Role conflation in the writing of undergraduate Law students

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Abstract: *In the course of their study, undergraduate Law students are often asked to assume professional roles when writing their assignments. For example, students may be asked to assume the role of a Judge and write a decision on an appeal, or they may be presented with the facts of a problem situation and then asked to assume the role of a professional lawyer and provide legal advice to one or more persons involved in that situation. Students are aware, however, that while the assignment attempts to simulate a professional task, the assignment is set within the university and they are writing for their lecturer. Demonstrating the heteroglossia Bakhtin recognised in all language use, there is a jostling of the student and professional voices, with the positioning of the writer as student bearing on the text in two ways; not only does it find representation in the text in is own right, but it is also the condition necessitating the production of the professional voice. Drawing on the schema established by Tim Moore and Brett Hough (see paper 1 above) this paper will briefly outline instances of such role conflation in set assignments. It will then comment briefly on the judgments made by students as they decide in what ways and the extent to which the written assignment should reflect these different roles. In particular, it will attempt to give a brief account of the constraints that seem most compelling for the students as they make their judgments.*

Keywords: *assessment tasks, roles, Law*

Introduction

This paper is the third of three papers (the other two being Tim Moore and Brett Hough "The perils of skills: towards a model of integrating attributes into the discipline" and Jan Pinder "Who am I writing for? Potential and problems of writer roles in assessment tasks") and refers to the analytical schema for assessment tasks developed by Moore and Hough [see LAS 2005 conference papers]. This paper considers aspects of the role [and identity] of the student writer, genre, discipline and audience.

Undergraduate Law students are presented with a number of tasks in their first year of law study. In addition to the more conventional 'essay' type assignment, where they might be asked to engage with policy issues related to the Law in whatever area, they can also be asked to produce case notes [of a court case designated by the lecturer], write a letter of advice to a client [based on a hypothetical situation details of which they are provided with], to produce a plea in mitigation of penalty [a written form of what is normally presented orally by a lawyer in court on behalf of his/her client] and so on. These usually involve a student assuming multiple roles and addressees. For example, a letter of advice requires a student address both lecturer and imaginary client, and write as student and lawyer. As lawyer they attempt to assume the authority, outlook and ways of thinking appropriate to a lawyer, which can be at odds with the sense they have as students of lacking any authority. It is precisely then the constitution of and the dynamic between the 'lawyer subjectivity' and 'student subjectivity' (Kamler and MacLean 1997 p179) that is the concern of this paper.

This paper therefore looks at the complexities that arise for students as they engage with and mange these roles and associated identities, as evidenced in both the production and form of their text. Ivanic (1997) suggests students can choose which of four identities available to them they will privilege in their writing. I shall suggest that the enactment of identities is more subtle than choice suggests, that the

heteroglossic nature of student texts (Bakhtin's concepts, see Vice 1997) point to identities that are less well-bounded and stable than Ivanic's formulation suggests.

Subject writing positions of students

The blending of roles and discourses that student tasks require creates a 'hybrid' discursive space (see Allen 2000 p25). As both lawyer and student, as they address their respective audiences, the writer must demonstrate mastery over law-specific skills and in this respect both are disciplined by the discourses of Law. However, the interpersonal relationships are very different, in some respects contradictory, and this can create difficulty in deciding the stages and form such a text should follow.

Swales (1990) argues that "the principle criteria feature that turns a collection of communication events into a genre is some shared set of communicative purposes" (p46) but in this case there are two distinct communities involved [academic, and law-professional] with quite different purposes, and the relative weighting given to either one [or others] can vary, having implications at least for the form such a text will take. Anecdotal evidence suggests that lecturers are not always clear about which role to privilege and whether the text should be organised around addressing the client, or around demonstrating the student's understanding of legal skills to the lecturer. Yet this has considerable implications for the writing of the text. A text primarily addressing the lecturer would explicitly track research carried out, show the skill entailed in that, cite sources in support of the substance or direction of one's close detailed analyses of cases, provide detailed demonstration of one's reasoning, and so on, but these would not be shown to a client. Thus register and text structure would vary according to who is being addressed.

Contradictions also exist in the relationship the writer assumes with respect to authority. Both lawyer and student share a deferral to the legal authority certain text types have. However a lawyer is expected to deal with such material with authority, whereas the student is not, or not in the same way. Also, the relationship of student-lecturer is one in which a student necessarily defers to the expertise and authority of the lecturer, while in the lawyer-client relationship the lawyer assumes authority. This assumption of authority or deferral to authority clearly marks texts differently, for

instance in mood at the level of the interpersonal function. Managing identity and mood differences at different points in the text would seem more manageable, but where both identities converge in the same utterance or word (the heteroglossia Bakhtin speaks of – see Vice 1997) in a contradictory way, then of course the student writer is faced with a dilemma, as we shall see.

In concluding this section, I shall present a brief outline of positions often entailed by the identities students bring to the writing task. This is an intuitive list but I think it fairly represents some of the positions these identities involve, even though they vary in intensity and extent from context to context and person to person. These include the following:

As students:

- Deferral to the authority of the institution and in particular its representative for them, the lecturer setting and marking their assignment
- Deferral to the legal authority certain texts possess, and to the secondary source materials they engage with and from which they learn, to which students sometimes attribute an oracular like authority.

As lawyer:

- Assumption of an expert and authoritative position towards the client for whom one is writing
- Engagement with a 'dependent' client
- Assumption of an authoritative position in the conclusion or position one reaches after analysis of texts, or in case notes one makes
- Acknowledgement of and respect for the legal authority/force that certain documents possess, such as statutes, court reports, legally binding Resolutions, and so on
- Respect for the authority of commentary and other secondary

source materials, but not deferral to any imputed superiority and certainly not deferral to them as though they were in possession of oracular authority

The personal identities forged in personal histories:

- Reasons for studying law [inherent interest; mercenary interests; family pressure, etc]
- Cultural issues such as ‘face’, ‘reputation’, and so on
- Personal background pressures [expectation by family, community, personal standards etc].

I shall now present a fairly brief commentary on the first page of a letter of advice written by a first year international undergraduate law student, before proceeding to a more general discussion of issues raised.

Student text

A student whom I shall refer to as “Benson” was asked to write a letter advising a client about the charges to be laid against him and how he should plead to each. This typical Law School exercise requires students to demonstrate to their lecturer competency in quite specific legal skills and simulates a task common for many practicing lawyers. The first page of Benson’s text is reproduced in Appendix A.

A preliminary point that needs to be made is that the client in such tasks is a rather attenuated entity. He embodies legally relevant facts, but no more. In professional life, the interview with the client during which the client’s account of the facts is established, police interviews at which the lawyer is present, and other biographical information that becomes known will inevitably broaden and deepen a sense of who the client is and who the lawyer is addressing. Because the context of writing provides only an attenuated sense of who one is addressing, one can suppose that the sense of the relationship with the client will be similarly diminished, which will impact on the interpersonal and rhetorical functions enacted in the letter of advice and which are central to generic structure (see Threadgold 1997 p96). Indications of

such impacts can be found, I think, in Benson's text.

Immediately noticeable on this first page is the absence of any introductory paragraph. Benson's reason for omitting such a paragraph was that the client would know why he was writing. This kind of comment is frequently given by students when explaining why they do not provide full details in assignments: "the lecturer knows this and I feel it is insulting to tell them something they so clearly know". Yet conventions in business letter writing [and this student admitted knowledge of such conventions] involve an opening paragraph stating the purpose or subject matter of the letter. In the example in Appendix A, something like the following would typically open such a letter: "Dear Jason, Subsequent to my discussion with you on [such and such a date] I am writing to inform you of the nature of the charges being brought against you and to provide advice on how you might plead". It would seem that in this case neither the weight of convention in letter writing nor the common gambit of establishing a new or a previously existing link with one's interlocutor before moving onto substantive issues is felt by Benson in this context, and this could be because the sense of who he is writing for is weak. Benson's reason for beginning his letter in this way does not suggest a cultural explanation, but rather points to a practice (not necessarily a good one) associated with writing for a lecturer. If this is what is at stake, the student appears at this point to be engaging with this task primarily as a student, rather than an advising lawyer. The move made at this point of the text appears to be dominated not by the interpersonal relationship with the client but by the institutional demand placed on the student and this positioning has led to change in at least one move typical of such a text.

A further interesting aspect of this student's letter of advice concerns the three criminal charges outlined. It is generally accepted that when providing advice to a client, one does not *instruct* the client what to do, but one outlines "issues of evidence that must be proved by the police, including an analysis of the elements of the relevant offences and the evidence required to prove each element" (quoted from the instructions given to students for this task) and provides advice on the basis of that analysis. That is, the client him/herself is provided with sufficient information to understand what is at stake, and consequently to make, with advice from the lawyer, an informed decision about whether, for example, a plea of 'not guilty' to a charge is

likely to succeed. Clearly the information Benson provides in the first two instances is not sufficient for this purpose. For example, in the ‘resisting arrest’ charge, no explanation is given of why the jury/judge would believe the client Jason rather than the police, of what circumstantial evidence might incline the jury to believe Jason against the police officers, or why, for example, under rules of proof the police would be unable to adequately justify their claim, and why therefore Jason should be able to confidently plead ‘not guilty’ to that charge. These are reasons both the client needs to know to make an informed decision, and also reasons the lecturer wants the student to demonstrate an understanding of. In this instance then, there is a coincidence between the demands placed on the student as student, and as lawyer, yet this student fails on both counts. Why might this be?

The reason Benson gave was that he wanted to “keep things simple”. This instruction is commonly given to students, partly in line with the ‘plain English’ movement that urges legal documents be written in English more accessible to the lay reader, but more importantly to guard students against transferring legalese into communication with their clients who have no legal training. Benson has followed that instruction but provided an everyday ‘lifeworld’ (Fairclough 1992) interpretation of ‘keep it simple’, rather than a law ‘disciplined’ interpretation that would have included, in ‘simple English’, an explanation of the kinds of things that the instruction sheet informed students were necessary.

One way of explaining this is that Benson occupies the ‘lawyer subject positioning’ in that he attempts to do what he knows a lawyer does [keep it simple] but does not enact the ‘lawyer subjectivity’ (Kamler and MacLean 1997) that such a position normally entails. We have as it were a projection of lawyer subjectivity from the position of student but with the everyday lifeworld being drawn on to give substance to that projected subjectivity, and in this we see a jostling between student, lawyer and everyday identities and associated voices (Bakhtin, see Vice 1997) as the student engages with his situation to produce a particular textual feature that can be described therefore as heteroglossic.

Lea and Street (1998) have argued that literacy issues evident in tertiary student writing arises not because students have a deficiency in literacy per se, but because

the forms of literacy particular to disciplines and their discourses are unfamiliar to them.

Proficiency in a specific academic literacy requires students have an understanding of the disciplinary contexts and practices that give meaning to such terms as ‘keep it simple’. However, I suggest that in Benson’s case there is more at stake than such understanding. The student had in this case been provided with an explanation of what was required and in other tasks had demonstrated considerable legal skills. It doesn’t seem to be his lack of understanding of relevant disciplinary practices that dominates here. The ‘keep it simple’ is an imperative imposed by an authority (lecturer, institution) to be submitted to (as student) and this positioning as [a non-authoritative] student dominates over the nascent lawyer subjectivity to which, when fully developed, the incorporation of the legally disciplined interpretation would be second nature.

This suggests a lawyer subjectivity that can be distinguished from a student subjectivity, and this precise distinction is made by Kamler and MacLean (1997 p179) in their study of the development of legal ‘habitus’ by first year students. Following Bourdieu (1990) they argue that discursive practices “are accomplished not only through language, but also through bodies, through ways of moving, dressing and talking, and through ingrained bodily dispositions or habitus” (p178). The lawyer subjectivity is therefore a function not only of cognitive understanding, but primarily of a way of being and of practices, from which forms of cognition follow. However, I am suggesting here that the discourse produced, and the subject producing it, is hybrid and heteroglossic (see Allen 2000, p25, on Bakhtin’s understanding of these concepts). While I would concur with Kamler and MacLean that the development of such skills and understanding involve the development of relevant practices, and of the subjectivity [eg lawyer subjectivity] that enacts such practices, the jostling between the different identities and voices in play, and the relative *force* they have on the enacting subject also needs to be accounted for as s/he produces discourse. Appeal to ‘lawyer subjectivity’ alone does not explain the relative force exerted by the various discourses that bear on the moment of discourse enactment and the hybrid nature of the discourse resulting from that.

There is one further observation to make concerning this text. Benson states categorically with respect to the charge of “threats to kill without appropriate excuse” that “Based on the evidence supplied, you were not intending to threaten Mr. van Dreyer of killing, and he also agreed that he was not being threatened to be killed.” He then adds that “Therefore it is *unlikely* that you will be [found] guilty of this offence.” This ‘unlikely’ reads rather strangely after stating quite forcefully that according to the evidence no such threat was made. Several possible explanations for the choice of this word are possible. First, Benson may have felt uneasy as a student assuming the authority to make a categorical prediction about a court decision, even though inferential logic would support such a prediction being made. Secondly, it may be that he felt [although not in a way he could have articulated clearly] caught between the force of logic that would have led him to be categorical and a feature typical of legal discourse, that it speaks in terms of likelihood and probability or possibility.

Phrases qualifying the degree of likelihood are common because on matters such as interpretation of legal documents or principle, or on matters concerning admissibility of evidence, or the force of specific circumstantial evidence and so on, defence and prosecution will often take up and argue contrasting points of view, and the judge is required to rule on how to proceed in light of such arguments. As such, a lawyer is unable often, on such matters, to anticipate with certainty how they will be decided, although s/he is, of course, expected to indicate in which direction s/he thinks things will go, in light of his/her expert reading. However, where the facts are established and agreed on, what logically follows from such facts can be stated with confidence. The reasons for Benson’s uncertainty are not evident. I suspect Benson is imitating the kind of qualification typically found in legal discussion, but has failed to understand the reasons for it and therefore where it is called for, and where not. Through imitation he attempts to project himself into the position of being a lawyer and assume ‘lawyer subjectivity’. But imitation fails because the perception of what is to be imitated is not disciplined by the discourses of law. This suggests imitation cannot be a means of discourse acquisition because one must already be disciplined by the discourse to apprehend what is to be imitated! This of course would make the need for imitation redundant! We do, nevertheless, see here I believe an instance of a student who feels compelled *as* a student to attempt to engage with the disciplinary

discourses, but unable as yet as a disciplined subject to respond to the positions the discipline typically constructs for subjects engaging with it. This engagement therefore is sustained and consequently shaped in important ways by the institutional discourses, and not by legal discourses alone.

Discussion

A question that so far I have not addressed is whether the example I have presented of a first year international student from a non-English speaking background, as he struggles with the discourses of Law with which he is presented and must engage, provides any general insight into the production of legal discourse by students as they become more law-literate. I referred earlier to a dilemma the student faced when deferral to [institutional-lecturer] authority and assertion of [lawyer-professional] authority coalesce in the one utterance. I have suggested that to the extent multiple discourses are present in the production of any text these sort of dilemmas are likely to be present, and there is little reason to suppose discourse is ever free of such interdiscursive processes. Ivanic (1997 p49) suggests academic writing is inherently intertextual. However, not only the text but the subject also is positioned by interdiscursive dynamics (see Fairclough 1992, p104 for a distinction between intertextuality and interdiscursivity), and this reduces for students the availability of the kind of choice Ivanic advocates, and also shapes the variations on a generic theme that emerges. By emphasising the significance of the relative *force* discourses have, and not simply their presence on any given occasion, I have also emphasised the hybrid nature of the enacting subject and the discourse produced. Thus genre too under these circumstances is better viewed not as product, but as process (Threadgold 1997, p97).

I suggested above that Benson's use of 'unlikely' may have arisen from an attempt to imitate something he had noticed in legal discourse. Bourdieu argues that habitus and the practical and embodied dispositions that regulate the production of discourse are not formed through imitation, but through a practical mimesis (see Butler 1999, p116). Butler points out that imitation requires an already formed subject that is capable of perceiving the object or action to be imitated. That is, we could add, the subject perceiving must already be 'disciplined' so that is 'sees' in an appropriate

[discipline specific] way. Benson shows how undisciplined imitation can be. In contrast, mimetic identification *forms* the subject. However, if this is so, then the subject being formed, I have suggested, is never a purely legal one [a 'lawyer subjectivity'], for other discourses such as the institutional one which compels the student as student to engage with the discourses presented to him is indispensably present, and thus what is acquired is hybrid. The habitus formed at law school is not the habitus pertinent to professional activity, even though relevant skills are developed. Once again, I am suggesting that it is the relative force discursive elements have at any given moment that is significant, and it is this force that constrains the judgments made by a subject, rather than the autonomous choice Ivanic (1997) suggests informed awareness makes possible.

Conclusion

I have suggested that the texts students produce are hybrid and heteroglossic and I have attempted to show some of the ways in which this is so. I have suggested that on occasions the convergence between different voices is unproblematic; on other occasions incompatibility or contradiction may exist, and on such occasions judgments must be made. However, I have also suggested that such judgments may be unwitting, and one way of accounting for this is to appeal to habitus, where judgments are consequent upon embodied dispositions. As such, Kamler and MacLean argue, acquiring a discourse is a matter of acquiring relevant dispositions. However, I have also suggested this too is not sufficient to account for what goes on, since such habitus presupposes a relatively stable discourse and context to which it belongs, but I have argued these are rather more dynamic than such a view supposes. An alternative way of understanding the dynamic that operates and positions subjects is in terms of the relative force of discourses, not solely their substance.

Appendix A

Mr. Jason Bloch
43 Ventnor street,
Fitzroy, Vic. 3119

5th May 2005

Police prosecution

Dear Mr. Bloch.

1. Evidence relating to the charges against you

Regrading your three criminal charges, the police must prove the following to the court:

- *threats to kill without appropriate excuse*

The police will need to prove that you intended to or carelessly caused Mr. van Dreyer fear that you were going to kill him

Based on the evidence supplied, you were not intending to threaten Mr. van Dreyer of killing, and he also agreed that he was not being threatened to be killed. Therefore it is unlikely that you will be guilty of this offence.

- *Threats to inflict serious injury without appropriate excuse*

Although you might not be intending to threaten Mr. van Dreyer of serious injury, it would still be enough if the police can prove that you carelessly caused him to fear of serious injury

Evidence indicates that you admitted of intimidating Mr. van Dreyer and in result he believed that you were going to seriously injure him. The evidence seems unfavourable to you, and unless you have any appropriate excuse for your conduct, such as urgent necessity or self-defence, otherwise you will probably be guilty of carelessly threatened Mr. van Dreyer.

- *Resisting arrest*

The police will need to prove that you resisted arrest when they were executing their duties. However, as they were off-duty when arresting you, they were not executing their duties, hence it is unlikely that you will be guilty of this offence.

Even if the police officers were exercising their duties in the arrest, as you honestly believed that they were not police officers until you say their ID, your genuine mistake is a legitimate defence to this charge.

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