to undermine the effectiveness nor 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 a little 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 falling over it. 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 they were not presented as separate matters: one was the municipality’s duty to prevent accidents, once it had created a nuisance; the second was that he was promised reimbursement by various municipality officials. These grounds were expressed by distinct means: the first was the only claim that he made in the textual complaint, the second dominated the oral argument.

The municipality was represented by one of its officials as well as its retainer legal counsel, an Acre lawyer who practiced in a one-lawyer firm, both Arab men. Both professed to considerable court experience. Like the plaintiff, the municipality official was Muslim, a year older than the plaintiff, held an academic degree and could not recall all the times he has been to small claims courts on behalf of the municipality—”over ten times in the last five years.” The Plaintiff was not represented. Significantly, before the
hearing the defendant’s representatives offered the plaintiff a settlement amounting to about 40% of his claim, which he promptly rejected.\(^{16}\)

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 plaintiff objected and the initially insisted on equilibrium:

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:]
Ruling: In order not to imbalance the equilibrium that must exist between parties and as the plaintiff refuses to be represented I deny the defendant’s lawyer’s motion to represent the municipality.\(^{17}\)

\(^{16}\) The damages/restitution sought amounted to 4,000 NIS (approximately US$1,000), composed of 3,000 NIS for out-of-pocket expenses for the railing materials and 1,000 NIS cost of mounting. The proposed settlement was for of 1,500 NIS

\(^{17}\) 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.
While a good deal of the hearing revolved around probative matters, those were framed by the court’s notions of obligation, which the plaintiff could not accommodate. 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 text-artifact, such as an “agreement”:

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 have.

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’ll put a railing like in the rest of the village, and at the neighbors’ 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 concerning the wall.]

Judge: So what did you do? When was the last time you went to the municipality?

Plaintiff: I went many times and no one obliged me. Finally they told me to construct it at my own expense and they’ll 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 oral agreement with?

Plaintiff: With X, the deputy chairman of the Council.18

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

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

18 The chairperson of a municipal council is an elected, executive position parallel to that of mayor.
The judge’s insistence on a written contract, a text-artifact, shuffled the plaintiff’s vocabulary as he tried to adjust to the court’s language. When is a promise, an agreement?

Plaintiff: I’ll also bring Y.
Judge: You made an agreement with him too?
Plaintiff: No, but he promised me, too.

The plaintiff in fact argued on the basis of an oral agreement—a seemingly perfectly legal one, if difficult to prove. Yet he never used the term, and failed to spell out the claim to the court. Nor did the defense make any probative counterclaim. Indeed, in the following exchange both the municipality official and the lawyer as much as admit to the contract, although the lawyer claimed it was “signed” ultra vires—an argument based on the alleged breach of a specific rule. However, it was the lawyer’s mistake to take the judge’s insistence on a text-artifact to be a thoroughly rule-oriented commitment.

Interrupting the judge’s examination of the plaintiff, the lawyer made a clear rule-oriented claim:

Lawyer: [Interrupting] 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.

Once again the language gets ironically confused: both the lawyer and the judge refer to a person “signing” an agreement although the point is precisely that no text-artifact existed. Indeed, the plaintiff’s main concern was to separate the text-artifact sense of agreement from the obligatory sense. As long as “agreement” meant “text,” the plaintiff had no claim. All he could do was retreat:

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19 Under Israeli law, contracts are formed by offer and acceptance, liberally construed. There is no requirement of consideration and no general statute of frauds or other formal requirements (such exist in particular categories, e.g. real estate transactions).
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 main argument, elaborated in his 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 exit interview he explained that the municipality has created a dangerous nuisance on his property, for which he was at risk of being held liable for accidents. 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 admonition of obligation resulting from relations, not from contract. Originally, the lawsuit was not brought on contractual grounds, which a text-artifact could substantiate. It was about compelling the municipality to desist from arbitrary or preferential treatment and apply the same measure of care in here as it did elsewhere. The plaintiff’s initial claim, grounded in a conception of civic community and the relations between the local political authority and the individual, was squeezed and translated into narrower contractual language in which it suffered a probative handicap. 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—to what by then has become a contractual claim—that he had rejected earlier. While in a sense he did not lose his case, it certainly got lost.

The matter of court-induced (or court-coerced) settlement can be viewed from a different perspective. This plaintiff refused all proposals to settle as long as they came from the defendant’s representatives. He then accepted immediately and without negotiation the exact same offer once it was tendered by the court. In the exit interview he expressed himself as having, in a sense, won the case. When confronted with the settlement and its amount he said “but not that way, I end up winning and don’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 power against his opponent—the essence of what, under this
interpretation, amounted to justice. It was not a “day in court” satisfaction that generated his position nor merely a helpless concession to a biased court, but a certain conception of justice where “victory” did not depend on the amount of damages awarded but on relations, namely submitting his opponent to the court’s superior power.

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 pains to protect the plaintiff’s procedural rights by denying the defendant legal representation, 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 relations with the municipality in the extra-legal world. However, none of this meant that the court would actually consider the plaintiff’s relational argument *qua* legal one; and once the dispute was formed in contractual terms—to the plaintiff’s obvious disadvantage—the judge had no more use for the matter of relations between the parties, even though those constituted a perfectly valid, independent legal claim. On the normative surface, the plaintiff’s probative handicap seems real, and the judge’s misgivings obvious. An analysis of the language of the exchange reveals the structural disadvantage suffered by plaintiff. Predictably, in his post-hearing interview the plaintiff reported having been “surprised” by the process of the hearing, claimed that the judge was not in possession of all facts necessary for deciding the case, complained that he was interrupted frequently by the judge, and although the overall procedure was not fair, the outcome was just because he had “won.”

The textual products and representations of the hearing—the protocol and the decision—do not express this complexity. Perusing them shows that the litigants’ respective rights were closely watched and that both sides agreed to a settlement. Readers who will only read the texts—as opposed to observing the actual process—will have little access to witnessing the case’s true processual dynamics. What law produces is a lot more of what its textual products expose. Unlike what one might assume reading standard legal scholarship (as well as law school curricula), law is not a machine for the production of texts. I wish to stay briefly on this point.

Focusing on trial rather than on appellate courts, and on actual process rather than on textual products, expresses a certain ideology of law in practice that differs from most
standard approaches in legal scholarship. For one, doctrinal issues are at best glossed over as the actual handling of disputes takes center stage. Texts are not presupposed to transparently express the realities of process, as indeed the judgments and court “protocols” examined in this study were found not. Not less significant, perhaps, is the notion that litigation in higher courts is a resource with limited access. In its requirements of professional representation it is costly, relatively complex, and requires a relatively assertive conception of civic identity and status. Whether for any of these reasons or not, of the litigants interviewed during this study none has expressed an intention to appeal a loss or a disadvantageous court-induced settlement. In the confines of standard litigation, the voices of some of these persons, and possibly their concerns and life-experiences, are marginalized or ignored. They become what Conley and O’Barr call “the missing voices” of the law.

It will be a mistake to consider wider professional representation as a policy step toward mitigating power inequalities in lay litigation. Representation will translate and transform concerns and suppress the opportunities for authentic expression and polyphony that are so fundamental to lay dispute resolution. The more promising—but also more difficult course—is for lay litigation rather than to suffocate polyphony, to embrace and bring it within the boundaries of a full, relational approach to due process. Professional representation, as argued above, extracts a serious toll on authentic expression and thus on law’s ability to deal with the actual, pre- and non-translated concerns of the persons whom it hosts.20

Within the framework of polyphony, the ability to switch from one speech orientation to another, either tactically or reactively, may be a key factor in lay litigation. “Horse-switching” can be broadly divided into two: tactical horse-switching is intended to improve a party’s argumentative position but is not caused by any clear speech or other event in the courtroom. Reactive horse-switching comes in response to an argument made by an opponent or a line of questioning by the judge. It can thus be a product of

20 This work is diverse enough not to welcome a full exposition of the concept of “law as hospitality.” It is developed in a forthcoming work of mine by the same name.
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.

VI. Justice, Language and Situational Tragedy

The complexities of linguistic expression in law, I claim, express a more profound category of the human condition and its dependence upon language. As shown above, a main linguistic tension expressed in lay litigation is between authentic expression and rhetorical effectiveness. The former involves expressing the pre-legal nontranslated relational concerns as they figure in pre-legal relations, talk, and consciousness. Its main attribute is its idiosyncrasy. The latter involves the institutional function of effectively mobilizing the court for desirable action. While the performance of rhetorical effectiveness is mostly persuasive, and that of authentic expression mostly assertive, both are also illocutionary in that they attempt to present the court with a reason for action (Raz 1979), i.e., by the performance, to cause the court to use its institutional power in some desired way. This is the connecting link between them, what makes them aspects of the same comprehensive experience, the agent’s interaction with justice. This also manifests language’s general performative multifunctionality (Silverstein 1993).

The tension between the performances is due to the incommensurability of the means that these goals impose on linguistic action, even when the goals themselves are commensurable and as such subject to tradeoffs in terms of performance. How is this tradeoff expressed, and what is its meaning? In this section, I wish to explore it as expressing a category of the human condition that, following Hegel and Sartre, I offer to term “situational tragedy.” At the outset, the choice of term may invoke objections. It is crucial to understand the notion of “tragedy” here not as a colloquialism for
“catastrophe” or, alternately, as a literary, typically dramatic genre,²¹ but as a philosophical concept that attempts to isolate a category of the human condition and locate its significance in real-world experience. The framework applied here originates in Hegel’s philosophy of tragedy, which centers not on the notion of a tragic hero “but a tragic collision, and that the conflict is not between good and evil but between one-sided positions, each of which embodied some good.” (Kaufmann 1968: 201-2, see also Gellrich 1988: 46-78.). These positions are incommensurable, in the sense that no second order norm conveniently lends itself to organizing them in a normative hierarchy.²² Both are imposed on the tragic agent. In Hegel’s analysis of Antigone, the imposition is on consciousness: through facing law, Antigone becomes a subject, or at least anticipates subjectivity through the transcendence of set social roles. What fascinates Hegel in Antigone’s case is not just her being a conscientious objector (like Socrates and later, Christ) but that the conflict into which she is thrust drives her to discover a voice of her own, transcending any former role; tragedy destroyed her, but also allowed her to develop into something that was impossible before. Antigone’s tragedy stems not from her choice of the obvious moral right over the obvious moral wrong, but from the competing legitimacies of the state sanction that she faces and what she alternately perceives as natural law and the dictate of her fledgling conscience. We recall the case of her father: Oedipus must know—against the seer’s, Theresias’ warnings—but he must also rule, live, be a king.

Sometimes, destruction is imposed on a character for nothing else than the inability

²¹ Since Aristotle’s Poetics, tragedy was associated with action and performance rather than narration and reporting:

Tragedy is the imitation of action; and an action implies personal agents, who necessarily possess certain distinctive qualities both of character and thought; for it is by these that we qualify actions themselves, and these—thought and character—are the two natural causes from which actions spring, and on actions again all success and failure depends.


²² For the incommensurability of moral claims in general see JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).
to deal with the nature of a tragic situation. Victor Hugo may or may not have read Hegel before devising, in his last novel, *Quatre-vingt-treize* [1793] (1874), a dark specter of Antigone in the character of Cimourden, the revolutionary zealot who kills himself directly after presiding over the execution of his once-pupil and later commander errant in the revolutionary army, when he realizes the impossibility—for him—of existing in a normative system that allows no quarter for love. Not all tragic protagonists live to evolve the way Oedipus or Antigone (or Cimourden) did: Lear loses his mind, Hamlet becomes an accomplished killer before succumbing to the sword himself, and Marlowe’s terrible Barabas not only loses all but seems to invent a new level of evil altogether.

In classical tragedy as well as in popular use, “tragedy” is strongly associated with terrible fortunes. However, what is distinct about the tragic situation—what distinguishes it from the pathetic, the sad, and the bad—is the causal link whereby destruction follows the impossibility (or inability) to reconcile or adequately adjudicate among two different compelling, equally legitimate normative claims, and the courses of action that they entail—in terms of the given situation. In law, we feel comfortable using such terms as frustrated interests, which frame, in legal interactions, the contextual meaning of the more evocative term “destruction.” In other words: destruction becomes relative to the salient characteristics of the given tragic situation. In drama, the tragic fates of protagonists are frequently awful indeed. But the tragic dilemma is a practical and communicative construct whose validity in understanding such situations does not depend on comprehensive destruction. Unlike *Tragedy*, the tragic situation need not result in comprehensive destruction, only in a situational one, i.e. destruction that is relative in kind and measure to the dilemma and interests that define the situation.

Thus we move away from the larger than life talk of *Tragedy* to the more mundane “situated tragedies” into which we are thrust not merely when our will is frustrated, but when we find ourselves subject to two equally binding normative claims that require conflicting action and are, among themselves, irreconcilable. Like tragedy, these are morally blameless conditions (and even if they are not, the morality of the issue is not the
salient aspect of the situation.). They emerge in circumstances where persons cannot perform through the venues of action open to them so as to express the different but equally compelling aspects of their humanness; if they insist, the consequences are situationally destructive. While in Tragedy the destruction is comprehensive, in situational tragedies it occurs in terms of the situational parameters. This is applicable to the polyphony of linguistic interaction as expressed by the study of small claims courts discussed above, namely, when structural parameters of the language of “relational” lay litigants frustrates their access to justice by requiring them to abort authentic expression in a tradeoff with their conflicting interest in rhetorical effectiveness. In such cases the tragic quality grows from the fact that justice is subverted through the very act of attempting to attain it. Situational tragedies are mundane, but they count—especially for persons for whom this defines their infrequent encounters with justice. I shall return to this point shortly, after defining what I see as the chief diagnostic of the lay linguistic interaction with institutional justice, as follows.

An important aspect of lay litigation discussed earlier in this study is the tradeoff that lay litigants perform between authentic expression of the self and relations on one hand, and rhetorical effectiveness in dealing with the court on the other. What is the relation between such preferences in terms of the risk of rhetorical handicap that relational talk may entail? Conley and O’Barr (1990) conclude that when relational litigants are aware of the underlying tension between the two linguistic functions they tend to perform tradeoffs, being primarily concerned with “satisfying the court.” However, in the present study, findings showed that litigants often failed to appreciate these as tradeoff situations. Instead, they required and expected the court to recognize their relational talk as rhetorically effective; they required that their relational talk count as adequate courtroom talk. And they required this not simply as a matter of interest (a “prudential” matter) but as germane to justice, in a sense defining it.

23 By contrast, a likely reading of Schopenhauer suggests that tragic situations are entailed by the essential human act of thrusting the will upon the world. This is an interpretation of Schopenhauer’s talk of a “guilt of existence;” (1819: §51), II 1844: ch. 37.
This requirement from a given institution—to recognize talk as multifunctional, combining authentic expression with rhetorical effectiveness—is perhaps not unique to justice, yet it does not characterize linguistic action in most social contexts. It appears most powerfully in love, where the lovers are compelled to express their selves in the most profound (and thus idiosyncratic) terms while attempting rhetorical effectiveness for the sake of actualizing love; the expressive and the perlocutionary are then intertwined, unlike, e.g., an order given by a superior whose entire performance is perlocutionary.\textsuperscript{24} Love is a “total situation;” but in most of our lives’ venues and contexts we are satisfied to act through role-playing and the compartmentalization of action and of interest, thus avoiding or mitigating situational tragedies.\textsuperscript{25} In most social interactions we express a clear preference between effective rhetoric and authentic expression, and our humanness does not demand nor does it expect to be comprehensively expressed. I go to the Bank: while I express myself to the loan officer and express some of my individuality, my clear goal is to receive a loan in the best possible terms. In J.L. Austin’s terms, the emphasis is on the perlocutionary act—generating action from the interlocutor,

\textsuperscript{24} According to Grice (1983), what allows such an order to be effective is that it communicates to the subordinate the superior’s intention (“storm that hill”) which then becomes a reason for action. Perlocution thus depends on expression. For the purposes of this work going into the debates surrounding intentionality-based models of performatory language is unnecessary; suffice it to recall Austin, for whom performances depended on the actualization of objective, conventional “felicity conditions”—a phenomenology that does not require the kind of inference from language to intention, as Grice argues for.

\textsuperscript{25} See Erving Goffman, "The Nature of Deference and Demeanor." 58 American Anthropologist 473 (1956); idem, The Presentation of Self in Everyday Life (1959). Surveying criticism of Goffman’s symbolic interactionism and nuances within his later work is beyond the scope of the present study. For a social-constructionist theory see Ralph H. Turner, The Role and the Person, 84 Am. Jour. of Sociology 1 (Jul., 1978) (looking into the function of the merger of role and person in the construction of personality. Merger occurs when there is a systematic failure of role compartmentalization, among other factors.)
by supplying her with reasons for action and other modes of persuasion.26 Approaching justice is different. Justice is not merely an abstract normative or political concept. In the context of the interactions studied in this study, it is a communicative framework for interacting with an “other”—a transformed antagonist who gained institutional status—and the state; yet it is also a place, a locus that operates according to unusual norms and expectations.27 As a social locus justice is perhaps unique in the expectation that it generates, to be a “complete situation” where tradeoffs between authenticity and effectiveness should not be required, let alone structurally determinative. In the house of justice, the host—on the relational understanding—is expected to act differently than other social hosts, especially in its comprehensiveness and drive for the genuine. Typically, in social contexts we are satisfied or at least reconciled to accept an efficacy-

26 By “perlocutionary act” Austin signified those speech acts whose chief function is to induce action (sometimes treated as language’s “rhetorical” aspect in a rather narrow sense). By “illocutionary act” Austin meant “performative” in the narrower sense of functioning through a performative force, distinct (functionally but not morphologically) from the speech act’s propositional content, otherwise denoted the “locutionary act” (these distinctions are better conceived of in functional rather than morphological terms, thus expressing the communicative multifunctionality of single utterances). In litigation, it is the judge who uses performative (illocutionary) language; the performance of the parties—represented or not—is mainly perlocutionary, attempting to generate such action. Authentic expression is an independent performance, locutionary in the outset which, in the context of relational lay litigation, claims to count as perlocutionary. See J.L. Austin, Performative Utterances in AUSTIN, PHILOSOPHICAL PAPERS 233 (1979) and idem, HOW TO DO THINGS WITH WORDS (1962). For some legal applications see Peter Tiersma, The Language of Offer and Acceptance: Speech Acts and the Question of Intent, 74 CAL. L. REV. 1 194 (1986); Jonathan Yovel, What is Contract Law “About”? Speech Act Theory and a Critique of “Skeletal Promises”, 94 NW L. REV. 937 (2000).

based or instrumental usage of language. In facing justice—or, to continue the metaphor, while being hosted by justice—litigants who insist on relational language express a conception of it that sets it apart from other social contexts. Lay litigation, supplying equally compelling, but mutually non-accommodating opportunities for effective social action on the one hand and authentic expression on the other, appears to promise to some agents a comprehensive relational opportunity, no detriment added. According to the finding of Conley and O’Barr as well as the present study, this promise invariably fails. Clinging to the promise may become prejudicial, and may destroy a case in ways that transcend merely notions of winning or losing in court. It involves notions of the elusiveness and inapproachability of justice, and finally of alienation.

Conversely, litigants employing rule-oriented language as their primary, spontaneous strategy approach justice as a compartmentalized, incomplete place to begin with. Their linguistic performance does not entail a comprehensive view according to which the entirety of the human interest can be reducible to the form of rule-talk. They simply accept that justice is one more partial, instrumental venue among many, to be approached through the application of its own language, just as another institution would require its own. They may be otherwise frustrated in their encounters with justice, but at least not on this level.

Some of the conflicts and tensions of lay litigation thus belong not to the category of politics but to tragedy and are associated with the very use of social language. As Aristotle, Hegel, and later existentialist thinkers such as Sartre point out, the category of tragedy is not political, and it entails neither blame nor moral fault (Kaufmann 1968:63-69; Whitman 1951: 254 n.23). This entails that tragedy cannot be avoided merely by a better management of things, nor by progressive politics. More precisely: as long as tragedy is a constitutive category of language use (at least in the institutional contexts dealt with here), it is not a problem to be solved as much as acknowledged and

28 its Aristotle in particular emphasized that although in dramatic tragedies the protagonist was always a person of unusual qualities, that was due to dramatic conventions rather than to any a moral function (audiences, apparently, tended to respond more to the lots of the noble than the base).
understood. Its implications can then be institutionally mitigated, but no institution can simply cancel tragedy out. Conley and O’Barr are not interested in language as tragedy, but as politics: the linguistic exertion of power in institutional context. Language as politics makes the case not just analyzable in terms of power, but to a degree malleable in terms of reform and progress. While politics is dynamic, tragedy appears static. A political approach is attractive in its susceptibility to progressive efforts. A tragedy approach is suspect of determinism and hopelessness. It is certainly proper, then, that Conley and O’Barr should commit to approaching institutions and institutional interactions (such as litigation, lay and otherwise) politically—i.e., through power relations entailed by linguistic interaction.\(^29\) In this paper, I do not deny the political aspect of language in the courts—on the contrary; yet I do claim that the political is not an exclusive nor conclusive category of language use in institutional or other contexts. The tragic, albeit in moderate and sometimes mundane manifestations (and sometimes not) is as persistent in such interactions as power is. The cases examined in this study suggest a limited sphere of situational tragedies, overlapping with a much more tangible sphere of power and politics. The politics of linguistic action interacts with the polyphony of the self, i.e. with the litigants concern of approaching justice—the comprehensive locus—in differing modes, simultaneously. Above I hinted that justice is not the only comprehensive locus. For Roland Barthes (1962), such is invariably the relation between language and love, which renders polyphony itself tragically situated.\(^30\) 

\(^29\) For a similar approach see Patricia Ewick and Susan S. Sibley, The Common Place of Law (1998).

\(^30\) Barthes claims that the tragedy of love and language goes deeper, in that love is in some senses destroyed by linguistic articulation, because language is external and necessarily imported by the lover from the general sphere in order to express her innermost experience. Lovers everywhere, but especially in Romantic literature, are faced with the tension between rhetorical effectiveness, i.e. wooing, courting—love's need to be fulfilled, materialized—and authentic expression and articulation that sometimes simply cannot be performed linguistically. (The original French title of Barthes’ book is *Fragments d’un discours amoureux* whose meaning is not captured by the English translation: Barthes wrote not of language that is employed to talk *about* love, but about
Conversely, in some social contexts this polyphony has the capacity of turning into what Bakhtin (1981) termed a “carnival” of a plurality of voices.

Of course, the extremities of linguistic authenticity and effectiveness are not stretched nor played out in every or, probably, in most litigated cases. Unlike in classic tragedy, polyphony opens rather than restricts venues for action, and in cases examined judges instinctively navigated flexibly within polyphonic spaces.31 The tragic quality of lay litigation emerges when comprehensiveness is assumed, sought, required: when litigants face their inability to realize and express both the compelling dimensions of their approach to justice. Those more susceptible to it are naturally those who tend less to approach justice as a prudential, practical locus and more as a comprehensive interaction with—or at least in the presence of—the state. From this position, justice is not just a branch of government but the abstract governing principle of the polity.

the language of love, about giving love a language (it is not the lover who employs discourse but discourse which must express love)).

31 E.g., by limiting effects of situational tragedies to matters of process. This study of small claims courts dealt also with the relations between perceived fairness of process and perceived justness of outcome, but those findings must be reported elsewhere.