Translating the Social World for Law: Linguistic Tools for a New Legal Realism

Edited by Elizabeth Mertz, William K. Ford, and Gregory Matoesian

This volume is dedicated to exploring the linguistic challenges arising from the process of interdisciplinary translation between law and the social science disciplines. Although the field of language and law has by now produced much wonderful work examining intersections of law and linguistics, much work remains in exploring the linguistic dimensions of the difficulties that continue to confound efforts at incorporating the insights of social science into the heart of legal scholarship.

The study of law has a special connection with the legal structure through which so much of our society is governed. For generations, many have noted and lamented a persistent failure of law to translate some aspects of the social world it governs. The social sciences have developed useful and powerful ways of understanding that world. They have also studied and analyzed law’s systematic failures. At a time when the legal academy is once again turning to social science, hoping to find some new approaches and answers, this volume provides guidance for those who seek a better interdisciplinary conversation this time around. The authors in this volume are part of the “New Legal Realist” project building new bridges between social science and law. They make the case that conversations between these disciplines can be enhanced through the tools provided by detailed linguistic analysis. The term “New Legal Realism” is itself a vehicle for interdisciplinary translation, signaling to a legal audience a form of scholarship that takes both law and social science seriously in a new generation.

1. Introduction: Translating Law and Social Science
By William Ford and Elizabeth Mertz
In their introductory essay, Ford and Mertz survey the articles in the volume and summarize some overarching themes that emerge from the group as a whole. To begin with, the authors of these articles do not view interdisciplinary communication as transparent or easy; the process itself is not to be taken for granted. They also pay close attention to details of language and linguistic contexts. Some articles demonstrate the linguistic structure of legal misunderstandings, others examine the language in which courts translate social science and law, while the final chapters in the volume explicitly examine barriers to translation between law and other disciplines.

2. Translating Defendants’ Apologies during Allocution at Sentencing
By M. Catherine Gruber
2A. Gruber “In Translation”
By Frances Tung
In an attempt to translate between sociolinguistics and the courtroom, this chapter analyzes an exchange in which a sentencing judge identified two possible meanings of a defendant’s brief apology. In her closing remarks, the judge noted that the defendant’s bare I’m sorry could mean that the defendant was sorry for his actions or that he was sorry to have gotten caught. This chapter explores the many and diverse ideologies surrounding the expression of emotion and the ways in which they can place either speaker or addressee in privileged positions when it comes to assessing someone’s emotional state. However, case law has long privileged the judge’s assessment of a defendant’s demeanor at sentencing as a legitimate factor in sentencing decisions. This paper takes up issues involved in the translation of the insights of sociolinguistics when these insights clash with ideologies surrounding role identity and the performance of emotion.
3. Translating Token Instances of “This” into Type Patterns of “That”: The Discursive and Multimodal Translation of Evidence into Precedent
By Gregory Matoesian

3A. Matoesian “In Translation”
By Christopher Roy and Elizabeth Mertz
When making a decision, courts in the United States and other common law countries draw upon previously established rules and principles—upon precedent—that deal with similar issues, facts, and cases. This study examines how a prosecuting attorney invokes precedent in a preliminary hearing for a rape trial, more specifically, how she introduces and transforms evidence from other rape victims to prove that the defendant possesses a modus operandi or pattern of criminal behavior. The chapter analyzes precedential translation as a microdiscursive form of identity transformation in which (token-level) evidence is placed under auspices of a (type-level) rule. Finally, the chapter places the prosecutor’s performance within broader social and linguistic contexts, showing how the linguistic ideologies emanating from dominant male conceptions of sexual access, and from how “inconsistency” is constructed in the courtroom, combined to undermine the presentation of evidence against the accused serial rapist in this case.

4. Part One Commentary: Performative Risks in Risking Performance
By Michael Silverstein
4A. Silverstein “In Translation”
By Elizabeth Mertz
Sequences in the procedurally framed events called trials, like all ritual moments, borrow their very material—communicative signs and their consequentiality—from everyday life while transforming it in the process of transposition. And, no matter how much we can recognize the massive bounding-off work that is designed to guarantee to the ritual of trial, as in any such ritual, performative autonomy and hence authority to determine and to ordain the actors inhabiting ritual roles are dogged by those everyday facts-of-semiotic-life, cultural commonplaces that inevitably turn out to play a major if perhaps unrecognized role in determining the course of “justice.” Both Matoesian’s and Gruber’s reports give examples of such semiotic “leakage” into trials; this leakage is simply impossible to counter, yet, as they argue, is decisive for understanding the actual course of things in trial procedure.

5. The Law and Science of Video Game Violence: Who Lost More in Translation?
By William K. Ford
This chapter evaluates state legislative efforts to translate the social science evidence about the effects of video game violence on children, such as evidence of a causal link between playing violent video games and subsequent aggressive or violent behavior on the part of children. Previous research demonstrates that the federal courts struggled with this evidence during litigation involving multiple states, but the state legislatures’ cursory investigations into the social science were thoroughly inadequate. Justice Stephen Breyer of the US Supreme Court asserts that state legislatures are in a better position than courts to analyze this kind of evidence. This chapter presents case studies from five different state legislative hearings, demonstrating that even legislative committees charged with careful perusal of the relevant social science literatures failed to achieve adequate translations.

6. Being Human: Negotiating Religion, Law, and Science in the Classroom and the Courtroom
By Winnifred Fallers Sullivan
This chapter reflects on the challenges of finding a language in which to translate between law, science, and religion, using the contemporary science classroom as the focus. How should a biology teacher
required by law to teach evolution respond to students who claim a religious right to reject such science? Should she refuse to talk about religion, just teach to standards? Should she make it personal, using either her own religious commitments to align herself with the student or to hold the two in tension? Should the teacher be trained to use the academic study of religion to relativize the discourses of religion and science? Using a close reading of the expert testimony in the Kitzmiller case, the essay argues that neither a separationist, culture wars, or modernist model is viable, appealing rather to a more honest, pluralist, and egalitarian approach to the science classroom.

7. Social Science and the Ways of the Trial Court: Possibilities of Translation
By Robert Burns
This chapter considers two language regions, those of the modern American trial court and of the social sciences, and explains how the languages of social science might be translated into the language of the trial court. It first surveys the controversies surrounding each region, suggesting that those controversies warn against any “craving for generality” in defining their relationships with each other. It describes the canonical account of the trial prominent in the rationalist tradition of evidence scholarship and contrasts that with a more concrete and philosophically informed understanding of the trial. Taking these contrasting views into account, it ends by suggesting how the social sciences could illuminate the tasks that the trial addresses. Through attention to meta-level linguistic ideologies and the epistemologies characterizing the language regions of law and social science, it offers promising avenues for translating certain understandings of social science into the interpretive and evaluative languages of law.

8. Part Two Commentary: Processes of Translation and Demarcation in Legal Worlds
By Susan Gal
This chapter presents a linguistic anthropologist’s view of translation, problematizing the term and finding that it is a fruitful metaphor suggesting a whole family of processes. Most generally, translation processes purport to change the outward form, social place, or meaning of a text while also, at the same time, seeming to keep something about it the same. Thus, judgments of similarity and difference are fundamentally at issue. These are not only matters of informational content but depend on broad presuppositions about linguistic practice that anthropologists call “language ideologies.” The chapter defines this and several other terms in order to explore the semiotic processes by which social science and law influence each other, as different yet related disciplinary languages. The chapter suggests that two significantly different types of “translation” are important to distinguish and exemplifies these through the case materials in the chapters and with other, related evidence.

9. “Can you get there from here?” Translating Law and Social Science
By Elizabeth Mertz
This article analyzes two sets of interactions between legal and linguistic scholars, using these encounters to demonstrate systematic ways in which law resists translations from other disciplines. The first encounter occurred at a conference in which legal scholars and linguists came together to attempt to find common ground. A transcript of this conference was subsequently published. The second encounter occurred during two meetings of the working group whose discussions led to formulating this volume. In that second encounter, which was also taped and transcribed, scholars from a variety of fields attempted to identify sources of difficulties (as well as successes) in the prior conversations during the earlier conference. Mertz compares both transcripts to highlight how different kinds of linguistic approaches shed light on legal translations of social science.

10. Law’s Resistance to Translation: What Law and Literature Can Teach Us: An Interview with Peter Brooks
This chapter presents an edited interview with Peter Brooks, who reflects on what the Law-and-Literature movement can teach social scientists about the limitations of legal language. In particular, he discusses how the structure of legal rhetoric can encourage lawyers to resist challenges to law’s hidden assumptions – thereby leading them to miss important questions and issues. Brooks considers the responses of law students and undergraduates to an alternative pedagogy that undermines some of the assumptions built into standard legal readings. In spite of the significant barriers identified by Brooks, he expresses optimism for continued interdisciplinary conversations between and law and other disciplines.

11. Afterword: Some Further Thoughts on Translating Law and Social Science
By Gregory Matoesian
In conclusion to this volume, I demonstrate how several linguistic concepts provide crucial resources for understanding translation between social science and law. Intertextuality, identity, multimodality, and power constitute conceptual tools for understanding how translation works as a two-way performance and how legal context is co-constructed in the concrete details of social interactive forms of social action. These semiotic tools offer concrete examples of how attention to metacommunicative norms, to linguistic details and contexts, to underlying worldviews that are encoded in the language we use, and to the interdisciplinary translation process itself provide a more robust and comprehensive approach for future efforts.