

Ideological Diversity and Textual Authority: Massachusetts Judges and the Language of Jury Instructions

John Curran

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.



—W.H. Auden

Acknowledgements & Thanks

- **The Lewis N. Cotlow Field Research Fund**
- **Faculty & staff of the Anthropology Department**
 - **Professors Alex Dent & Joel Kuipers (advisors)**
 - **Professors Laura Wright & Maggie Ronkin**
- **Prof. Derek Malone-France (UW Program)**
- **Susan U. Philips (University of Arizona);**
- **Elizabeth Mertz (Univ. Wisconsin);**
- **Andrew Arno (Univ. Hawai'i);**
- **Wellesley College Dept. of Anthropology**

- **Members of the judiciary who assisted me in this project.**
- **Sameeah Muhammad, Hasen Khudairi, Lauren Deal, and Chris Bloechl.**
- **My family, especially my mother and father.**

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BACKGROUND:

**LINGUISTIC ANTHROPOLOGY
GOES TO COURT**

Conley and O'Barr

Rule v. Relational “orientations”:

Described variously as “ideas about”: (1) the law; (2) conflict and social rights and responsibilities; (3) the world, generally; and (4) ideas about language.

But is “law” and legal practice ideologically diverse?

“For people like us who have done comparable research framed in terms of discourse, the concept of language ideology may provide greater analytical precision... We would have done better to characterize these orientations as *language ideologies*, for that is exactly what they are: shared ideas about language. Specifically, they are ideas about the linguistic practices that appropriate in legal contexts. Because different social groups have differential access to these divergent ideologies, and because only one is compatible with the dominant ideology of the law, the power implications are clear.”
(2005:159)

Spoken Law: Philips

“Trial court judges represent their implementation of the law as involving little or no gap among written forms of law and between written law and spoken law, which gives their words authority. But, as should be evident from this idea of the degree of gap, I argue here that there are significant gaps between the genres of law I examine...

“[T]his diversity is obscured and hidden from members of the lay public because they see only the spoken law and do not have access to the interpretive practices of the judges as they index the written law in their spoken procedures. In this way the impression that the law is monolithic and singular is sustained.”

(1998:28)

Guilty plea procedures

- **Judges’ linguistic behavior was informed by a “complex interpenetration” of legal, political, and “control” ideologies.**
 - Differences among their ideological stances reflected wider social processes of ideological conflict and struggle
- “Intertextual gap”
 - Obscured by judges’ interpretive practices

Spoken Law: Philips

- Judges' linguistic behavior was informed by a "complex interpenetration" of legal, political, and "control" ideologies.
 - Differences among their ideological stances reflected wider social processes of ideological conflict and struggle
- "Intertextual gap"
- "Obscures ideological diversity"

"The courtroom control ideology seems most like those analyzed in the emerging anthropological literature on **language ideologies** (e.g. Kroskrity, Schieffelin, & Woolard 1992)...

It entails both practice and talk about practice (metapragmatics) and has both implicit and explicit dimensions.

Still, language is subordinated to the ideas of both control and informality, which is why I have called this a **CONTROL IDEOLOGY** rather than a **language ideology.**"

(1998a:196n3, citation and caps in original)

||| Jury Instructions & Linguistic Ideologies

What are they?

Comprehensibility

Require the judge to enact their own interpretation of the law.

“Intertextual gap”

Entextualization → mediated by ideology

What’s at stake?

Reversible error.

Does variation exist?

Plain English vs. Textual Fidelity

Links linguistic form & social function



|| Trial Courts: Finding the Facts

Jury deliberation as a rational fact-finding process

Charge conference — ideologically saturated metalinguistic speech

Default position: In favor of defendant.



Jury box, Suffolk Superior Court

Stages in a Jury Trial

Stage 0: Voir Dire (Jury Impanelment)

Stage 1: Opening statements Plaintiff (π)

Stage 2: Opening statements Defendant (Δ)

Stage 3: Plaintiff presents evidence and witnesses

Stage 4: Defense cross-examines

Stage 5: Defense presents evidence and witnesses

Stage 6: Plaintiff cross-examines

Stage 7: Plaintiff rebuttal

Stage 8: Defense surrebuttal

Stage 9: Defense closing statements

Stage 10: Prosecutions closing statements

Stage 11: Jury charge conference

Stage 12: Judge instructs jury

Stage 13: Jury deliberation (+questions)

Stage 14: Presentation of verdict





Judge 1, Jury Instructions in *Dail v. Shop & Go Supermarket Company* (Slip & fall)

My responsibility as the judge is to give you all the law you need to know in order to dissolve the issues placed before you in this trial. You must take the law as I give it to you and apply the law and the law alone to the facts as you collectively find the facts to be.

You as the jurors are the sole fact finders in this case and you determine the credibility of witnesses. Your memory of the evidence must control; not the memory of the lawyers, not my memory, but your collective memories determine the evidence in this case. [...]

You must consider all the evidence you've heard during the trial calmly, dispassionately, without sympathy. You're in search of a verdict; the word verdict extending from two Latin words *Dictum Veritas*, meaning to speak the truth. We have a shared responsibility in this case, as in all cases.

You are the sole judges of the facts; I am the sole judge of the law. You decide the facts and of course you must make your determinations in this case, your verdict, based on the law as I give it you concerning the facts as you find the facts to be.

Research Questions:



- What ideological frameworks inform the behavior of judges?
- How are these ideologies enacted in the way they present jury instructions?
- How are they related to wider social processes?

Sketch of Judge 2 by Anonymous spectator

Research Questions:

- What stylistic discourse features in the judges' spoken procedure detach its "source" texts (statutes, case law, pattern manuals, attorney proposals, etc.) from their pragmatic context of performance?
- What systematic patterns of variation exist across different contexts?

- Do the variations among judges show evidence of the ideological stances suggested in the existing literature:
 1. comprehension vs. accuracy;
 2. rule vs. relational orientations;
 3. narrative vs. paradigmatic organization;
 4. "record" vs. "procedure" ideologies.

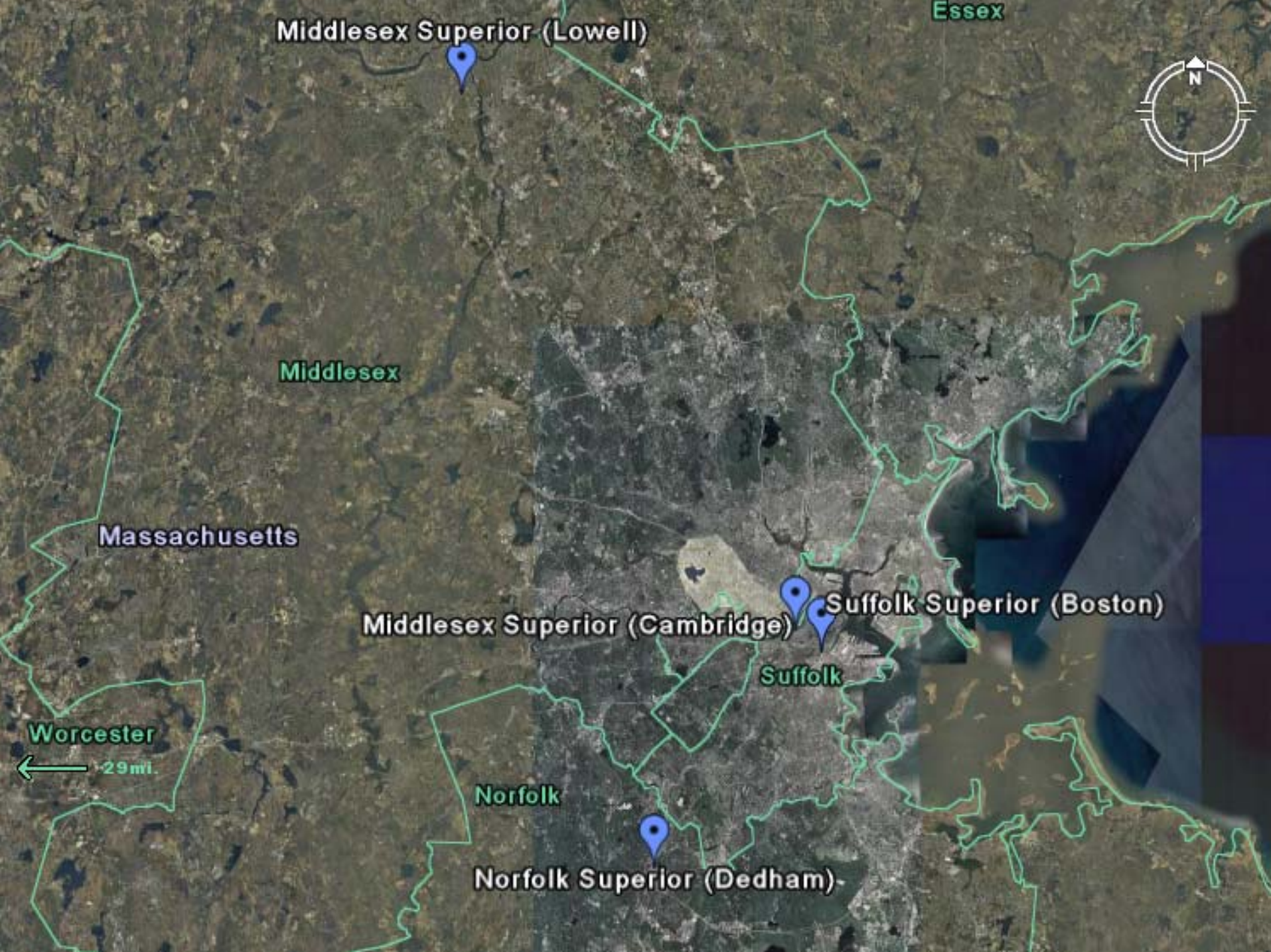
Prediction:

"Research on the processes by which jury instructions are entexted will likely reveal a rich, patterned diversity of ideological dispositions — linguistic, cultural, political, and legal — among judges. "



PART 2:

FIELDWORK, ANALYSIS, & FINDINGS



Middlesex Superior (Lowell)

Essex



Middlesex

Massachusetts

Middlesex Superior (Cambridge)

Suffolk Superior (Boston)

Suffolk

Worcester

← 29mi.

Norfolk

Norfolk Superior (Dedham)

Data

- **~15 hours of audio recordings from trial proceedings of 12 cases**
 - 70-80% Jury Instructions
 - 30-20% Jury charge conferences, closing arguments, witness testimony/examination
- 3.5 hours of semi-structured interviews with judges
- Copies of Clerk's case files: Attorneys' proposed instructions, original complaint, and selected motions.



Suffolk County Superior Court, Boston
foreground: SJC & Appeals Court
(courtesy: flickr)

Judge 1	Judge 2	Judge 3	Judge 4	Judge 5
	+ Public nuisance	+ Prisoner case	Sexual harass. / national origin	Negl. infliction emotional distress
+ Appeal of Judge 2 decision in District Court			Goods & services	
ADA/reasonable accommodation			Firearm poss. (criminal)	
Insurance contract				
Personal Injury / Architectural malpractice				

Key:



Motor vehicle negligence



Employment discrim.



Slip & fall



Contract dispute

Analysis: Discourse level

- Transcription and coding with AtlasTi
 - Concordance software “Intertextual gap”
 - elaboration or abbreviation of segments
-
- Quotations of texts
 - Which instructions were given?
Rejected?
 - What does their inclusion or exclusion mean?
 - Rate of speech as contextualization cue?



Features of interest

- Pronouns
 - “you” v. “I”
 - Royal “we”
- Metalinguistic speech
 - “I don’t comment on the evidence!”
- Narration & hypotheticals
- Rhetorical questions
- Modals
 - “shall”, “may”, “must”
- Intensifiers
 - Obviously, clearly
- “Now”, “well”
- “As you know”
- “I think” & “I believe”
- Present habitual, subjunctive

Discourse markers

Contextualization cues

Key terms

Judge 3: *Blake v. Commonwealth of Mass.*

To prove a case of negligence, **the plaintiff must prove** by the preponderance of the evidence the following elements:

First, **that the defendant owed the plaintiff a duty, or obligation, to exercise reasonable care to protect him from injury**; second, that the defendant breached that duty, or in other words, was negligent; third, that the breach of duty caused the injuries claimed by the plaintiff...(+4.5) as a result– That– That the breach of duty caused the injuries claimed by the plaintiff,.. it should say. Put simply, the issues you..


Pattern Instruction § 2.1.8 "Causation."
(source text)



**Daniel Webster Courtroom
Middlesex Superior (Lowell)**



Findings


- Judges did not profess to see their ideas about language as influencing either their judicial behavior or political views.
 - Interestingly, some judges said their political views may influence their judicial behavior where discretion is expressly allowed (e.g. sentencing)
 - Pragmatic concerns of judges not ideologically neutral, and accomplished through language
 - “Inoculate the case against appeal.”
 - Appellate court “too liberal.”
 - Language ideologies influence non-linguistic judicial behavior
 - “Women talk; men decide.”
- 

Identifying the Ideologies

- Every judge professes to be in favor of “Plain English” jury instructions
- But what does Plain English mean to them, and how does it affect their judicial behavior?
 - Different levels of priority
 - Different political attachments
 - anxieties about my research:
 - Resistance to hegemonic discourse (re)asserting itself in *their* courtroom
 - “You can’t script a trial!”
 - Innovative jury trial practices



Contours of Ideologies in Political Economy?


- **Defense v. Plaintiff's Bar**
 - *Texts may be tainted by virtue of their origin*
 - "You don't know where that language has been."
 - **Appellate v. Trial Courts**
 - Judge o
 - "The self-abnegating exegeter"
- 

Further Questions

What systematic patterns of differences can we identify in these judges' uses of, and ideas about, language?


How do these affect judicial behavior?





Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.

Yet law-abiding scholars write:
Law is neither wrong nor right,
Law is only crimes
Punished by places and by times,
Law is the clothes men wear
Anytime, anywhere,
Law is Good morning and Good night.



Others say, Law is our Fate;
Others say, Law is our State;
Others say, others say
Law is no more,
Law has gone away.

— W.H. Auden

Appendix 1:

Related studies in Anthropology of American courts with a fieldwork component

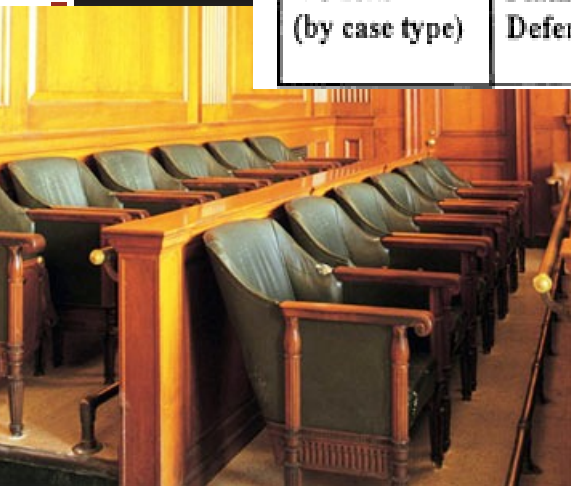
	Merry 1990	Conley & O'Barr 1990	Philips 1998	Present study
Site(s)	Cambridge & Salem, MA	6 cities (North Carolina, Colorado, Mid-Atlantic region)	Pima County, AZ	Boston, Cambridge, Dedham, & Lowell, MA
# of judges # cases	Not specified.	14 536 cases observed 156 transcribed cases	9 (final); 4 (pilot) 44 pleas	5 judges 12 cases
Hours of courtroom recordings	None permitted.	Not specified. 19 transcribed litigant interviews	7hrs. (final) Career history interviews	15 hrs. 3.5 hours of semi-structured interviews with judges
Trial data?	Some?	Yes	No; guilty pleas	Yes.

“The Disappearing Jury Trial” (& the statistically improbable plaintiff’s verdict)

Judge [REDACTED]'s Personal Injury Cases: January 1, 1993 – Oct. 31, 2004

[JUDGE 4]

	Miscellaneous Tort	Slip & Fall	Motor Vehicle	Product Liability	Medical Malpractice	TOTAL (by county)
Middlesex	Plaintiff: 0 Defendant: 4	Plaintiff: 1 Defendant: 3	Plaintiff: 2 Defendant: 3	Plaintiff: 0 Defendant: 1	Plaintiff: 1 Defendant: 3	Plaintiff: 4 Defendant: 14
Norfolk	Plaintiff: 1 Defendant: 13	Plaintiff: 1 Defendant: 8	Plaintiff: 3 Defendant: 19	Plaintiff: 1 Defendant: 2	Plaintiff: 0 Defendant: 8	Plaintiff: 6 Defendant: 50
Plymouth	Plaintiff: 1 Defendant: 11	Plaintiff: 1 Defendant: 14	Plaintiff: 1 Defendant: 13	Plaintiff: 0 Defendant: 2	Plaintiff: 0 Defendant: 9 Hung Jury: 1	Plaintiff: 3 Defendant: 49 Hung Jury: 1
Bristol	Plaintiff: 1 Defendant: 2	Plaintiff: 0 Defendant: 1	Plaintiff: 0 Defendant: 4	Plaintiff: 1 Defendant: 2	Plaintiff: 0 Defendant: 0	Plaintiff: 2 Defendant: 9
Essex	Plaintiff: 0 Defendant: 0	Plaintiff: 0 Defendant: 0	Plaintiff: 0 Defendant: 0	Plaintiff: 0 Defendant: 0	Plaintiff: 0 Defendant: 1	Plaintiff: 0 Defendant: 1
TOTAL (by case type)	Plaintiff: 3 Defendant: 30	Plaintiff: 3 Defendant: 26	Plaintiff: 6 Defendant: 39	Plaintiff: 2 Defendant: 7	Plaintiff: 1 Defendant: 21 Hung Jury: 1	GRAND TOTAL Plaintiff: 15 Defendant: 123



Appendix 2

Jury box, Suffolk Superior Court