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Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice

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TRANSCENDING LEGACIES OF LITERACY AND TRANSFORMING THE TRADITIONAL REPERTOIRE: CRITICAL DISCOURSE STRATEGIES FOR PRACTICE

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I. INTRODUCTION

Legal novices face perplexing uncertainty as they enter the cacophonous discourse community of law school, the entrance lobby to the larger discourse community of practice. They do not understand how to read legal texts, nor do they know the conventions of analysis, argument, and agreement lawyers use in predicting, persuading, and drafting. They do not understand lawyers' pluralistic purposes, the needs of their legal audiences, or the complex web of overlapping and changing contexts which structure new opportunities and constraints for each writing project. Given this lack of understanding, novices naturally flounder during the unfamiliar task of actually producing legal text, where uncertainties of comprehension, knowledge transformation, and rhetorical setting combine to produce glutinous prose necessarily echoing old forms and old purposes.

Legal writing specialists have begun to map the complexities facing legal novices and to prescribe new pedagogies, which would accelerate and intensify students' acculturation into the legal discourse community. Teresa Godwin Phelps was the first to propose a "new rhetoric" which would transform students' appreciation of the multivariate purposes and audiences of legal writers and increase students' self-control of their writing processes as well as their writing products.[1] Neil Feigenson joined Phelps' new rhetoric when he urged legal writing specialists to focus their pedagogy not on the traditional texts lawyers produce but on the writer and

1. *See* Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089, 1094 (1986).

on the writer's rhetorical assessments and purposes.[2] Elizabeth Fajans and Mary R. Falk revisited the new rhetoric and argued backwards that stronger writing was dependent on stronger reading, and that legal novices must be taught more robust heuristics for interpreting legal texts pluralistically and critically.[3]

Joseph Williams, Chris Rideout, and Jill Ramsfield further extended the new rhetoric project by focusing on a contextual and social pedagogy – one emphasizing the social field and diverse interpretive community of legal practitioners.[4] Rideout and Ramsfield, in particular, urged legal writers and legal writing specialists "to acknowledge the social contexts within which writing takes place and, thus, to acknowledge the ways in which writing generates meanings that are shaped and constrained by those contexts."[5]

More recently, a group of legal writing specialists has challenged the political and moral purposes of traditional legal rhetoric urging an even more critical interpretive stance towards legal texts, legal discourse, and legal culture.[6] They recognize that the

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2. *See* Neil Feigenson, *Essay Review: Legal Writing Texts Today*, 41 J. LEGAL EDUC. 503, 506 (1991).

3. *See* Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 164 (1993).

4. *See* J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 56 (1994); Joseph Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1, 1 (1991).

5. Rideout & Ramsfield, *supra* note 4, at 57. "The social perspective, then, moves beyond the traditional rhetorical concern for audience, forcing researchers [and legal writing specialists] to consider issues such as social roles, group purposes, communal organization, ideology, and finally theories of culture." *Id.* at 56-57 n.80 (quoting Lester Faigley, *Nonacademic Writing: The Social Perspective*, *in* WRITING IN NONACADEMIC SETTINGS 231, 235-36 (Lee Odell & Dixie Goswamie eds., 1985)).

6. *See, e.g.*, Elizabeth C. Britt et al., *Extending the Boundaries of Rhetoric in Legal Writing Pedagogy*, 10 J. BUS. & TECH. COMM. 213, 223 (1996); Lorne Sossin, *Discourse Politics: Legal Research and Writing's Search for a Pedagogy of Its Own*, 29 NEW ENG. L. REV. 883, 894 (1995) (advocating legal writing assignments designed to challenge students to explore the politics of legal discourse); Deborah Schmedemann, *Some Thoughts About Teaching Values in the Legal Writing Class*, Panel Presentation at the Legal Writing Institute (Aug. 1, 1992) (on file with the author); Brook K. Baker, A Theory of Ecological Learning and Its Implications for Research, Analysis and Writing Programs 89-92 (1995) [hereinafter, Baker, Implications for Research, Analysis and Writing Programs] (unpublished manuscript, on file with author); Brook K. Baker, Connection and Expertise in the Workplace: Finalizing a Theory of Ecological Learning, 106-25 (1994) [hereinafter, Baker, Connection and Expertise in the Workplace] (unpublished manuscript, on file with author).

legal discourse community is not only hard to enter, but that it is also hard to leave – that fully acculturated practitioners have trouble transcending the soothing conventions of their craft, the traditional professional repertoire. They emphasize that neither students nor practitioners appreciate their role in developing law, their critical moral authority to impact law's justice mission through their writing.

Collectively, these colleagues advanced the project of discovering a more complex pedagogy for legal writing specialists, one that eases acculturation to existing practice at the same time that it holds forth hope for a more critical, and more transformative practice. Although much has been accomplished, two questions remained unasked and unanswered. First, what exactly are the legacies of past literacy practices that confound students' process of acculturation, and how can we build on and transcend the surface traces of past projects and the deep structures and ideologies of American literacy?[7] Second, in addition to displaying critical consciousness and utilizing critical interpretive strategies, what are the critical *writing* strategies that address compelling issues of social justice?[8] In exploring these two questions, I propose to look back into

7. Fajans, Falk and Joseph Williams address common problems in novices' passive reading strategies. However, they offer little insight into the culture of literacy and the effects of schooling and how they affect the interpretive stances novices display toward authoritative texts. Williams for one seems to suggest that passive acceptance and paraphrase are unavoidable stages in the students' acculturation into any new discourse community. *See* Williams, *supra* note 4, at 18-23. Likewise, although Fajans and Falk discuss students' weak reading at length, they do not diagnose those anemic strategies in terms of the overwhelming momentum of schooling practices which prime text-driven strategies. *See* Fajans & Falk, *supra* note 3, at 166-90.

8. Sossin, for example, recommends a pedagogy which addresses the politics of legal discourse and which uses more socially relevant subject matter for investigation. *See* Sossin, *supra* note 6, at 897-901. She has failed, however, to consider the additional step of articulating what a more critical discourse strategy might be. Britt and her colleagues are more "political" than Sossin, because they propose cultural awareness about "the roles of language in making knowledge and power; interrelationships of institutions, knowledge, and power; the roles of popular culture and everyday practices in shaping and/or resisting dominant systems of knowledge and power." Britt et al., *supra* note 6, at 218. Thus, Britt et al. recommend a pedagogy that critically examines legal texts and the relationship between community membership, language, and power. *See id.* at 231-34. But they, too, offer little advice about transferring consciousness to a reformulated writing practice in law offices and judicial chambers.

Clinicians have had more time and more opportunity to consider the benefits of a social justice mission in their teaching. *See, e.g.*, Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law*

the recesses of students' reading and writing histories for the tacit assumptions they bring to current tasks. I propose as well to look forward, beyond the classroom, to the world of practice where critical texts must be produced under grinding pressures of conformity, client-centeredness, and calcified reader expectations.

Fortunately, in addressing the first question concerning legacies of literacy, the study of reading and writing practices has grown increasingly sophisticated as researchers have devised ingenious studies investigating the constructive processes involved in reading and writing, especially during periods of transition.[9] Composition researchers have studied reading-to-write practices in a number of transitional contexts, most particularly college writing programs. These researchers emphasize that reading and writing are active cognitive processes that deploy well-established routines of meaning-making but which are constrained both by the immediate rhetorical setting and by the larger cultural matrix of ideology and literacy practices one inherits.[10] In addition to highlighting the unfamiliar contextual constraints in a novel discourse community, these researchers emphasize that readers/writers-in-transition must devise their own goals and purposes to motivate and shape their interpretation and production of text.[11] In doing so, they are both enabled and burdened by exemplars of past practice, exemplars which confuse their conceptions of new literacy contexts and purposes.

Because local setting, cultural context, rhetorical purpose, and highly stylized discourse conventions are even more unfamiliar and opaque during entry into a professionalized social practice domain like the law, the transition to the legal discipline is particularly onerous.[12] The standard, and largely subconscious, repertoire of cog-

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School Clinics, 2 CLINICAL L. REV. 37 (1995). Nonetheless, clinicians also struggle over whether to present an "invitation" to consider social justice issues or whether the purpose of their pedagogy should be frankly transformative. *See id.* at 39-44.

9. *See, e.g.*, LINDA FLOWER ET AL., READING-TO-WRITE: EXPLORING A COGNITIVE AND SOCIAL PROCESS (1990) [hereinafter READING-TO-WRITE].

10. *See* Linda Flower, *Introduction: Studying Cognition in Context*, *in* READING-TO-WRITE, *supra* note 9, at 3, 12-14.

11. *See* Linda Flower, *The Role of Task Representation in Reading-To-Write*, *in* READING-TO-WRITE, *supra* note 9, at 35, 50-53.

12. See Williams, *supra* note 4, at 14-16. I do not mean to suggest that problems during periods of transition are entirely cognitive. The first year of law school can be a period of numbing isolation, plummeting self-esteem, and intense alienation. *See, e.g.*, Paul D. Carrington & James J. Conley, *The Alienation of Law Students*, 75 MICH. L. REV. 887, 889-98 (1977) (surveying law student levels of alienation, dissatisfaction, and sociability); Faith Dickerson, *Psychological Counseling*

nitive practices, reading techniques, and writing strategies students have relied on successfully in the past are frequently ill-adapted to the specialized demands of more purposeful discourse communities like legal practice. Even worse, the purposes and contexts of legal writing are unusually pluralistic and conflicted given contradictions between the interests of client and community,[13] between the moral agency of lawyers and of those they represent,[14] and between law as given – that which protects the existing social order – and law as it might be – that which expresses our aspirations for social and legal justice.

To better understand the challenges of teaching new arrivals to our discourse community, Part II of this Article outlines the typical transitional problems that novice lawyers face in developing the

for Law Students: One Law School's Experience, 37 J. LEGAL EDUC. 82 (1987) (compiling a study of students who sought professional counseling provided by the law school); B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627, 635-41 (1991) (examining the impact of stress on the social behaviors of law students and positing that the extreme pressure interferes with learning and encourages counterproductive behaviors); Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 670-75 (1994) (focusing on the psychological distress caused by traditional legal teaching methods); Stephen B. Shanfield & G. Andrew H. Benjamin, *Psychiatric Distress in Law Students*, 35 J. LEGAL EDUC. 65, 69 (1985) (comparing levels of stress in law school students with those in medical school); Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 398-405 (1971) (discussing the psychological impact of the process of legal education); James B. Taylor, *Law School Stress and the "Déformation Professionelle,"* 27 J. LEGAL EDUC. 251, 253-61 (1975) (discussing the law school experience and its effects on students' social and ethical values). Lack of context, incomprehensible teaching methods, delayed feedback, and interpersonal isolation can reduce previously competent adults to an AC/DC state of severe depression and/or hot-wired anxiety. This psychological infantilization is hard enough on majority students but is even more difficult for students of color and other nontraditional students who suffer microinequities and explicit exclusions beyond those experienced by more privileged insiders. *See* Roach, *supra*, at 675-79. In addition, a culturally primed expectation of unfavorable evaluation can create a self-fulfilling prophecy for nontraditional students, especially where one-chance-only exams are used. As if this internally and externally imposed emotional distress were not enough, many students also experience a profound moral disillusionment with what seems to be the amoral relativism of law professors and the hired-gun excesses of practicing lawyers. For this they pay $20,000 a year to arrive in a depressed labor market!

13. *See, e.g.*, William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1091-1119 (1988) (discussing the use of ethical discretion when evaluating a client's objectives); Paul Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street Level Bureaucracy*, 43 HAST. L.J. 947, 968-70 (1992) (focusing on the role of the lawyer representing the poor and disadvantaged).

14. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 52-55 (1988) (discussing the moral nonaccountability of a lawyer acting as advocate for a client).

competencies of a new discourse. Part III discusses the conservatism of those very same competencies and focuses on the cognitive, reading, and writing strategies, both personal and pedagogical, which can incubate legal writers' more critical and purposeful discourse. Although the initial analysis will highlight lessons about improving the traditional interpretive and communicative skills of our students in light of and despite their past histories, this Article's most important theme deals with nurturing a critical, transformative perspective and expanding lawyers' capacity to produce a more critical discourse in practice.

In addressing this central theme, the Article moves beyond the outlines of critical consciousness and critical interpretation developed by others. It points to a transformative writing practice which attempts to effect real results in the lives of individual clients and group constituencies. This critical *writing* pedagogy addresses, though it cannot resolve, the tension between a professional regime of client-centered representation and the essential inequities of the existing legal order. It addresses, but cannot resolve, how that tension might be enacted in a more critical discourse in everyday practice. Although I ultimately recommend increased use of "outsider" narratives and of a less biased, less adversarial and more feminist advocacy, I admit that I only begin to explore the discursive practices which might confront power and still yield change.

II. TRACES OF PAST LITERACY: PASSIVE READING AND WEAK WRITING DURING TRANSITIONAL PHASES

Students entering law school are prototypical examples of novices entering a new field. They draw on the repertoire of literacy skills and strategies harvested from their secondary and postsecondary school practice, and attempt to blend and adapt these cognitive competencies to the more complex demands of legal discourse. The legacies of past practice significantly structure students' current understandings of their reading and writing tasks, reproducing habituated responses to new interpretive and writing dilemmas.[15] Given their unfamiliarity with legal discourse practices,

15. *See* John Ackerman, *Translating Context into Action*, *in* READING-TO-WRITE, *supra* note 9, at 173. Ackerman writes:

> [A]s teachers and researchers . . . . [w]e knew that the reading and writing behavior we saw was strongly influenced (if *determined* is too strong a word) by these students' twelve years of public schooling and eighteen years (or so) of living in a literate culture. . . . When we say that writing

law students stumble and struggle during their border-crossing experiences – during their process of discourse acculturation.

> What students need to be helped to see, then, is that fluency with certain rhetorical and linguistic commonplaces – the specialized conventions of academic or professional discipline – comes with practice, and . . . [that] the more comfortable, routine commonplaces – the reading and writing habits that won them success elsewhere – must be examined, refined, and extended.[16]

In this transitional phase, law students are hampered by three related factors: (1) they unreflectively rely on previously learned reading and writing strategies when tackling the more purposeful literacy tasks they face; (2) they misapprehend the rhetorical purposes of legal interpretation and legal discourse as involving passive summary and comment strategies, instead of more active knowledge transformation strategies; and (3) they misapprehend the discourse expectations and changed standards and conventions held by their new community of readers – lawyers and judges.[17] An overarching problem is the students' essential passivity in interpreting, applying, and discussing legal text – their unwillingness to explore what the law might be as well as their struggle with what it is.[18]

A. Dilemmas in Comprehension and Interpretation of Legal Text

Composition experts have identified the key cognitive processes that constitute reading-to-write literacy, including: (1) monitoring for comprehension, (2) elaborating personal meaning, (3) structuring themes and relationships, and (4) preliminary planning for discourse strategies.[19] The first three stages predominantly concern reading and interpretation of text, where law students confront their first set of dilemmas in acculturating to the discourse

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> behavior is 'socially structured,' we mean that the topics, rhetorical means, and linguistic conventions all have antecedents within a larger literate culture. Any given act of writing echoes previous literate practice and, more specifically, the literate practices of discourse communities.

Id.

16. *Id.* at 175-76; *see also* Williams, *supra* note 4, at 14-16, 24-30 (discussing a process of u-shaped development and stages of pre-socialization, socialization, and occasionally post-socialization).

17. *See* Flower, *supra* note 10, at 21-23.

18. *See* Fajans & Falk, *supra* note 3, at 164 (noting that "students are trained to read only for facts, for information").

19. *See* Victoria Stein, *Exploring the Cognition of Reading-to-Write*, *in* READING-TO-WRITE, *supra* note 9, at 119, 121-24.

community of lawyers. The last category, planning, concerns the transition to writing where another set of dilemmas occurs.

First, through monitoring, readers maintain awareness of their comprehension and overall progress in "constructing" meaning from a text. Monitoring comprehension includes such skills as paraphrasing and restating gists, and negotiating contradictions in text interpretation.[20] Self-monitoring deepens one's comprehension of interpretive intentions and tracks one's progress in breathing meaning into inert text. Readers use a number of monitoring strategies to aid their comprehension and interpretation of text, such as: (1) double-checking the authority of the author and the historical time period of the text; (2) reading for introductions, conclusions, and other signposts of meaning; (3) anticipating the text's arguments and analyses; and (4) formulating questions to be explored in the text. Thus, monitoring is the active process whereby the reader pays most attention to the author's purposes, word choice, and intended meaning.

Second, elaboration is the more subjective cognitive process by which readers add their own meaning, material, and structure to the source text "as prior knowledge combines with the source text propositions to create new ideas and critical perspectives."[21] Fajans and Falk differentiate passive, text-driven interpretive strategies from stronger "transactional" strategies where students add their own meaning.[22] One of the paradoxes of students' writing practices is that their extensive elaboration processes, captured in writing protocol statements, frequently disappear from their actual texts.[23] Although students use elaboration in their inner dialogue to criticize and evaluate text based on their prior experience and to develop ideas further and more deeply than the source text, students abandon these elaborations in their intellectual subservience to the

20. *See id.* at 122.

21. *Id.* The need for elaboration, or integration of personal experience with legal doctrine, has been expressly recognized by many legal educators. *See, e.g.*, Sossin, *supra* note 6, at 899-900 n.60 (citing Angela P. Davis & Marjorie M. Shultz, *"A(nother) Critique of Pure Reason": Toward Civil Virtue in Legal Education*, 45 STAN. L. REV. 1773 (1993)). Davis and Shultz contend that classrooms become both "boring and dangerous" when law teachers "seek to eliminate emotion from legal discourse." Davis & Shultz, *supra*, at 1779-81.

22. *See* Fajans & Falk, *supra* note 3, at 181.

23. *See* Victoria Stein, *Elaboration: Using What You Know*, *in* READING-TO-WRITE, *supra* note 9, at 144, 152 (stating that 78% of all elaborative propositions were missing from the final text).

gospel of the printed word.[24] One explanation of why students neglect to import their personal cognitive elaborations of a subject into their study notes and their eventual text is that literate culture teaches them to respect authority.[25] In essence, students are self-censoring in obedience to cultural practices which privilege received wisdom over self-generated knowledge.[26]

Unfortunately, "students seemed unaware not only of the value of the material they generated through elaboration, but also of the value of the process of elaboration itself."[27] Although "students elaborated freely and spontaneously," they did so unreflectively and thus abandoned prematurely the power of their own invention.[28] Fortunately, this tendency to jettison one's own cognitive work can be partially ameliorated. "[R]ecent research . . . finds that purposeful instruction in the process of elaboration not only aids in comprehension and recall, but also facilitates depth of processing and encourages critical thinking."[29]

In structuring, the third cognitive component of literacy, readers/writers shape and reshape source material and their own elaborations. Most creatively, structuring activities involve "discovering relations between ideas in the text that may not have been apparent on reading alone."[30] Structuring activities include: (1) noticing instances of agreement, disagreement, and conflict; (2) searching for organizing themes and superordinate categories; and (3) arranging categories and sub-categories of proposition and proof.[31] This architecture of meaning consists of both analyzing

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24. *See id.* at 153-54.

25. *See* Kathleen McCormick, *The Cultural Imperatives Underlying Cognitive Acts*, *in* READING-TO-WRITE, *supra* note 9, at 194, 202 ("That students often wrote simplistic essays while they had developed much more complex elaborations further suggests the power of a dominant school ideology encouraging intellectual passivity.").

26. The current-traditional ideology of text interpretation suggests that "texts mean something," that they had coherence and clear meaning, which must be decoded correctly. *See* Fajans & Falk, *supra* note 3, at 180. In contrast to this simplistic approach, Fajans and Falk suggest a "transactional" approach where the reader negotiates meaning derived from text sources and meaning incorporated by prior life experiences resulting in analysis and interpretation. *See id.* at 181. "To be strong readers, students must be weaned from their belief that reading is about decoding or uncovering the one 'real' topic or theme of a text." *Id.* at 187.

27. Stein, *supra* note 23, at 154.

28. *Id.* at 154-55.

29. *Id.* at 146; *see also* Fajans & Falk, *supra* note 3, at 190-201 (reporting success with their upper-level critical reading course).

30. Stein, *supra* note 19, at 122.

31. *See* Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, The-*

separate components of knowledge and integrating those parts into a gestalt coherence. "In constructing meaning from sources, . . . students . . . actively *selected*, *connected*, and *organized* information."[32]

The fourth cognitive practice, planning, "plays a central role in moving from reading to constructing a text of one's own."[33] Global planning of an entire text can help one "build more connections, dig deeper into the material, and thus [permit] an even closer, fine-grained analysis."[34] One form of planning is the topical outline which many inexperienced writers shun. Expert writers, on the other hand, tend to spend much more time on planning activities and "they construct more fully elaborated and integrated plans."[35] Although such planning frequently occurs before writing, it also occurs recursively as writers revise their plan consciously and unconsciously according to the exigencies of their task and to the meaning they discover in the writing process itself.[36]

B. *The Transition from Reading Law for Comprehension to Reading for a Purpose*

As members of a new discourse community, students' first disadvantage is their unfamiliarity with the key texts and text-types of the lawyering community and with the analytical and purposeful strategies lawyers employ when they read legal texts. Although some students who are unusually precocious may find legal texts easy to read, most students do not. Legal texts are organized strangely; they have words students don't understand; and they rely on unfamiliar authority and rhetorical moves. These texts are isolated landmarks in a totally unfamiliar and vast discursive landscape.

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ory and Reflection in Ecological Learning, 36 ARIZ. L. REV. 287, 310-13 (1994) [hereinafter, Baker, *The Role of Context, Experience, Theory and Reflection in Ecological Learning*]; Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Function of Theory*, 45 J. LEGAL EDUC. 313, 332-42 (1995).

32. Linda Flower, *Negotiating Academic Discourse*, *in* READING-TO-WRITE, *supra* note 9, at 221, 226.

33. Stein, *supra* note 19, at 122.

34. *Id.* at 133.

35. *Id.* at 122; *see also* Blasi, *supra* note 31, at 344-45 (discussing the tendency of experts to spend more time in general on nonroutine problems).

36. *See* Wayne C. Peck, *The Effects of Prompts on Revision: A Glimpse of the Gap Between Planning and Performance*, *in* READING-TO-WRITE, *supra* note 9, at 156, 164 (positing that writing protocols suggest "that many students were negotiating their task, their text, and their situation as they planned and revised"); *see also* Fajans & Falk, *supra* note 3, at 179-80.

Even worse than unfamiliarity is students' initial misunderstanding about the constructed meaning of law. Most novices in any field, law included, hope that meaning is unitary and unambiguous.[37] Law students hope that THE LAW is clearly, unequivocally, and authoritatively articulated in statutes and cases. Yet, the first rule of constructive reading is that meaning is made, not found.[38] What we ordinarily call comprehension is no more than the unreflective giving of meaning to indeterminate texts based on personal and cultural interpretive practices of which we are largely ignorant. Contrary to the first rule of constructive reading, students think that their main task is a "concrete" one[39] – to find the "key language" of a judicial opinion or of a statute – and that the resulting language they find is unambiguously THE LAW.[40] They

37. Fajans and Falk refer to this as the common-sense realist paradigm that language accurately captures and conveys real experiences of the unmediated world. *See* Fajans & Falk, *supra* note 3, at 173. Other commentators refer to the realist paradigm as "the myth of literal meaning." Norris Minick, *Teacher's Directives: The Social Construction of "Literal Meanings" and "Real Worlds" in Classroom Discourse*, *in* UNDERSTANDING PRACTICE: PERSPECTIVES ON ACTIVITY AND CONTEXT 343, 371 (Seth Chaiklin & Jean Lave eds., 1993) [hereinafter UNDERSTANDING PRACTICE]. Minick states:

> [T]he myth of literal meaning is merely one face of a broader myth that posits a 'monistic' and 'objective' real world that can be discussed, described, referred to, and indeed lived in. Just as the myth of literal meaning posits a language that has meaning independent of local concerns, interests, and perspectives – independent of the formation of 'temporary mutual commitments to shared perspectives' – the myth of the 'monistic real world' posits a world that can be described and comprehended in isolation from such local concerns, perspectives, and commitments.

Id. at 371; *see also* Britt et al., *supra* note 6, at 214-15 (discussing an "objectivist" epistemology analogous to the "realist" and "literal meaning" perspectives).

38. "[T]oo rigid or superficial schematization of what they are reading blinds students to the text's indeterminancies and openness to interpretation." Fajans & Falk, *supra* note 3, at 171-72. For example, "holdings are not cast in stone, inextricably memorialized in the language of the court, but can be framed for persuasive purposes." *Id.* at 172.

39. Williams lists four common but overly "concrete" features of novice legal writers, which flow from their unfamiliarity with the interpretive practices of legal writers: (1) failure to redefine, paraphrase, or restructure legal problems as posed by others; (2) extended discussion of self-evident banalities; (3) incompetent and occasionally incoherent expression; and (4) over-reliance on legal jargon or dialect. *See* Williams, *supra* note 4, at 18-23. This tendency of novice legal writers to focus on the concrete text is entirely consistent with the more general tendency of novices to focus on the surface features of a problem rather than on its deep structures. *See* Blasi, *supra* note 31, at 343-44.

40. *See* RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 220-25 (2d ed. 1994); WILLIAM P. STATSKY & R.

naively think that understanding the law is simply locating the law as stated and then parroting it to themselves and others so that they will "sound" like lawyers.[41] After this "ventriloquism," THE LAW will unproblematically determine the single correct outcome of a legal dispute.

Instead of this naive view, law students must understand that comprehension of legal text is a constructive, cognitive act in which new text must be interpreted pluralistically[42] to create varied meanings based on the prior discourse and interpretive experience of each individual and based on the new purposes of lawyers.[43] And yet no student's reading can match that of a mature lawyer who understands the conventional interpretive practices of her community[44] and, even more importantly, the multiple purposes to which this existing text might be enlisted.[45] In other words, legal

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JOHN WERNET, JR., CASE ANALYSIS AND FUNDAMENTALS OF LEGAL WRITING 142 (4th ed. 1995) (discussing the so-called "crane" method).

41. "[Students'] papers are only 'a paraphrase away' from another author's text." Fajans & Falk, *supra* note 3, at 180. The imperative to sound like a lawyer is not simply a function of naiveté, however; it is also a function of students' desire to fit in – to create the impression that they belong in the community of lawyers. *See* Urs Fuhrer, *Behavior Setting Analysis of Situated Learning: The Case of Newcomers, in* UNDERSTANDING PRACTICE, *supra* note 37, at 179, 198.

> Many social psychological and social anthropological theories assume that people are highly sensitive to the social significance of their conduct . . . and are motivated to create desired impressions on others. From this view, all behavior settings are potentially threatening for newcomers. . . . What matters most to the newcomer is not how he or she views his or her own behavior and its consequences, but rather how others view them.

Id.

Phelps uses the much more vivid description of "tribal speech" in identifying students' attempts to "sound like" a lawyer:

> Law students too frequently acquire their new 'tribal speech' by imitating the style of the appellate opinions they read, by quoting judges' words at length, and by incorporating alienating and stuffy legalese. They cower behind their research, avoiding assertion, much less commitment. They fraudulently enter their new discourse community by adopting language not their own and by reneging in the struggle to find their own valid professional voices.

Phelps, *supra* note 1, at 1102.

42. Jerome Bruner defines "pluralism" – one of the few universals of human cognition – as "our dazzling intellectual capacity to *envision alternatives.*" JEROME BRUNER, ACTS OF MEANING 110 (1990).

43. "[S]tudents must see that the texts they produce are not merely paraphrases and summaries of other texts, but also interpretations of the original text as well as new works." Fajans & Falk, *supra* note 3, at 181.

44. *See* Williams, *supra* note 4.

45. "The purposive use of language is perhaps the only truly common de-

novices are constructing unitary meaning for the text that they are reading, but that meaning differs from the multiple meanings given by expert practitioners who routinely recognize both the canonical ways in which legal text is interpreted *and* the pluralistic, purposeful meanings which might reasonably be given to any legal text. Practicing lawyers, in contrast to law students, ordinarily read legal text with a particular instrumentalist purpose in mind, namely to understand the legal matrix of a client's problem, to predict how a future court might decide that problem, and to decide how to use the legal precedent to argue in a client's favor. This sense of client-based purpose gives rise to the second rule of constructive reading – the meaning of legal text depends on the purpose. Thus, legal meaning is pluralistic in both interpretation and purpose, subject ultimately to community judgments about fair use and plausible reform.[46]

Accordingly, legal writing pedagogy's first task is to help students bridge the gap between their naive, passive, purposeless reading of legal text and the traditional interpretive purposes of lawyers who read cases and statutes wondering how they might be applied to their client problem, favorably and unfavorably. Gaining an increased sense of authentic role, and thus of genuine purpose, would give students-in-transition a tremendous advantage over decontextualized classroom reading. But having a lawyer's perspective and a more authentic purpose is not enough by itself. Students also need practice, repeated practice, to learn the conventions lawyers use in reading and writing about cases and statutes. This practice ensures that students' purposeful interpretations and production of texts will become increasingly meaningful according to the judgment and practices of their new community elders.[47] Repeated

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nominator among all forms of legal practice." Sossin, *supra* note 6, at 898. Feigenson posits:

> Because lawyers write for a multitude of purposes and audiences and are constantly faced with new situations, a good legal writer must also comprehend how the various roles she occupies (e.g., interviewer, counselor, negotiator, advocate) shape her reasoning and writing, and must know how to adapt her experiences and knowledge to new roles and contexts.

Feigenson, *supra* note 2, at 506.

46. "[L]anguage, as a powerful medium of gatekeeping, helps to create boundaries that define discourse community memberships as well as acceptable kinds of knowledge and discourse within those communities." Britt et al., *supra* note 6, at 219.

47. "[S]tudents must learn the traditional forms [of legal analysis and writing] or be excluded from the discourse community." *Id.* at 231. Learning these conventions, however, does not necessarily take the form of transmission of pro-

practice helps students to develop "situation sense" – to learn how to recognize new contextual constraints and opportunities and how to adapt habituated reading strategies to novel demands and purposes.[48] It also exposes students to interwoven conventions of interpretation, analysis, and discourse – conventions best "taught" transactionally during the process of text interpretation and production.[49]

C. *Dilemmas in Text Production – The Legacy of Weak Writing Plans and the Resulting Misrepresentation of Task*

After helping students learn how to read law pluralistically with legal purpose, most legal writing instructors understand that their other most pragmatic task is to guide their students through traditional forms of legal analysis and legal writing. Linda Flower

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positional knowledge from a master to a novice. "[T]he master's effectiveness at producing learning is not dependent on her ability to inculcate the student with her own conceptual representations. Rather it depends on her ability to manage effectively a division of participation that provides for growth on the part of the student." William F. Hanks, *Foreword* to JEAN LAVE & ETIENNE WENGER, SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION 13, 21 (1991). "Quite simply, if learning is about increased access to performance, then the way to maximize learning is to perform, not to talk about it." *Id.* at 22.

48. Feigenson, *supra* note 2, at 505.

49. Legal writing textbooks are crammed with descriptions of conventional legal discourse practices, e.g., IRAC, structures of legal proof, organizational schemes, and citation practices. But the current list is relatively traditional in a conservative sense. For a different kind of list of legal discourse strategies see Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991) and Karl Klare, Conventions on Legal Argument 1-12 (1994) (unpublished manuscript, on file with author) (identifying common forms of legal argument arising in first-year studies).

Unfortunately, most students cannot appreciate these conventions or reinterpret them to apply to their writing until they are in the throes of their own writing dilemmas. This does not mean that description of conventions is not useful to them – it means that talk is most useful when it is timed to become part of their performance.

> It is . . . necessary to refine our distinction between *talking about* and *talking within* a practice. Talking within itself includes both talking within (e.g., exchanging information necessary to the progress of ongoing activities) and talking about (e.g., stories, community lore). Inside the shared practice, both forms of talk fulfill specific functions: engaging, focusing, and shifting attention, bringing about coordination, etc., on the one hand; and supporting communal forms of memory and reflection, as well as signaling membership, on the other. . . . For newcomers then the purpose is not to learn *from* talk as a substitute for legitimate peripheral participation; it is to learn *to* talk as a key to legitimate peripheral participation.

LAVE & WENGER, *supra* note 47, at 109.

has constructed a helpful taxonomy of the organizing plans most frequently used by freshmen in structuring ideas for their first college essays – plans that are recycled later in law students' first writing projects. According to Flower's analysis, college freshmen deploy a standard set of plans for organizing their writing projects from the most to the least common: to summarize the readings, to respond to the topic, to review and comment, to synthesize with a controlling concept, and occasionally to interpret with their own purpose.[50] These plan-types are not simply developmental stages, but the sequence does represent movement towards discourse practice increasingly well-suited to lawyering.

Flower has found that students' writing plans are not preselected from a conscious array of pre-set templates.[51] Instead, writers construct a task representation (or writing plan) repeatedly and recursively "integrating elements from a large set of options and schemas."[52] This constructive activity is rarely conscious.[53] "Decisions usually rose to awareness only when the writer encountered a problem or conflict, and not always then."[54] Instead, students default subconsciously to the most common plans – summary, topic response, and review and comment – because these are the information-recitation plans most prized under traditional educational criteria. Having been trained culturally to avoid ambiguity, to simplify complexity, and to suppress their own engagement with textual authority, students slavishly follow the text and recite its most soothing banalities.[55]

According to Flower's research, the most common discourse strategy used by most reasonably literate writers is the gist-and-list strategy:

> The writer goes through the text looking for the main points, finds an idea or term that links them, and uses that to organize the text. This familiar strategy, the product of years of paraphrasing, summarizing, and recitation in school, is dominated by the text and fueled by the reading process.[56]

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50. *See* Flower, *supra* note 11, at 41-53.
51. *See id.* at 54.
52. *Id.*
53. *See id.* at 55.
54. *Id.*; *see also* Baker, *The Role of Context, Experience, Theory and Reflection in Ecological Learning*, *supra* note 31, at 303-04.
55. *See* Ackerman, *supra* note 15, at 183-84; Williams, *supra* note 4, at 18-23.
56. Flower, *supra* note 32, at 235.

In the legal context, this strategy implies a passive, uncritical acceptance and reliance on the actual words of a reported decision.[57] In analyzing multiple cases, the gist-and-list strategy results in each case being reported seriatim in summary form. Little effort is made to synthesize cases, to apply cases to client facts, or to activate one's law-making or meaning-making authority to develop and prove legal contentions in furtherance of one's goals of prediction, persuasion, or reform.

A second common discourse strategy is the TIA strategy – the "that's True, Important, I Agree" strategy – which relies on the student's agreement and disagreement with the text.[58] The legal equivalent of this strategy is selecting only those cases, and those interpretations and applications of cases, that are favorable to one's client. Such analysis is one-sided, unreliable, and contains many unexplained gaps and absences. This strategy pays too little attention to the actual authority of legal text within a system of *stare decisis* and legislative enactment and to the ethical mandate that lawyers must report all governing authority to the court.[59]

Somewhat less frequently, students use a dialogue strategy which combines the gist-and-list and TIA strategies so that the student actively engages the text, her own ideas, and then "negotiates" her understanding of the ideas in question.[60] A law student employing a dialogue strategy is more likely to wrestle with legal doctrine and precedent, to elaborate and connect the law with her personal experience, and to apply the law more comprehensively to client facts. This is an improved strategy, but one that still evidences unfamiliarity with more sophisticated purposes for legal writing and the particular demands of a legal audience.

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57. As Feigenson has noted, some of our legal writing texts support passive reading and interpretive strategies. *See* Feigenson, *supra* note 2, at 512 (reviewing DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH (1989)). On the other hand, some texts are more "open" to interpretation than others. Many have argued "that it is impossible to construct linguistic representations that correspond fully and unambiguously with a single 'intended meaning.'" Minick, *supra* note 37, at 347. In legal writing, however, there is considerable effort to accomplishing precisely this end, which necessitates more attention to the actual words of certain legal texts. In many instances, lawyers have to pay exquisite attention to probable intended meaning in interpreting certain legal texts; similarly, lawyers frequently struggle to convey intended meaning in their own text production.

58. *See* Flower, *supra* note 32, at 235.

59. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(B)(1) (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3) (1983).

60. *See* Flower, *supra* note 32, at 236; Fajans & Falk, *supra* note 3, at 181 (referring to dialogue with text as a "transactional" strategy).

Relying on these three interrelated strategies, the standard writing plan of most law students is simply to report what they now know, that is to write the wrong text.[61] Students struggle with obtuse writing assignments in unfamiliar classrooms within a new discourse community because they are unclear about their readers' expectancies, standard format conventions, and canonical discursive and analytical practices. As they struggle, they experience enormous difficulty in responding to environmental clues, which translates into further difficulty in planning their task.[62] "Students may be caught in a tacit transitions [sic] in which the cues to change are subtle, but their significance is far reaching."[63] Instead of accurately inferring the poorly expressed intentions of their legal writing instructor or legal supervisor, students may superimpose the weak writing plans with which they are most familiar, whether they are fully appropriate or not.[64] The texts resulting from these weak plans maintain a startling resistance to revision. "The first response to an assignment, by habit and practical necessity, is an investment writers do not easily cast aside, even when they benefit most by rethinking and starting anew."[65] Therefore, it behooves us

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61. *See* Flower, *supra* note 32, at 238-39. Flower notes that the three strategies lead students to write quick and superficial papers that do not transform their knowledge into useful intellectual or rhetorical tools. Consequently, the students communicate irrelevant and useless information to their readers. *See id.*

62. Despite making this point about a novel context's opaqueness, context is the most powerful force in structuring students' expectancies and activities. Students interact with their environment in remarkably robust ways and receive a plethora of implicit clues which support and guide their performance. *See* Baker, *The Role of Context, Experience, Theory and Reflection in Ecological Learning*, *supra* note 31, at 295-324; Fajans & Falk, *supra* note 3, at 184; James F. Stratman, *The Emergence of Legal Composition as a Field of Inquiry: Evaluating the Prospects*, 60 REV. EDUC. RES. 153 (1990).

63. Flower, *supra* note 32, at 249.

64. *See* Flower, *supra* note 11, at 35. Flower notes that as readers and writers,

> [w]e respond to the problems we pose. The process of task representation begins when the problem solver begins consciously or unconsciously to represent the givens and constraints of this situation, the goals she would attain, and the strategies or actions she might take, since together these constitute the problem she is solving.

Id. at 38.

Other researchers de-emphasize the importance of a so-called task representation in approaching a novel performance and point instead to the idea of participating more meaningfully in a social role and community practice that organize performance organically. *See, e.g.*, Hanks, *supra* note 47, at 17.

65. Ackerman, *supra* note 15, at 178. Unlike novices, most experts spend more time structuring and diagnosing the problem space and more effort redefining the problem to be solved during their ongoing task performance. *See id.* at

to discover pedagogical interventions that help students countermand the legacy of weak plans.

D. The Transition to Conscious Plans and More Purposeful Writing

To counteract the momentum of habituated writing plans, legal writing instructors and practice supervisors must focus explicitly on the writing plan as part of their task supervision. In addition, writing coaches must: (1) clearly describe and clarify writing assignments, (2) explain the context of the writing project and the applicable conventions of practice, and (3) encourage the students to be more self-aware and purposeful in their writing.

To decrease reliance on habituated writing plans, legal writing instructors and practice supervisors first must be as clear as possible about the need for an appropriate writing plan and even clearer in describing the parameters of the initial assignments. Students frequently do not understand what they are being asked to do.[66] They need to know, among other things, the relevant facts, the procedural posture, the client's needs and interests, the intended audience, time and resource constraints, and format expectations. Despite the clarity of initial task representation, they also need to reformulate their task by noticing "cues from the context and evoking relevant memories"[67] and by getting clarification from their supervisors or instructors. Students are especially open to mid-course corrections during collaborative writing-in-progress conferences where they can receive suggestions, exemplars, and other forms of support and guidance.[68] Although students' resulting revisions usually lead to improved task performance, such adjustments also can generate discontinuities of voice, style, and content,[69] unless the student is careful to "re-read" and "re-write" the entire text.[70]

Even when supervisors give "clear" assignments and even when students clarify writing plans and ruminate about their writing projects, "they must still 'read' the situation," a process fraught with in-

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66. *See* Flower, *supra* note 11, at 36.

67. *Id.* at 56.

68. *See* Baker, Implications for Research, Analysis, and Writing Programs, *supra* note 6, at 73-78; Baker, Connection and Expertise in the Workplace, *supra* note 6, at 77-79.

69. *See* Flower, *supra* note 11, at 58.

70. *See* Fajans & Falk, *supra* note 3, at 179-80 (discussing the recursive process of text production and the writer's reader-response during the composition process).

terpretive error.[71] Although we might assume that novices can map the landscape of a novel discourse setting, this assumption clearly is unwarranted. Thus, as a second strategy "to move students along the continuum of discourse experience, we need to give them experience and practice and a more demystifying insight into [the context and] the conventions of the discourse before them."[72] Clarity about both context and convention is critical. If students increase their sensitivity to the myriad, complex contextual clues, they should be able to respond even more fluidly and fluently to its constraints, resources, and opportunities.[73] However, the immediate social context does not always provide direct clues to the established conventions of a social practice domain. These conventions are hidden as work product in other files or as performances behind closed doors. Thus, articulation of the conventions of practice is a valuable resource in the development of expertise.[74]

Lastly, because students will not always have instructors to explain assignments, context, and conventions of practice, Flower suggests that increased meta-cognitive control of literacy – awareness of one's rhetorical context and discourse processes – is necessary to improve fluency with a novel discourse and the writing tasks it requires.[75] "Although task representation may influence all that follows, the process is often carried out with little or no awareness on the part of the writer."[76] Thus, "[t]he problem in teaching is to help students learn to invoke conscious choice and evaluative awareness on complex problems that need them" instead of simply relying on well-established, automated writing plans.[77] To improve their appreciation of their context and their writing task, Flower recommends that "writers. . . *monitor their own process*, noticing what they are thinking and what they have done so far, reflecting on whether it is working."[78] "Under these circumstances the writer's goals, constraints, and possible strategies themselves become the objects of thought as writers engage in . . . 'intentional cogni-

71. Flower, *supra* note 11, at 63.
72. *Id.* at 67.
73. *See id.* at 68 (stating that "[c]ritical literacy and critical consciousness are states of heightened awareness – knowing the covert messages the context is sending and [the writer's] own assumptions and habits of response").
74. *See* Ackerman, *supra* note 15, at 176; Blasi, *supra* note 31, at 355-61, 377-78.
75. *See* Flower, *supra* note 11, at 67.
76. *Id.* at 40.
77. *Id.* at 41.
78. *Id.* at 70.

tion.'"[79] By this process of intentional cognition, the implicit but incomplete recognition of contextual opportunities and constraints is augmented by the technologies of conscious reassessment, with the likelihood that richer, better practice will result.[80]

It is not enough to monitor one's discourse processes. Students also must become purposeful in their writing. Although the subconscious, knowledge-driven writing plans students bring from their formative writing experiences are sufficient for many tasks, they are woefully inadequate for the goal-oriented writing of lawyers and judges.[81] Legal readers expect more than a dispassionate report of existing legal authority and mechanical, conclusory application of that authority to the facts of a client's case.[82] Experienced legal supervisors and decision-makers expect young lawyers to use a purposeful knowledge-adaptation strategy to reconstruct pre-existing legal authority in support of a rhetorical purpose, either to predict how a future decision-maker will decide the case or to make persuasive arguments to that decision-maker in order to advance the client's paramount interests.[83]

> What has changed the most [in the transition from school to a professional discourse] is not the apparent genre or conventions, but the goals. The goals of self-directed . . . inquiry, of using writing to think through

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79. *Id.* Philip Kissam refers to this monitoring not as metacognition but as a "critical writing process." Philip Kissam, *Thinking (by Writing) About Legal Writing*, 40 VAND. L. REV. 135, 140-41 (1987). Kissam writes:

> [T]he critical writing process allows the writer's mind to function like a 'radar scope that plays continually over one's own text' in ways that can force the writer to confront and control hard issues more directly and more creatively than is possible with non-written thought. This special perspective thus can enhance the creation of new thoughts, the articulation of complex thoughts, and the recognition of subtleties, nuances, and qualifications that are so important to the art of lawyering.

Id. Studies of expertise in many areas have demonstrated that experts, rather than novices, in general are more likely to exercise self-monitoring skills. *See* Blasi, *supra* note 31, at 358-60; Baker, Connection and Expertise in the Workplace, *supra* note 6, at 57-59 and sources cited therein.

80. *See* Flower, *supra* note 11, at 68.

81. *See* Flower, *supra* note 32, at 239; *see also* Allen Boyer, *Legal Writing Programs Reviewed: Merits, Flaws, Costs and Essentials*, 62 CHI.-KENT L. REV. 23, 24 (1985) (stating that "[g]rades in substantive courses help students obtain starting positions, but it is research and writing skills which make careers").

82. *See* Flower, *supra* note 32, at 239.

83. *See, e.g.*, Flower, *supra* note 32, at 239, 248-49. "Full-fledged members of [the academic discourse community] are . . . expected to speak as contributors with the authority of their own thinking" to utilize strategic knowledge. *Id.* at 249.

> genuine problems and issues, and of writing to an imagined community of peers with a personal rhetorical purpose – these distinguish academic [and legal] writing from a more limited comprehension and response.[84]

In sum, our students must consciously learn the purposeful, rhetorical strategies of lawyers in reconstituting legal authority to the demands of client goals in order to acquire even the standard repertoire of legal discourse skills.

III. NURTURING THE FORMATION OF CRITICAL DISCOURSE STRATEGIES

A. *Developing Critical Awareness and a Critical Writing Practice*

Critique, as a literacy skill, evidences a resistant cognitive stance to the dogmas of text and community – both in text interpretation and in text production. Unfortunately, unexamined cultural imperatives can blind students to the potential of a more powerful, more autonomous, more resistant stance in their reading and writing.[85] Unless they are challenged, cultural mandates superimpose their strictures on every feature of our students' writing.[86] For example, student essays, academic writing, and law-related writing typically require authors to "efface" themselves from the text.[87] In addition to desubjectifying the author, current literacy practices also valorize coherence, closure, and unity at the expense of ambiguity, contradiction, and conflict.[88] The forced "discovery and reproduction of a unified meaning in texts [coherence and closure] is just one way in which a society asserts its consistency and stability."[89] As a result, students are forced to become painfully "aware of the authority of the printed word – and that authority generally carries with it connotations of unity and consistency."[90]

Legal academics in many subdisciplines have produced reams of critical scholarship challenging accepted literacy practices, legal

84. *Id.* at 251 (emphasis omitted).
85. *See* McCormick, *supra* note 25, at 195.
86. *See id.* at 195-96.
87. *See id.* at 197, 206-09. McCormick notes that "[l]earning to succeed [in school or in the courtroom] by effacing oneself as a subject is just one of the many social apparatuses that helps to fragment and decenter the subject." *Id.* at 197.
88. *See id.* at 199.
89. *Id.* at 205.
90. *Id.* at 214-15.

authority, legal institutions and, indeed, the entire system of justice:

> The legal writers who urge a critical perspective on the law . . . [use] the intellectual tools of Marxism, structuralism, and post-modernism to destabilize support for the status quo. The critical legal studies movement, the critical feminist movement, the critical race movement, and the critical clinical movement all point to abhorrent social conditions and codified power imbalances which privilege some and radically disadvantage others. They distrust the rule of law, legal institutions, prevailing forms of legal practice, and legal culture at the same time that they hold forth some hope for resistance and interstitial change.[91]

Although some critical discourse scholars have joined the larger critical project and urged students "to look for unstated or unacknowledged cultural assumptions and institutional pressures motivating cognitive acts,"[92] it is unclear that this critical discourse scholarship has attracted the attention of legal writing specialists as a whole.[93] As a consequence, we are largely unfamiliar with the possibility of nurturing a more critical stance in our students. Nonetheless, some legal writing specialists have begun to propose a pedagogy of critique.[94] Sossin, for example, explicitly calls for a more political pedagogy.[95] "Effective legal writing instruction en-

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91. Baker, Connection and Expertise in the Workplace, *supra* note 6, at 118; *see also* Britt et al., *supra* note 6, at 213 (describing how these movements "are taking up these [critical] interpretive methods to illustrate how law, as a rhetorical system, supports existing social relationships while claiming to do otherwise").

92. Ackerman, *supra* note 15, at 197.

93. *See* Sossin, *supra* note 6, at 900-01. "[W]hat is normally taught in [legal reading and writing classes] – the form of a memo, the anatomy of the library, the 'grammar of law' – historically has been taught in a one-dimensional fashion, conveying only a singular and status-quo oriented vision of legal communication." *Id.* However, a recent survey of legal writing specialists by Nancy Millich of Santa Clara University Law School discovered dozens of instances (51) where legal writing instructors had used writing assignments addressing social and diversity concerns. *See* Nancy Millich, Summary of Legal Writing Problems Raising Issues of Diversity or Social Concern (July 1994) (unpublished manuscript, on file with author).

94. *See* Britt et al., *supra* note 6, at 231-34; Patrick Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC'Y REV. 197, 221 (1995) ("Knowing the rules and perceiving a concealed agenda enhance the possibilities of intervention and resistance."); Teresa Godwin Phelps, *Narratives of Disobedience: Breaking/Changing the Law*, 40 J. LEGAL EDUC. 133 (1990) (discussing narratives of disobedience as instrumental in changing legal understanding); Sossin, *supra* note 6, at 900-01.

95. *See* Sossin, *supra* note 6, at 894-95.

courages students not only to explore the law but also, ideally, to articulate a notion of justice."[96] For her, legal writing pedagogy should "be about more than merely learning the structure and strategy of legal communications; it should also challenge first-year law students to explore the politics of legal discourse."[97] Sossin argues that "[s]tudents should be required both to research and write 'like a lawyer' and also to see the social, political, and economic implications of this form of discourse, and to be aware of the alternatives."[98]

Likewise, Britt and her colleagues also call for a more critical pedagogy deconstructing legal language and the power it displays: "[A]nalysis of law's rhetoric is . . . part and parcel of a political and ethical project whose object is the transformation of law in the name of justice all too rarely spoken about in the profession of law."[99] They urge students to recognize their power to reconceptualize the world in every act of interpretation.[100]

> [I]nterpretation, because it involves the privileging of some points of views over others, is always already political. Interpretations cannot help but include the morality of the interpreters: how the interpreters view the world and the way the world should be, and their beliefs about what measures are necessary or reasonable for creating the kind of world they want.[101]

According to Fajans and Falk, who have also self-consciously joined the critical project, "[t]o read judicial opinions closely and critically is to talk back to power."[102] "Exploration of these hidden or 'master' stories – drowned shapes in the depths of our culture – is a crucial, but neglected enterprise."[103] They propose adding multiple interpretive voices from various jurisprudential and critical traditions to deepen and broaden students' pluralistic engagement with legal precedent.[104] In addition, they recommend several specific critical heuristics in reading legal texts: "to read cases for what

96. *Id.* at 903.
97. *Id.* at 909.
98. *Id.* at 901.
99. Britt et al., *supra* note 6, at 213 (citing THE RHETORIC OF LAW: THE AMHERST SERIES IN LAW, JURISPRUDENCE, AND SOCIAL THOUGHT 3 (Austin Sarat & Thomas Kearns eds., 1994)).
100. *See* Ackerman, *supra* note 15, at 173, 193.
101. Britt et al., *supra* note 6, at 225-26.
102. Fajans & Falk, *supra* note 3, at 165.
103. *Id.* at 199.
104. *See id.* at 192.

is implicit there – literary style and jurisprudential or interpretive posture – and for what is not there at all – legal and historical context and omissions of fact or lapses in logic."[105]

In sum, according to these scholars, if we want to undo the cultural mandates of passive, objective, simplistic, and uncritical literacy, we must first change the culture of the classroom and eventually of the law office and courtroom.[106]

> This goal [of critical resistance and transformation] . . . can be attained only in a rich [counter]cultural context that rids itself of the subjective/objective paradigm, that situates the positions of experts, and that grants credibility to the positions of students by giving them, indeed requiring them to develop, a voice that must be as closely scrutinized as those of the experts.[107]

By exposing our students to systems of contemporary cultural criticism, these scholars argue that we can reduce their subservience to the written word by making students even more aware that texts in general, and law texts in particular, are always ambiguous, usually contradictory, and thus places of contested social meaning.[108]

Despite the spirit and strength of this scholarship, it has not yet offered critical writing strategies to practicing lawyers. Having a critical consciousness and a critical interpretive practice is rare enough, but acting on that critique is rarer yet, though some lawyers, albeit in small numbers, have written critical texts which have helped to reshape the matrix of law itself. Nonetheless, critical writing in the field of practice is a forceful political act – one that unsettles the ideological beliefs, assumptions, habits, and practices of one's professional domain. Despite limited but powerful examples from practice, most critical discourse scholars have simply

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105. *Id.* at 169. In a more detailed list, Fajans and Falk recommend: (1) reading for jurisprudential and interpretive posture; (2) reading for case context and historical context; (3) reading for rhetorical style and voice; (4) reading for master narratives; and (5) reading for omissions. *See id.* at 193-201.

106. *See id.* at 204-05. Fajans and Falk argue that "to be effective practitioners and to make a contribution to the ongoing discourse of the legal community, students of our text-dominated discipline must learn to read – and thus to think and write – for themselves." *Id.*

107. McCormick, *supra* note 25, at 209; *see also* Phelps, *supra* note 1, at 1090-91 (asserting that lawyering requires the development of a personal and professional voice).

108. *See, e.g.*, McCormick, *supra* note 25, at 215. "Even texts that appear coherent, therefore, can often be regarded as sites of struggle, as semiotic battlefields in which diverse and often contradictory meanings compete for dominance." *Id.*

urged a more robust reading pedagogy and the production of a more critical scholarship to internal audiences, rather than a discourse pedagogy aimed at the production of critical lawyering texts by practicing lawyers for real-world decision-makers.[109] Similarly, it seems fair to note, notwithstanding certain exceptions, that the critical legal studies movement and other critical subdisciplines primarily have produced scholarship rather than court documents or legislation. Thus, even though an extraordinarily rich body of critical scholarship has filled thousands of pages of law reviews during the past twenty years, an obvious question arises. Why is there no pedagogy for critical writing in practice and/or why hasn't the academy's critical discourse transferred to the world of practice on its own accord?

The answer to this question revolves around the familiar rhetorical issues of context, audience, and purpose, supplemented by a big dose of raw political power. First, the context of most law professors is a context of classroom pedagogy and scholarly writing. This situation reality serves as a template for our imagination, blinding us perhaps to the complicated discourse realities that lawyers, judges, and legislators face.

Second, although there certainly are institutional and cultural constraints on producing critical scholarship – constraints relating to tenure, to political acceptability, to selection preferences of law review editors, et cetera – law professors and students lack the lawyer's clients and a client base. At least in private practice, where most lawyers write, lawyers must pay exquisite attention to the needs of individual clients and additional attention to getting paid and attracting new clients. Lawyers, unlike academics, do not get paid or gain professional stature merely by producing critical texts.

Third, legal scholarship has an audience of one's immediate peers who are willing to tolerate if not embrace more critical perspectives. Critique, especially balanced, rational critique, is one of the alleged foundational premises of the Academy. Lawyers, on the other hand, have judges and legislatures as their audience. Thus, there is a much greater challenge to meet the expectations

109. *See* Britt et al., *supra* note 6, at 231-34 (discussing unspecified texts to be analyzed in an upper-level course as social constructs); Fajans & Falk, *supra* note 3, at 201 (discussing assignment of a scholarly paper or a law review note); Sossin, *supra* note 6, at 904-13 (discussing introspective writing project in "memo" form that combines an analysis of the "best argument" [by what criteria?], a prediction of judicial outcome, and the student's personal sense of how the litigation should be resolved).

of socialized and privileged legal decision-makers. These audiences are infused with the hegemonic rules of culture and law; they have conscious and unconscious perspectives, ideologies, and commitments favoring the status quo and privileging certain narrative accounts, social rules, and forms of reasoning and argumentation.

Fourth, although legal scholars might write in part to change the world, their immediate purposes are more plebeian – they want to demonstrate familiarity with ongoing academic dialogues and (occasionally) to offer new knowledge. Lawyers, in contrast, have immediate demands on power – they want to help a client to get out of jail, win a court case, negotiate a takeover, or lobby successfully. Likewise, lawyers must use the institutions of state power to achieve tolerable outcomes for their clients. As much as scholars work in universities infused with power relations, practitioners actually battle at the front lines of power, where immediate decisions are made and longer-lasting principles are forged.

As a result of all these differences in context, audience, purpose, and power, critical academic writing may suggest strategies for a more critical discourse in practice. But the conventions and forms of the Academy cannot be incorporated unproblematically into lawyers' writing. Developing a critical discourse is fraught with contradictions arising from lawyers' competing obligations to act and write zealously on behalf of clients on the one hand, and to resist dogma and write transformatively in furtherance of community interests and social justice on the other. Nonetheless, legal writing specialists might consider the efficacy of increased reliance on: (1) using subversive outsider-narratives; (2) confronting and avoiding appeals to bias; and (3) using a more dialogic, less adversarial, more feminist discourse. Although teaching – in the sense of a classroom pedagogy – may play some small part in nurturing such discourse strategies, the more promising pedagogy is situational and participatory. Legal writing instructors will have to help create a more transformative legal discourse community or subcommunity within and beyond the Academy which will afford novices with enriched opportunities to develop an increasingly effective and engaged critical discourse in the world of practice.

B. *Contradictions of Purpose in Client Representation, Guild Membership, and Critical Discourse*

Undertaking a more critical discourse strategy is fraught with contradictions at the heart of lawyering. On the one hand, lawyers are exhorted to act zealously on behalf of their clients and to use all lawful means to accomplish their clients' lawful objectives, even if those objectives are unduly oppressive to others and contrary to proper social ordering for the larger community.[110] On the other hand, lawyers have obligations to the interests of the court that the law be argued respectfully[111] and with some fidelity to precedent

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110. According to the Model Code of Professional Responsibility, "[a] [l]awyer [s]hould [r]epresent a [c]lient [z]ealously [w]ithin the [b]ounds of the [l]aw." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980). "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously . . . . [E]ach member of our society is entitled . . . to seek any lawful objective through legally permissible means." *Id.* EC 7-1. Although the lawyer may not assert legal positions which are frivolous, he or she must urge a construction of law favorable to his or her client "without regard to his professional opinion as to the likelihood that the construction will ultimately prevail." *Id.* EC 7-4. Likewise, although the lawyer may not pursue a client's preferred course of action merely to harass or unduly oppress others, *see id.* DR 7-102(A)(1), and although a lawyer may seek to avoid that which is unjust or which might inflict needless harm, *see id.* EC 7-9, 7-10, if the client's objectives and means are lawful, the lawyer *must* pursue them, *see id.* DR 7-101(A)(1). Finally, though a lawyer may counsel the client about probable legal outcomes, harsh consequences, and the moral implications of the client's plans, "the decision whether to forgo legally available objectives or methods because of nonlegal factors is ultimately for the client . . . ." *Id.* EC 7-8. Commentators have taken this well-established rule of zealous advocacy to create a role-based morality for lawyer-as-legal-friend. This stance is allegedly sanctioned by existing moral principles that lawyers can do all that friends ordinarily do for each other so long as the conduct is not prohibited by ethical rules, even if the conduct causes harm to others. *See, e.g.*, Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship*, 85 YALE. L.J. 1060, 1071-76 (1976) (suggesting that lawyers are special purpose friends who adopt client interests as their own). For more extended analyses of the traditional conception of zealous advocacy, see LUBAN, *supra* note 14, at 11-18; Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901, 917-37 (1995) (discussing the boundaries of zealous advocacy within cases involving racial conflict); Stephen L. Pepper, *Counseling at the Limits of Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1587-98 (1995) (discussing the extent of discretion the law allows lawyers when advising clients regarding illegal & immoral activity); and Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 12-22 (1995) (summarizing professional and philosophical defenses of the standard conception of zealous advocacy).

111. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-36. The model code provides:

and legislative will;[112] lawyers have obligations to the interests of party-opponents and witnesses that they be treated fairly and with respect;[113] and lawyers have additional obligations to their fellow attorneys, litigation opponents, and negotiating partners[114] where the survival of dispute resolution outcomes and transactional agreements might depend on fair accommodation of competing goals and interests.[115] Beyond these immediate interpersonal and institutional obligations, lawyers are the gatekeepers to the halls of justice – to legislative and administrative forums, to judicial chambers, and to the private conference rooms where most disputes and most deals are actually resolved or consummated. As gatekeepers, lawyers exert enormous influence not only on who gets access to legislative bodies, judicial dispute resolution, and private contractual ordering, but also on the content of the law itself and the quality of

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> Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears.

Id.

112. *See id.* EC 7-23. The model code states:

> The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence . . . but having made such disclosure, he may challenge its soundness in whole or in part.

Id. "In his representation of the client, a lawyer shall not . . . [k]nowingly make a false statement of law . . . ." *Id.* DR 7-102(A)(5).

113. *See id.* EC 7-10 ("The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm."); *id.* EC 7-25 ("[A] lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him . . . .").

114. *See id.* EC 7-37 ("In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers."); *id.* EC 7-38 ("[A] lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice . . . .").

115. *See* Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162 (1958) (arguing that an important part of transactional lawyering "is to design a framework of collaboration that will function in such a way that litigation will not arise").

negotiated deals.[116] What lawyers argue for and negotiate is a large component of what the law actually is.

These contradictions between constituencies and interests are not solved simply by a purposeful, knowledge-adaptation strategy; it takes a critical discourse strategy to negotiate even provisional resolutions to these complexities. This alternative, critical discourse strategy is not subject solely to the demands of a single client or client group, but must pay heed to the moral authority and agency of the lawyer and to the interests of other constituencies in rationalizing or ameliorating the oppressive legal and social-political arrangements which plague our society.[117] In developing critical

116. *See* David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 477 (1990) (stating "lawyers have more practical power than judges to manipulate the legal terrain").

117. Not unsurprisingly, lawyers' ethical codes do not talk about legal and social oppression – too loaded, too political. They do, however, use more polite language to describe lawyers' obligations to seek law reform and to enhance the justice mission of the law. "A Lawyer Should Assist in Improving the Legal System." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1980). "If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law." *Id.* EC 8-2. "A lawyer should render public interest legal service . . . . by service in activities for improving the law, the legal system or the legal profession." MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1983). The aspirational standard has been reaffirmed in the recent *MacCrate Report*, especially in the section on Fundamental Values of the Profession:

> Value § 2: *Striving to Promote Justice, Fairness, and Morality.* As a member of a profession that bears special responsibilities for the quality of justice, a lawyer should be committed to the values of:
>
> 2.1 Promotion of Justice, Fairness, and Morality in One's Own Daily Practice;
>
> 2.2 Contributing to the Profession's Fulfillment of Its Responsibilities to Ensure that Adequate Legal Services Are Provided to Those Who Cannot Afford to Pay for Them;
>
> 2.3 Contributing to the Profession's Fulfillment of Its Responsibility to Enhance the Capacity of Law and Legal Institutions to Do Justice.

American Bar Association Section of Legal Education and Admission to the Bar, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM 140-41 (1992).

Commentators, too, historically have championed the lawyer's obligation to seek justice. *See, e.g.*, Fuller & Randall, *supra* note 115, at 1217 ("The special obligation of the profession with respect to law reform rests on considerations too obvious to require enumeration."). In more recent times, a whole cottage industry has developed which attacks the standard conception of lawyering and which proposes more activist approaches. *See, e.g.*, LUBAN, *supra* note 14, at 57 (noting that the lawyer's duty in an adversarial proceeding is "one-sided partisan zeal in advocating her client's position"); Simon, *supra* note 13, at 1083 ("Lawyers should have ethical discretion to refuse to assist in the pursuit of legally permissible

strategies, students, even novice students, must be encouraged to think about what the law should be rather than what it is now; they should consider how the law might be reinterpreted and reformed to achieve social justice rather than to further the present, narrow, and privileged interests of powerful individuals and institutional clients. As a necessary precondition to addressing this wider range of competing interests, students must move beyond understanding their discourse competency as a technical, instrumentalist skill and must reconceptualize discourse as a moral, political, social activity that actually helps constitute the next day in our social world.[118]

Maintaining critical awareness about the moral weight of legal discourse and the aspirational possibilities of progressive law reform and social change necessarily complicates lawyers' relations with their clients and with their clients' future texts. If one conceptualizes the lawyer-client relationship as a client-centered one which gives primary legal and moral authority to the client[119] and if

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courses of action and in the assertion of potentially enforceable legal claims. This discretion involves not a personal privilege of arbitrary decision, but a professional duty of reflective judgment."); Tremblay, *supra* note 110, at 12-22; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 12-15 (1975-76) (discussing role-differentiated behavior resulting in professional amorality).

118. *See* Sossin, *supra* note 6, at 888. "To teach that how lawyers use language is technical and apolitical, that the same 'rules' apply whether in a poverty clinic or a Wall Street firm, with the wealthy and indigent client, in my view, presents a dangerous and misleading vision of the legal world." *Id.*

119. *See* DAVID BINDER & SUSAN PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 135-91 (1977). Binder and Price rely on the client-centered counseling model of Carl Rogers for the theoretical underpinnings of this conception. They advocate a process of legal counseling designed to foster client decision-making free from domination and preemption by the lawyer. Advocates of client-centeredness long have questioned the propriety of trying to influence the client to accept the lawyer's preferred solution to the client's problem. Binder and Price's text is the classic presentation of the client-centered model. *See also* Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 UCLA L. REV. 811, 843-62 (1987) (extending the client-centered model to integrate counseling and negotiation paradigms).

Professor Robert Dinerstein exhaustively has catalogued the systemic arguments in favor of client-centered counseling. *See* Robert Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 512-56 (1990). The core argument supporting client decision-making is that by stifling the lawyer's paternalism and coercive expressions of preferences, the client's individual autonomy is enhanced. *See id.* at 512-17. Dinerstein argues that client-centeredness advances a political agenda of empowering poor clients and perhaps increasing client participation in democratic and economic institutions. *See id.* at 517-23.

Arrayed against arguments for client-centeredness are a number of counter-

one conceptualizes that a client has something like a right of informed consent with respect to important representational issues,[120] then attempting simultaneously to accommodate client goals and competing social values necessarily creates contradictions and complexities.[121] As a result of these contradictions in values, a critical perspective initially might lead to more careful selection of clients – the most moral decision that a lawyer makes.[122] Given that lawyering is such a limited and specialized resource,[123] a critical perspective might result in more *pro bono* or institutional representation of poor clients and legal outsiders and less single-minded representation of moneyed interests, white collar criminals, and corporate hooligans (hyperbole intended).

Similarly, a critical legal perspective might necessitate more moral dialogue with the client, both advantaged and disadvantaged – a dialogue with unpredictable results, some justice-enhancing and some justice-avoiding.[124] Nonetheless, more moral dialogue

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arguments, most of which have a political or moral edge. One opponent urges that lawyers in civil cases should decline to pursue legally sanctioned client goals if such pursuit on balance would frustrate paramount goals of justice or fairness. *See id.* at 556-57. A related, but tangential, attack on client-centeredness, challenges the idea that lawyers may avoid moral responsibility for their lawyering activities in pursuit of client goals. *See id.* at 560-61. At the very least, critics advocate the lawyer's responsibility to raise moral issues in a nonmanipulative, nonpreemptive manner, in other words to have a moral dialogue in which the lawyer and client discuss moral issues. *See id.* at 561-64.

120. *See* Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (proposing an informed consent model of lawyer-client decision-making).

121. *See* Hing, *supra* note 110, at 938-56 (describing lawyers who worked with their clients to reduce interminority conflicts and adversarial strife in pursuit of a goal of racial harmony); Peter Margulies, *"Who Are You to Tell Me That?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213, 218-20 (1990) (discussing the probability of attorney-client conflict once competing interests are raised); Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 CLINICAL L. REV. 639, 650-63 (1995) (contrasting theories of client-centeredness and collaborative lawyering and then suggesting a third alternative, facilitative lawyering); Tremblay, *supra* note 110, at 48-60 (discussing contradictions, especially in poverty law practice).

122. *See* Duncan Kennedy, *The Responsibility of Lawyers for the Justice of Their Causes*, 18 TEX. TECH. L. REV. 1157, 1158 (1987); Simon, *supra* note 13, at 1083-84.

123. *See* Pepper, *supra* note 110, at 1546-48 (analyzing the extent to which lawyers provide access to the complex legal environment through counseling).

124. *See* David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 737-38 (1988) (discussing client counseling as a negotiation aimed at diverting clients from projects harmful to the common good); Simon, *supra* note 13, at 1098-99; Tremblay, *supra* note 110, at 44 n.148; *cf.* Pepper, *supra* note 110, 1546-54 (discussing how clients can use legal counseling to circumvent

might reduce absolute client-centeredness and individualistic client autonomy to set goals, even selfish goals, on self-defined terms. Expanding the counseling dialogue might eventuate a changed moral vision for the client and/or the lawyer.[125] In some cases, it would be the client who changes his willingness to extract the last pound of flesh from his opponents; in other cases, a moral dialogue might reveal new, more critical realities to the lawyer, even the progressive lawyer, whose narrowness of experience has precluded exposure to or understanding of a client's lived experience.

Clients, however, are not the only source of constraint in developing a more critical discourse – the professional ideal of zealous advocacy itself can impede a transformative writing practice. Forces arising from client representation, client perspective, client-centeredness, attorney self-interest, the duty of zealous advocacy, and rampant American individualism all combine to define a context and cultural norm which pressure the lawyer to be "Machiavellian" in choosing her discourse strategies.[126] Having been informed about the lawful client goal, the lawyer is emboldened, in fact exhorted, to pursue that goal with all "lawful" discourse means. Under this regimen of Machiavellianism, the choices that lawyers make about the arguments they advance are determined primarily by principles of instrumentalism and utilitarianism – the effectiveness of the argument in persuading an actual, culturally biased decision-maker to decide in the client's favor by all not-unlawful means. Thus, the choice is rarely conceived of in terms of its effects on other parties or court participants, its non-outcome-determinative impact on decision-makers, or its influence on society-at-large or the corpus of law itself.

But the complexities of a critical discourse strategy go well beyond concerns about client selection, client counseling, and the convention of zealous, Machiavellian advocacy. Assuming that legal writers have reached appropriate moral judgments about which clients to represent, that they have consulted with their clients

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or violate the law and the moral and practice quandary this creates for their lawyers).

125. Of course, even suggesting a moral dialogue with clients about legal discourse, advocacy themes, and the content of legal arguments would require a major change in legal writing pedagogy, since we currently disregard clients' right of informed consent about the most traditional of discourse decisions. *See* Baker, Implications for Research, Analysis, and Writing Programs, *supra* note 6, at 69-71.

126. *See* LUBAN, *supra* note 14, at 11-18; *supra* notes 110-21 and accompanying text.

about which law reform position to advance, and that they have rejected rank Machiavellianism, many discourse decisions remain. Critical writers must ask themselves hard questions about the contents and forms of legal writing that might spark legal and social change. After all, critical writers are asking fully acculturated decision-makers, whose social status is closely associated with protecting the interests of dominant forces in society and whose cognitive heuristics ordinarily disfavor change,[127] to do an extraordinarily difficult thing – to expand and even transform their world view and to initiate a rebellious social act. And to do so, the critical writer must use discourse forms and content that are sufficiently familiar to the decision-maker so that an imaginative leap might occur. What words, written in what order, in whose voice, might prompt minor social revolt among the judges, legislators, and others empowered to make legal decisions?

C. *Critical, Subversive Narrative as a Discourse Strategy*

1. *The Ubiquity and Contradictions of Narrative*

Many critical legal scholars recommend subversive "outsider" narrative or critical storytelling as a discourse strategy that confronts power.[128] For multiple reasons, however, narrative as a pure

127. *See* HOWARD GARDNER, THE UNSCHOOLED MIND 171-72 (1991).

128. *See, e.g.*, NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW (David R. Papke ed., 1991); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning the Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 259-80 (1994); Robert M. Cover, *The Supreme Court 1982 Term – Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994); David Ray Papke, *The Black Panther Party's Narratives of Resistance*, 18 VT. L. REV. 645 (1994); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989).

Legal educators also increasingly discuss the use of narrative as a tool in changing students' understanding. *See, e.g.*, Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 CLINICAL L. REV. 41 (1994) (using the evocative power of a fictional rape story and her client's multiple stories to challenge traditional "theory of the case" pedagogy); Judith G. Greenberg & Robert V. Ward, *Teaching Race and the Law Through Narrative*, 30 WAKE FOREST L. REV. 323 (1995) (using the Rodney King trials as the substance of a course to give stu-

form is not necessarily a transformative genre.[129] To begin with, narrative is the central constitutive[130] and generative force in our experience of the social world.[131] It is also the primary communicative practice we use in our internal and external dialogue whereby we attempt to explain our lives to ourselves and to share our realities with others.[132] Narrative on a larger scale is used both to forge

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dents a better understanding of contemporary racism); Joseph W. Singer, *Persuasion*, 87 MICH. L. REV. 2442 (1989) (using the threat of a flunk-out policy to teach the realities of plant closings). Other, practice-based educators also emphasize the importance of narrative in learning a trade or profession. *See* LAVE & WENGER, *supra* note 49, at 108 ("For apprenticeship learning is supported by conversations and stories about problematic and especially difficult cases."). "These stories, then, are packages of situated knowledge. . . . To acquire a store of appropriate stories, and, even more importantly, to know what are appropriate occasions for telling them, is then part of what it means to become a midwife." *Id.*; *see also* Baker, *The Role of Context, Experience, Theory and Reflection in Ecological Learning*, *supra* note 31, at 342-43 (discussing the use of familiar past situations as examples of new, unfamiliar situations).

129. *See* Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229, 1230-34 (1995) (presenting a sympathetic but powerful critique of the transformative claims of outsider autobiographical scholarship); Ewick & Silbey, *supra* note 94, at 199-200; Cathy L. Mansfield, *Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 BROOK. L. REV. 889, 928-29 (1995) (challenging the transformative claims of outsider autobiographical scholarship).

130. *See* Ewick & Silbey, *supra* note 94, at 211 ("*[N]arratives are social practices*, part of the constitution of their own context. Because narratives are social practices that are constitutive of, not merely situated within, social contexts, they are as likely to bear the imprint of dominant cultural meanings and relations of power as any other social practice.").

131. *See* BRUNER, *supra* note 42, at 43, 67, 77; Baker, *The Role of Context, Experience, Theory and Reflection in Ecological Learning*, *supra* note 31, at 303-04; Ewick & Silbey, *supra* note 94, at 198-99 (discussing how humans use eventfulness or narrative as the principal cognitive strategy to make sense of the world); *id.* at 204 n.5 (discussing Ricoeur's analysis of narrativity) ("[N]arrative is not simply a construction of the author but something directly corresponding to lived human experience.").

132. *See* BRUNER, *supra* note 42, at 77, 111-15; Ewick & Silbey, *supra* note 94, at 198-99. The success of narrative depends in substantial part on the empathy of the listener. *See* Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLINICAL L. REV. 65, 81-86 (1994). To counteract the dilemma of an "uncaring" lawyer or decision-maker, Goldfarb emphasizes the importance of a listener being empathetic to the resonance of narration, particularly to the submerged stories of subordinated "others." *See id.* at 85-86. "[A person's] capacity for insight is a product of his empathy. His empathy in turn is a product of his willingness to immerse himself in other's pain. He feels another's anguish without losing his capacity to act on his or her behalf." *Id.* at 81 (footnote omitted). Goldfarb continues:

> The primary corrective for distorted projections of the world of others, whether the source of the distortion lies in colonialism or in other forms of hierarchy or separation, is found in the ability to listen intently to

the "imperial" meta-narratives of the nation state and the more local, more rebellious narratives of geographical, ethnic, or cultural subcommunities.[133] Accordingly, narrative, as a ubiquitous form of discourse, has no special or unique salience.

Instead, narrative is produced in diverse social settings, including legal ones, with a variety of purposes, audiences, and effects,[134] some progressive and some regressive. As a consequence of these multiple purposes, audiences, and effects, narrative has no singular valence of transformative meaning. "[There is no] single fundamental political purpose or psychological (or transcendental) effect of narratives, whether it be to reflect reality or to supplement it, to reinforce ruling ideologies or to subvert them, to console us for our mortality or to give us intimations of our immortality."[135] Narratives are articulated within a cultural context where power and resource imbalances abound and where conscious and unconscious forces conspire to protect the status quo. Accordingly, many narratives are hegemonic in that they represent, reinforce, and re-

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> those in social locations other than our own . . . to 'look[] to the bottom.'

Id. at 79 (citing Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987)). Goldfarb professes that finely-tuned, empathetic attention to stories activates both our moral intuitions and our emotions. *See id.* at 67. Contact with the detailed particulars of the lives of others helps move "us beyond the boundaries of our parochial lives, helping us feel and consider a wider range of possibilities than we would otherwise identify, and rendering us more willing to be touched by life's complexity and variety, mystery and uncertainty." *Id.*

133. Rebecca R. French, *Review Essay: Of Narrative in Law and Anthropology*, 30 LAW & SOC'Y REV. 417, 422-23 (1996) (reviewing NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER (Martha Minow et al. eds., 1993)).

134. *See* Ewick & Silbey, *supra* note 94, at 206 ("[S]tories are always told within particular historical, institutional, and interactional contexts that shape their telling, its meanings and effects. They are told with particular interest, motives, and purposes in mind. Furthermore, stories are constrained by both rules of performance and norms of content.").

135. *Id.* at 205 (citing Barbara Herrnstein Smith, *Narrative Versions, Narrative Theories*, 7 CRITICAL INQUIRY 213, 235 (1980)). Winter describes the polyglot and routine use of narrative strategies as follows:

> The narrator does not tell his or her story from the raw, unmediated date of life, but rather assembles and makes use of the preexisting cultural ICMs [idealized cognitive models] with which he or she apprehends the world. The narrator then configures these nuclei to form a recognizable story-pattern with an apprehensible meaning. By the time the reader confronts the story, the original experiences and ideas have been twice rendered and shaped by cultural and narrative forms.

Winter, *supra* note 128, at 2252. "We can think of the effective legal story-teller as one who 'retails' cultural knowledge from the stock of practices produced by the culture at the 'wholesale' level." *Id.* at 2270.

produce the existing social order.[136] The well-told tales of "welfare cheats," "welfare dependency," "teenage pregnancies," and "unwed mothers" (and other political parables) do much to create a social world in which newborns and their mothers might be denied food, shelter, and clothing.[137] "Constituent and distinctive features of narratives make them particularly potent forms of social control and ideological penetration and homogenization. . . . Performative features of narrative such as repetition, vivid concrete details, particularity of characters, and coherence of plot silence epistemological challenges and often generate emotional identification and commitment."[138]

The individualism of personal narratives also undermines their subversive potential. Contrary to many of its claims,[139] outsider narrative frequently requires the storyteller to reproduce a liberal, autonomous self "that culture already has prepared for her."[140] Thus, for Coughlin, narrative "texts describe the individual self, its material needs, and psychological desires as central concerns of law."[141]

Precisely because it appeals to readers' fascination with

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136. *See* Ewick & Silbey, *supra* note 94, at 212. The authors observe:

> Because of the conventionalized character of narrative, then, our stories are likely to express ideological effects and hegemonic assumptions. We are as likely to be shackled by the stories we tell (or that are culturally available for our telling) as we are by the form of oppression they might seek to reveal. In short, the structure, the content, and the performance of stories as they are defined and regulated within social settings often articulate and reproduce existing ideologies and hegemonic relations of power and inequality.

Id.; *see also* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 849 (1993) (arguing that narrative per se is not always transformative because it must always relate to an aspect of insider experience).

137. *See* Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs the Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159, 1189-95 (1995).

138. Ewick & Silbey, *supra* note 94, at 214.

139. *See* Coughlin, *supra* note 129, at 1248-51 (cataloguing the liberatory claims of outsider scholarship).

140. *Id.* at 1251. Although Coughlin primarily discusses outsider, academic autobiography, her concerns are applicable to other outsider narratives, including those which might be produced by practicing lawyers on behalf of outsider clients. *See id.* at 1338.

141. *Id.* at 1252. "Individual narratives . . . allow for decontextualization, a shift to the 'single cell' which loses the larger social and political context." French, *supra* note 133, at 417 (discussing Lawrence Stone, *The Revival of Narrative: Reflections on a New Old History*, 85 PAST & PRESENT 3 (1979)).

> the self-sufficiency, resiliency and uniqueness of the totemic individual privileged by liberal political theory, there is a risk that autobiographical [or other outsider narrative] discourse is a fallible, even co-opted, instrument for the social reforms envisioned by the outsiders . . . . [O]utsider autobiographies unwittingly deflect attention from collective social responsibility and thwart the development of collective solutions for the eradication of racist and sexist harms.[142]

According to Coughlin, not only must outsider narrative conform in structure to dominant templates of self and of a life well-lived, this same narrative necessarily privileges the individual over the group – personal need over communal justice. This individualistic tendency of narrative is exacerbated by the litigation process, which typically requires individual stories rather than collective ones.

> In fact, given the ideological commitment to individualized justice and case-by-case processing that characterizes our legal system, narrative, relying as it often does on the language of the particular and subjective, may more often operate to sustain, rather than subvert, inequality and injustice. The law's insistent demand for personal narratives achieves a kind of radical individuation that disempowers the teller by effacing the connections among persons and the social organization [indeed orchestration] of their experiences.[143]

2. *Subversive Content and Outsider Voice in Critical Narrative*

As a result of this analysis of narrative's multiple and conflicting usages and possibilities, critical legal writers must do more than simply import the distinctive discursive features of narrative – selection of characters and events, temporal ordering, and emplotment of conflict and closure[144] – to create "critical" narratives. They must discover and select those aspects of a particular narrative which

142. Coughlin, *supra* note 129, at 1285-86.

143. Ewick & Silbey, *supra* note 94, at 217.

144. *See id.* at 200. Although there is disagreement about what exactly constitutes a narrative, narrative as a genre typically employs three features: (1) "selective appropriation of past events and characters," (2) temporal ordering with a beginning, a middle, and an end, and (3) emplotment – an "overarching structure, often in the context of an opposition or struggle. . . . [to] ensure both 'narrative closure' and 'narrative causality.'" *Id.*

might make it subversive or critical rather than hegemonic.[145] Ewick and Silbey have described a sociology of narrative identifying two features which might make a narrative truly subversive: (1) juxtaposing the individual and collective content in a story and (2) using outsiders' direct reports.[146] Each of these features, however, raises special difficulties for legal writers writing in typical practice settings to traditional legal audiences.

In terms of content, "subversive stories are those that employ those connections [between the particular and the general], making manifest the relationship between . . . biography and history."[147] "[S]ubversive stories recount particular experiences as *rooted* in and part of an encompassing cultural, material, and political world that extends beyond the local."[148] Coughlin argues that non-subversive narratives reinforce key tenets of mainstream ideology.[149] In doing so, non-subversive narratives privilege the individual over the group by trying to "escape" stereotypes rather than destroy them.[150] In contrast, truly subversive stories explode stereotypes and particularize group injustice by challenging myths that confine and deform. "They shock and enlighten precisely because they juxtapose the particular and private with the legal abstractions that are supposed to contain them."[151] "If narratives instantiate power to the degree that they regulate silence and colonize consciousness, subversive stories are those that break that silence."[152] Lucie White's now classic story of Mrs. G.'s rebellious testimony that Sunday shoes were "necessities" in her world, no matter how impoverished, is a prototypical example of how a particular story confronted, revealed, and unsettled the classic welfare concept of basic necessities used to deny dignity and vital resources to welfare recipients.[153]

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145. "Subversive stories" are those "which defy and at times politically transform" hegemonic practices. *Id.* at 217.

146. *See* Ewick & Silbey, *supra* note 94, at 219, 221-23.

147. *Id.* at 218 (citation omitted).

148. *Id.* at 219.

149. *See* Coughlin, *supra* note 129, at 1292-1302 (discussing the scholarship of Jerome Culp, who argues that while all black scholars possess a black voice, only those who espouse opposition to racial oppression possess a black perspective).

150. *See id.*

151. Ewick & Silbey, *supra* note 94, at 219.

152. *Id.* at 220.

153. *See* Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (recounting the story of Mrs. G.). Mrs. G. was a 35-year-old, African American, single mother of five girls, living on AFDC. *See id.* at 21. After receiving a lump-sum insurance settlement for an automobile accident, Mrs. G.'s AFDC worker told her she was free

A subversive story, like Mrs. G.'s, might be most critical or transformative if it convinces not only that it is unique, but that it is exemplary of a shared social problem that calls for redress. Mrs. G.'s story suggests the existence of many similar stories. Since it addresses the phenomenology of oppression concretely *and* generically, this story elicits an empathetic response by appealing to the moral sensibilities of a welfare worker.[154] According to Coughlin's critique, however, one still could wonder if the outcome and the message of Lucie White's article is not primarily about the triumph of the autonomous, heroic welfare recipient who overcame both her lawyer and the welfare system.[155] Moreover, what if Mrs. G. had not been a religious Christian in the deep South, thereby conforming to a privileged cultural identity?[156] What if she instead had been buying Nike sneakers to increase her children's social status on the street – would her story end in the same triumph? Is there a better story, yet untold, about multiple welfare recipients fighting collectively to change the allotment category – is there ultimately a better, more collective, more subversive story to be told?

As exemplified by Mrs. G., there is a danger in over-romanticizing and over-essentializing the stories of outsiders, even if they have a privileged knowledge of oppression. Clearly, every outsider can tell "a story" – every outsider can tell many stories.[157]

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to spend the money and it would not affect her benefits. *See id.* at 24. After a random audit of her AFDC file revealed the existence of this insurance payment, Mrs. G. was ordered to repay that amount which was considered an overpayment by AFDC. *See id.* In an attempt to dismiss the repayment order, Mrs. G.'s lawyer opted against using an estoppel argument, in favor of arguing that Mrs. G. spent the money on necessities, which would exempt her from the order. *See id.* at 28-30. When testifying Mrs. G. stated she used the money to buy new Sunday shoes for her girls. *See id.* at 31. Although she lost the hearing, the county dismissed the repayment order, determining that it would not be "fair" to make her repay the amount. *See id.* at 32. Ewick and Silbey discuss Mrs. G.'s story as a subversive prototype. *See* Ewick & Silbey, *supra* note 94, at 218.

154. *See* Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 209 (1985) ("The narrative in legal theory, like all narrative, brings us face to face with our moral selves, our moral options and our capacity for moral action.").

155. *See* Coughlin, *supra* note 119, at 1299.

156. *See* Mansfield, *supra* note 129, at 916.

157. *See id.* at 906. Mansfield writes:

> As with all individuals, poverty law clients tell their stories in different settings for different reasons . . . . In each setting, the client may distill the story [differently] in furtherance of the purpose for which the story is being told. Over time, the client's own understanding of his or her story may change and transform.

Id.

All we have to do is look at the stories told by Clarence Thomas, Louis Farrakhan, Spike Lee, and Derrick Bell to see that they may tell radically different, even oppositional stories. Is each story "true"? Is each story "representative" of a shared experience of the world? Should each story be left unchallenged? Decidedly, not so.[158] Perhaps each story must be told, perhaps each story must be heard, but each story must in turn be judged (or interpreted) on its merits.

> The [stories of the] oppressed do not have intrinsic values simply by the fact of their membership in an oppressed group. What they do have is a strong political claim to be heard: [V]ictims are entitled to insist on others' attention not because they can offer virtue to a fallen world, but because they are experts on their own lives.[159]

Articulating a critical narrative – producing one in the first place – ordinarily is empowered if the narrator has an opportunity to share her story with others similarly situated. Mutual dialogue around common social content is the social process that helps elicit and reveal "the collective organization of personal life."[160] Feminist consciousness-raising groups are a contemporary example of this phenomenon.[161] They show that the best way to discover the com-

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158. Coughlin in particular rejects the claim that narrative must be exempt from critical reaction. *See* Coughlin, *supra* note 129, at 1281-82. She asserts:

> By rejecting any critical reaction as a treacherous failure of sympathy for the author's [or protagonist's] pain, if not as the product of prejudiced ignorance, and by dismissing criticism as a personal attack on the author's character, autobiographical rhetoric is no less coercive of readers than the legal rhetoric that the outsiders desire to supersede.

Id. Exercising her power of critique, Coughlin challenges the autobiographical forms and tropes of several prominent outsider legal scholars including Jerome Culp, Patricia Williams, Richard Delgado, and Robin West. *See id.* at 1292-1338 (stating that the authors' unreflective storytelling promotes mainstream ideals which conflict with the very tenets of discourse they claim to advocate).

159. Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW ENG. L. REV. 1173, 1213 (1992); *see also* Peter Halewood, *White Men Can't Jump: Critical Epistemologies, Embodiment, and the Praxis of Legal Scholarship*, 7 YALE J.L. & FEMINISM 1, 24 (1995) ("[T]he perspectives of the oppressed are not a sure source of wisdom; the 'false consciousness' of oppressed groups is a real problem: 'subordination can obscure as well as illuminate self-knowledge.'" (citation omitted)).

160. Ewick & Silbey, *supra* note 94, at 221; *cf.* French, *supra* note 133, at 422 (discussing Robert Cover's idea of a "paideic," small community narrative that encompasses a normative view of what is and what might be); Charles R. Lawrence, III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 839-42 (1995) (describing the need of a "homeplace" for outsider communities for material support, strategizing, and storytelling).

161. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE

munal content of stories of oppression is to share them with others and then to discern their common themes.[162] Typically, however, lawyers have limited opportunity to support "consciousness-raising" groups in their conference rooms or otherwise.[163] The predominance of individual representation, the ethos of zealous advocacy, and rules about confidentiality conspire to limit lawyers' ability to aggregate clients so they can share critical narratives.

In addition to revealing a collective wrong, the way the story is told and by whom may be critically important to its transformative potential. There may be a particular value in having the outsider client tell the story directly because social marginality might be a necessary condition of the story's subversive impact.[164] Paradoxically, this preference for an actual outsider voice creates special complications for legal writers who ordinarily must "represent" their client in their writing. Even when lawyers use their most human voice,[165] or when they most effectively convey the "unedited" version of their client's story, the subversive element might be lost in transmission. To say it differently, having a socially powerful lawyer retell (and usually recast) the story of a marginal outsider could defeat the slim possibility that the story might trigger a transformative empathetic response.

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83 (1989).

162. *See id.*

163. *But see* Naomi R. Cahn, *Defining Feminist Litigation*, 14 HARV. WOMEN'S L.J. 1, 8-12 (1991) (describing the important collaborative aspects of feminist litigation); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1605 (1989) (detailing the problem-solving meeting between a lawyer and her client); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 160 (1994) (advocating the use of legal scholarly projects in order to develop collaborating lawyering environments); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 700 (illustrating how a lawyer and a social worker were instrumental in reshaping local government in South Africa).

164. *See* Ewick & Silbey, *supra* note 94, at 220.

165. *See* Elizabeth Perry Hodges, *Writing in a Different Voice*, 66 TEX. L. REV. 629 (1988). Elizabeth Hodges views the problem of developing a critical discourse strategy as one of developing a more "human" professional voice. *See id.* at 630 ("Can one unfreeze, so to speak, the professional voice and liberate its elusive, protean, 'human' relative?"); *see also* Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 872-73 (1988) (discussing discourse strategies based on the character of speaker/writer and the need to construct a trustworthy communicative self to establish moral authority with one's audience).

3. *Meeting Adverse Audience Expectations and the Dogma of Legal Narratives*

As frustrating and difficult as it might be to get a client's story heard at all, given institutional barriers to its production and articulation, the much greater dilemma relates to the incommensurability of outsider narrative and expectations of a traditional legal audience.[166] To put it mildly, the typical expectations, indeed the dogmatic demands, of the traditional legal decision-maker disfavor outsider narrative in lieu of insider tales and rules.[167] The problem here is not that a lawyer and her client might not have a critical, counter-hegemonic consciousness themselves and a subversive story to tell, but that both the lawyer and the client might have difficulty in making this unfamiliar, perhaps unwelcome, perspective cognizable to a legal audience.[168] In law as elsewhere, "[t]he content of narratives is . . . governed by social norms and conventions. Content rules, as they operate within different cultural and institutional settings, define *what* constitutes an appropriate or successful narrative. They define intelligibility, relevance, and believability, while specifying what serves as validating responses or critical rejection."[169]

In many important respects, law dictates, excludes, and confines the narrative content of legal discourse, especially when it requires that a client story reproduce or conform to the narrative structures of existing legal paradigms. Law, especially common law, does not eschew narrative – it embraces legally sanctioned narrative accounts, master stories which are hegemonic in expressing

166. *See* Ewick & Sibley, *supra* note 94, at 207 (discussing appropriate content contained in successful legal narrative).

167. *See id.* at 208 (describing how judges strongly influence the stories in court by determining evidential relevance, length of witness testimony, and the type of information allowed into the witness' story).

168. *See id.* at 207-11 (illustrating the importance of a sound legal narrative and its influence on legal audiences).

169. *Id.* at 207. *See generally* Gilkerson, *supra* note 128, at 914-15 (arguing that poverty law lawyers must be sensitive and articulate); Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913, 1914 (1990) (stating that lawyering for the poor can be an activity of generating narratives that illuminate, create, and reflect normative worlds and that bring impoverished experiences that might otherwise be invisible and silent into public view). Comprehension problems can of course affect lawyers as well as judges. *See* Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459, 2463-69 (1989) (discussing the impact on clients of lawyers who insist on their own methods of interpretation).

the cultural/social/legal relations which maintain power.[170] Thus, there are fundamental tensions between privileging client voice, encouraging direct client participation, presenting the subversive social content of individual stories, and translating client stories to make them more plausible and credible to establishment decision-makers.[171] In this process of representation and translation, the dissident voices and subversive traces in a narrative and the evocative particularities of an individual story might be suppressed and compressed within the conventionalized and homogenized story lines of law.[172]

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170. *See* Fajans & Falk, *supra* note 3, at 199 (discussing the "prototypical narratives at the heart of a discourse that is explicitly hostile to narrative"); David Ray Papke, *Discharge as Denouncement: Appreciating the Storytelling of Appellate Opinions*, 40 J. LEGAL EDUC. 145, 147-54 (1990) (discussing legal master narratives in general and in bankruptcy cases in particular); Elizabeth Tobin, *Imagining the Mother's Text: Toni Morrison's* Beloved *and Contemporary Law*, 16 HARV. WOMEN'S L.J. 233 (1993) (discussing narrative accounts of mothers in four recent cases, each of which illustrates the problematic nature of representing the experience of motherhood).

171. *See* Ewick & Silbey, *supra* note 94, at 208. "[T]o the degree that the narrative presented by a litigant or witness fails to provide the logical connections demanded by the developing plot and conventionalized norms for sequence, motive, and the like, the audience will supply those normative connections" and in the process either accept or reject the plausibility and justiciability of the narrative presented. *Id.; see also* Baron, *supra* note 128, at 264 ("Law's stories are highly structured by substantive principles that render irrelevant much 'ordinary' information. . . . Just as the law recognizes only limited kinds of stories, law also recognizes only limited ways of telling stories."); Coughlin, *supra* note 129, at 1287 ("The autobiographer who desires a material benefit from her performance must adopt a persona that is intelligible, if not enticing, to her audience."); William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661, 698 (1985) ("[T]he law imposes highly specific requirements on narratives."); White, *supra* note 153, at 17 (stating that "[l]itigants who use a relational framework do poorly in court because the logic of their stories clashes with the rule – breach – injury logic in which judges have learned to conceptualize legal claims").

Some commentators do not regret the attorney's obligation to translate and to impose legal narrative structure on a client's story. *See* Mansfield, *supra* note 129, at 900. Mansfield states:

> If the poverty lawyer does not take an interpretive editorial role in the presentation of the client's story through the imposition of legal construct upon it, utilitarian control over the story is forfeited to other entities, such as the tribunal or the opposing attorney, neither of whom is as closely affiliated with the client's interests as the poverty lawyer.

Id.; see also Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 524-29 (1994).

172. *See* Ewick & Silbey, *supra* note 94, at 208; Britt et al., *supra* note 6, at 15. In an effect called homogenizing, "[e]xperiences are translated into already recognized legal categories, so that differences between individuals and groups are

Likewise, and in addition to contradictions between the urgency of outsider narrative and the hegemony of legal master stories and categories, there are tensions between the legal system's emphasis on "truthful" stories about "what really happened" and outsider narrative's offer of "perspective" stories that give the audience new vantage points from which to view the uncertain world.[173] Even though the "what really happened" story is undoubtedly a partial fiction in and of itself,[174] being "truthful" is part of a lawyer's ethical obligation to the court[175] and of a client autobiographer's implicit contract with her audience.[176] However, by accepting an emphasis on truthfulness, the lawyer at least partially reinforces a foundational view of the world that "actual" events happen and that "objective" reports can convey those events "accurately."[177] Perspective stories from outsiders, on the other hand, may challenge power to the extent they help reveal the unacknowledged vantage point of the culturally favored party and of the decision-maker.[178] Towards this end, stories emphasizing point-of-view might choose to focus on the shared but socially significant perspective of a particular client – for example, what it is like to wait for an abusive partner to come home for dinner. Alternatively, the perspective story might not simply suggest the moral primacy of a previously suppressed perspective, but suggest that there are "many realities" in the interpretable universe.[179] Both of the above uses of point-of-view perspective expand the possibility of empathetic alliances with those whose vantage points and experiences are too often ignored or devalued, but they do so at the price of de-emphasizing "truth" claims.[180]

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erased." *Id.*

173. *See* Baron, *supra* note 128, at 280-85.

174. *See id.* Since narrative, too, is a constructive medium that utilizes selective appropriation of characters, events, and dramatic tensions, it is impossible to find a single truthful narrative account, though there may be many which would be plainly false.

175. *See supra* note 112.

176. *See* Coughlin, *supra* note 129, at 1269-73 (discussing an autobiographer's implicit promise to represent *real* events and experiences).

177. *See* Baron, *supra* note 128, at 280-83.

178. *See id.* at 283-85; Johnson, *supra* note 128, at 832-842 (analyzing the use of narratives within the voice-of-color context); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2082 (1989). People of varying social status and experiences often see events in distinct and differing ways. *See id.*

179. *See* Baron, *supra* note 128, at 284; Johnson, *supra* note 128, at 832-37.

180. A more radical viewpoint on perspective suggests that the reason to accept and acknowledge outsider perspectives is not merely to demonstrate good discourse manners or to enrich pluralistic, democratic decision-making. Instead,

4. *Strategies for Using Critical, Subversive Narrative in Practice-Based Writing*

When resolving these tensions about subversive content, client voice, legal viability, narrative truth, and social perspective – in pursuing a more critical narrative discourse – a legal writer might ultimately choose to use "outsider" narratives. If she does, where should she use them? One possibility is to plead her case differently, eschewing the conventional format and stylistic prose of traditional complaints for a more contextual narrative – a so-called "thicker" pleading, told situationally and from a point of view about the unfolding of a life and the social events and dilemmas of that life.[181] Similarly, lawyers might choose to loosen the shackles of "objective" fact-telling in their legal memoranda and briefs and develop a more textured, point-of-view narrative to narrow the empathetic gap between client and reader.[182] Those point-of-view nar-

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according to this "positionality" perspective, knowledge itself is radically identity-based, experiential, and situational, and thus the discourse of outsiders is the *only* reliable report of their oppression. *See* Halewood, *supra* note 159, at 19-25. "[I]n an epistemological world populated by multiple forms of consciousness, 'white men can't jump'" – they can't "know" the realities of oppression despite their best efforts and intentions. *Id.* at 6. "[K]nowledge of the mechanisms of subordination can best be gained from below, that is, by those occupying a subjugated social location, by those who *embody* subjugation." *Id.* at 20; *see also* Matsuda, *supra* note 132, at 324-26.

To credit this balkanization of identity epistemologies would be severely to doubt the ability of legal decision-makers to empathize with, comprehend, and credit the perspective of outsiders. *See* Halewood, *supra* note 159, at 10. "Because the distance between white male scholars [and judges] and oppression is experiential [and epistemic], empathy and good intentions on the part of such scholars [and judges] are not sufficient to bridge it." *Id.*; *see also* James M. O'Fallon & Cheyney C. Ryan, *Finding a Voice, Giving an Ear: Reflections of Masters/Slaves, Men/Women*, 24 GA. L. REV. 883, 893 (1990) ("Good intentions alone cannot dissolve the institutionalized deafness that constitutes [male] ideology."). Under these circumstances, "the best scholars, [lawyers, or judges] can hope for is to work together and to combine perspective, each contributing to an improved picture of the social whole." Halewood, *supra* note 159, at 7. This epistemological fragmentation might work for scholarly discourse, the true subject of Halewood's analysis, but it doesn't hold much promise for critical discourse aimed at convincing deeply conservative legal audiences and decision-makers. In the real world, we must hope for the possibility of empathy and partial sharing of vicarious realities.

181. *See* Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 808-33 (1995) (suggesting that civil rights litigators consider drafting pleadings with elements such as drama, client narrative, metaphor, irony, poetry, homilies, oxymorons, the free word, the lawyer's own voice, and jazz).

182. Some feminist briefs, especially amicus briefs, have collected individual stories from many women in an effort to show both the individuality and the rep-

ratives might be strengthened by blending cinemagraphic themes or other cultural narratives in their factual matrix,[183] as long as they are progressive instead of regressive. Likewise, the structure of narrative might provide more of the thematic structure of the "legal" argument section itself, so that doctrine and precedent are blended within a system of narrative coherence that calls for justice.

Relying on and yet confronting narrative structures by which jurors, judges, and other decision-makers understand the world,[184] lawyers also might construct more critical stories which challenge the prevailing master stories of race and gender[185] in favor of transformative, subversive stories of rebellion, redress, liberation, and equality. The welfare mother becomes a conscientious parent forsaking work outside the home in favor of important child-rearing work inside the home.[186] A dangerous Black youth becomes a basketball player, a struggling but increasingly successful student who

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resentativeness of women's experiences of oppression. *See, e.g.*, Ruth Colker, *Feminist Litigation: An Oxymoron? – A Study of the Briefs Filed in* William L. Webster v. Reproductive Health Services, 13 HARV. WOMEN'S L.J. 137, 170-71 (1990) (providing extensive testimony from women who had abortions); Sarah E. Burns, *Notes from the Field: A Reply to Professor Colker*, 13 HARV. WOMEN'S L.J. 189, 198 (1990) (describing a speak-out brief summarizing personal accounts from 40,000 women); Kathryn Abrams, *Feminist Lawyering and Legal Method*, 16 L. & SOC. INQUIRY 373, 393-94 (1991) (discussing Martha Minow's use of short statements from 36 pro-choice religious groups); Lynn M. Paltrow, *Amicus Brief:* Richard Thornburg v. American College of Obstetricians and Gynecologists, 9 WOMEN'S RTS. L. REP. 3, 12-24 (1986) (containing over 40 women's experiences with legal, illegal, or unavailable abortions).

183. *See* Philip N. Meyer, *"Desperate for Love": Cinematic Influences upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721, 740-46 (1994) (discussing, organizing and presenting closing argument with themes and style of screenplay).

184. *See generally* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING (Reid Hastie ed., 1993) (introducing the major themes of juror decision-making and the research that has been conducted to evaluate their reality).

185. *See generally* RACE-ING JUSTICE, EN-GENDERING POWER (Toni Morrison ed., 1992) (analyzing Anita Hill's accusations of sexual harassment in a racially charged context); *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1279 (1992) (also analyzing Anita Hill's accusations of sexual harassment); Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581 (1993) (describing racial master stories and their effects on cross-cultural conflict between communities of color).

186. *See generally* JILL DUERR BERRICK, FACES OF POVERTY: PORTRAITS OF WOMEN AND CHILDREN ON WELFARE 6-9 (1995) (giving an historical account of the transformation of the popular stereotype of the welfare mother from that of the deserving poor who should be encouraged and helped to stay at home with their children, to that of the undeserving, freeloading poor with questionable morals).

helps to support his family.[187] Even transformative stories, however, must satisfy culturally primed longing for coherence, comprehensibility, and plausibility.[188]

D. Detecting, Avoiding, and Confronting Appeals to Bias

Another critical discourse strategy, whether using narrative or not, tackles the dilemma of ubiquitous bias. First, to address the dilemma of bias at all, the legal writer must learn how to diagnose both direct and indirect appeals to bias, not only in one's own writing but in the writing of others.[189] What tropes of language, rhetorical flourishes, codes, metaphors, and symbols catalyze latent cognitive and emotional bias, and how do they do so? Second, in her "offensive" strategy "against" the other side, the advocate must weigh the value of making "persuasive" appeals to the negative biases of readers against the countervailing value of avoiding such appeals to culturally primed inheritances of classism, racism, sexism, and homophobia.[190] Third, in her "defensive" strategy, in characterizing and recharacterizing her own client, the advocate must figure out how to successfully counteract overt and covert appeals to the biases of decision-makers.[191] She must do so in a legal regime which, as a matter of color-blind formalism, says that bias (and counterbias) has no place whatsoever, at the same time that there is routine tolerance of rampant appeals to bias. Fourth, not only must the advocate accurately detect corrosive discourse strategies aimed at her client, she also must consider whether to respond with counterappeals to "positive" bias, e.g., victim status or valor-

187. *See generally* ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE (1991) (chronicling the lives of two boys who grew up in a Chicago housing project).

188. *See* Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 72-74 (1994). Professor Sherwin makes a passionate and deeply sophisticated argument for what he calls affirmative postmodern storytelling. *See id.* at 72-80. Rejecting the simplicities of traditional linear storylines and the nihilism of postmodern narrative implosion, Sherwin suggests that affirmative postmodern storytellers embrace multiplicity and complexities of details at the same time that they meet their audience's expectations of a shared cultural narrative. *See id.* "For the affirmative postmodern story to work, . . . there must be a coherent storyline to cling to." *Id.* at 77. Although many culturally sanctioned stories are structured by existing power relationships and inequalities, other familiar stories evidence resistance, egalitarianism, and altruism.

189. *See infra* Part III.D.1-4.

190. *See infra* notes 193-223 and accompanying text.

191. *See infra* notes 224-233 and accompanying text.

ized identity.[192] If these responses are inappropriate, the advocate must discover other, more effective countermeasures that help to level the discursive playing field.

1. *The Ubiquity of Cognitive Bias and Social Stereotypes*

Human action and language is organized around the efficiencies of cognitive bias – quick decisions based on scant evidence.[193] Some of this bias is organized to support existing systems of purposeful oppression, like racism, but the central core of cognitive bias is simply organized around the prototype, narrative, and categorical forms of subconscious reasoning that all of us must use to navigate the physical and social world.[194] Unfortunately, from the earliest age, most of us learn a robust repertoire of negative social stereotypes.[195] Some of these stereotypes become crystallized into a set of ideological commitments, and a system of purposeful discrimination and oppression, like white supremacy,[196] patriarchy,[197]

192. *See infra* notes 239-249 and accompanying text.

193. *See* Baker, *The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, *supra* note 31, at 310-13.

194. *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990) (offering an extensive analysis of the "dilemma of difference" – the pervasiveness of categorization/difference-making, especially in the context of systems of oppression); Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 750-59 (1995) (discussing how automatic, culturally imposed responses to outsider groups can by counteracted by activating conscious, egalitarian belief systems and other self-monitoring practices); Jay Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 696-705 (1989) (describing our recurrent use of cognitive paradigms); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1166-1217 (1995) (analyzing how discriminatory employment decisions usually result from a variety of unintentional categorization and inference-building errors which characterize routine human cognition); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-44 (1987) (discussing the prevalence and persistence of subconscious racism and concluding "we are all racists"); Steven L. Winter, *Transcendental Nonsense, Metaphorical Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1114-59 (1989) (discussing experientialist cognition and idealized cognitive models which help explain the efficiencies of cognitive shortcuts).

195. *See* Armour, *supra* note 194, at 741-42 n.34 (reporting research that children learn negative associations – stereotypes – by the age of three to four, well before they have the cognitive skills to counteract them). Once humans gain any basis for a group identity, they seem immediately to attribute favorable features to in-group members and negative features to out-group members. *See* Krieger, *supra* note 194, at 1191-93.

196. For a powerful account of how whites, even poor whites, participated in constructing an ideology of racial supremacy, see DAVID R. ROEDIGER, THE WAGES

and heterosexism.[198] These clearly articulated ideological prejudices certainly have found their way into courtrooms, legal texts,[199] and our political discourse. More frequently, however, these childhood stereotypes are reinforced, or culturally primed, repeatedly until they become habitual, and therefore unconscious, parts of our mental processes.[200] From the shrouded depths of our subconsciousness, these well-structured systems of "white" magic frequently overcome our more conscious commitments to egalitarianism.[201]

In order to activate a stereotype's negative bias component, humans are not limited to direct appeals to pejorative terms and ideologies of superiority. Instead, code words, associated secondary attributes, and other metonymic devices can activate latent, subconscious prejudice.[202] The concept of metonymy – the part evokes the whole – is particularly powerful in elucidating the cognitive processes of bias. First, metonymy describes how the whole group can be tarnished by the negative behavioral and attitudinal features of particular group members.[203] In essence, the negative

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OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991).

197. *See, e.g.*, MACKINNON, *supra* note 161 (investigating how stereotypes and social power shape a patriarchical society).

198. *See, e.g.*, Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 607-33 (1992).

199. See, for example, *Bowers v. Hardwick*, 478 U.S. 186 (1986), *Bradwell v. Illinois*, 83 U.S. 130 (1872), and *Dred Scott v. Sanford*, 60 U.S. 393 (1856), for only the briefest sampling of grotesque stereotypes opined at the level of Supreme Court decisions.

200. *See* Armour, *supra* note 194, at 750-59. Not only are these prejudices frequently "primed" by an elaborate array of nearly invisible, immediate cultural messages, they also have become habituated as "chronically accessible social constructs." John A. Bargh, *Does Subliminality Matter to Social Psychology? Awareness of the Stimulus Versus Awareness of Its Influence*, *in* PERCEPTION WITHOUT AWARENESS: COGNITIVE, CLINICAL, AND SOCIAL PERSPECTIVES 236, 242 (Robert F. Bornstein & Thane S. Pittman eds., 1992) (emphasis omitted). We subconsciously "call on" these primings and chronic cultural constructs when interpreting otherwise ambiguous social situations. *See id.* at 242-43. For example, in one set of experiments, "an ambiguously aggressive act was seen as more hostile when performed by an African-American than when a white was the perpetrator – and this was true of both African-American as well as white perceivers." *Id.* at 243-44.

201. *See* Armour, *supra* note 194, at 739. Under the pressure of civil rights activists and other ideologies of equality, most Americans subscribe to a conscious system of racial equality. *See id.*

202. *See* Winter, *supra* note 194, at 1149-50. According to Steven Winter, some of our most common cognitive models make use of metonymy, where reference to a salient part calls forth the whole. *See id.*

203. *See* Winter, *supra* note 128, at 2234 n.32. "What occurs in the case of

feature of an individual is considered to be representative – it is generalized to be characteristic of the entire, now despised social group.[204] Thus, the first form of metonymy, the negative exemplar (e.g., a youth gang member), comes to epitomize the whole outsider group (youth of color).

Another form of cognitive metonymy is even more insidious. Here a single element or symbolic representation of a stereotype can elicit the entire negative schema and aversive reaction.[205] Thus, describing Bernard Goetz's victims as "predatory"[206] or describing Rodney King as "uncontrollable"[207] conjures the aggregating stereo-

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stereotypes is that attributes which are experienced with respect to some members of a social group are ascribed to all. Stereotypes are metonymies because the experientially grounded part (the attributes of some) come to stand for the whole (the entire social group)." *Id.* (emphasis omitted). One explanation for the excessive weight given to the negative exemplar is that it is more salient and thus more memorable. *See* Krieger, *supra* note 194, at 1193-95.

204. *See* R. NISSBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 18 (1980) (describing two of the most dominant cognitive biases – the representativeness and availability heuristics used to classify and compare events and people). The use of these heuristics is "generally automatic and nonreflective and notably free of any conscious consideration of appropriateness." *Id.* The representativeness heuristic helps us reach quick judgments, but according to old categories. *See id.* at 24-28. Thus, bias persists through selective attention, cognitive inertia, and belief perseverance. *See* Krieger, *supra* note 194, at 1199-1211 (discussing how cognitive stereotypes "cause" discrimination, particularly through processing errors of representativeness, salience, and schema activation).

205. *See* Armour, *supra* note 194, at 758. "[I]t seems that the black stereotype must be constructed cognitively in such a way that activating one component of the stereotype simultaneously primes or activates the remaining closely associated components as well." *Id.* Armour speculates that cognitive psychologists' theory of associative network – of connected, mutually reinforced neural pathways – helps explain this cognitive process. *See id.* at 758-59 n.122. Krieger refers to this brand of cognitive metonymy as one of "illusory correlation" where there is a subjective impression of a strong correlation between group membership and a particular trait. Krieger, *supra* note 194, at 1195-98. "[O]ne can conclude that stereotyped conceptions of minority groups could result from illusory correlations between two salient variables: minority group membership and negative behavioral events." *Id.* at 1197.

206. *See* Armour, *supra* note 194, at 765-66 (discussing GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNARD GOETZ AND THE LAW ON TRIAL (1988)).

207. *See, e.g.*, Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1747 (1993) (discussing depictions of Rodney King as animal-like and subhuman); D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 GEO. L.J. 437, 493 (1993) (recounting current uses of the "old story of blacks as beasts or animals"); Lawrence Vogelman, *The Big Black Man Syndrome: The Rodney King Trial and the Use of Racial Stereotypes in the Courtroom*, 20 FORDHAM URB. L.J. 571, 576-77 (1993) (discussing the defense tactic of demonizing Rodney King, the individual, as the dangerous, irrational Big Black Man).

type of dangerous Black men. Likewise, describing Anita Hill as delusional conjures the stereotype of the hysterical, irrational female.[208] Thus, the second form of metonymy – from partial signifier to a total stereotype – helps to explain one of the most common subterranean moves of contemporary bias – it latches onto secondary characteristics or alleged behavioral attributes as a justification for a discriminatory decision: "I fired him because he was lazy, not because he was Black."[209] Because humans look for explanations of their own decisions (but do so poorly), they frequently attribute their explanation to well-associated "defects" in others.[210] In doing so, they are not really reporting the actual basis of their decision, they are replicating the plausible, socially-sanctioned explanations frequently used in such circumstances.[211]

2. *Roadblocks in Developing a Less Biased Advocacy*

Despite the pervasiveness of cognitive bias, it certainly seems appropriate to write in ways that limit and counteract appeals to unconscious bias – to adopt the equivalent of hate speech codes[212] for lawyers' writing – a code that addresses both overt and covert prejudice. Counterbalanced against the deeply embedded convention of Machiavellian adversarialness are moral values of social justice, egalitarianism, and empowering "outsiders." These alternative values condemn use of racist, misogynist, and other oppressive stereotypes. These values condemn direct and indirect appeal to the bias of decision-makers. These values limit the arsenal of the advocate to those arguments that do not prey on the privilege of some and the oppression of others. Under this alternative system of values, lawyers must be acutely aware of the denotation and connotation of their words. Their self-reflection and self-restraint would narrow the acceptable range of advocacy so as to avoid unprincipled harm to others. Instead, their advocacy focuses on exposing and transforming linguistic ideologies and symbols of superiority and inferiority.

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208. *See* RACE–ING JUSTICE, EN–GENDERING POWER, *supra* note 185, at 264-65.

209. *See* Bargh, *supra* note 200, at 246. In one experiment, John Bargh found that subjects showed "stereotypic ratings and impressions of the target not as a function of the target's sex *but as a function of the sex-type of the target's behavior.*" *Id.*

210. *See* Krieger, *supra* note 194, at 1213-16.

211. *See id.*

212. *See generally* MARI MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993).

Although the propriety of appeals to bias in legal writing is not widely addressed, a lively debate has developed among a few criminal law commentators about the propriety of efforts to regulate overzealous advocacy, most of whom seem to favor regulation.[213] At least one commentator, however, objects to this regulation, arguing that it results in an unavoidable dilution of the duty of zealous advocacy on behalf of impoverished criminal defendants who are already "under-represented."[214] This debate patterns the debate between First Amendment proponents and anti-discrimination proponents concerning hate speech.[215] The problem for practicing lawyers, however, is even more nuanced than these debates suggest. How are "overzealous" appeals to bias diagnosed? How are "subtle," implicit appeals to bias to be judged? When, if ever, are such appeals justified and with what limitations?

As laudatory as anti-bias goals might seem, the ability to articulate and enforce a new professional or personal norm is extraordinarily difficult in practice. The difficulties of avoiding and/or responding to appeals to bias are complicated by at least two factors: (1) the prevailing ethic of Machiavellian adversarialness,[216] particularly the permeability of the current relevancy standard; and (2) the backlash effect of the color-blind jurisprudence movement that punishes efforts to counteract oppressive stereotypes as vigorously as efforts to perpetuate those stereotypes.

Under the prevailing adversarial ethic, lawyers have a great freedom in selecting stories, themes, contentions, and arguments. This choice is largely unfettered by legal norms other than the elusive and imprecise norm of relevance and the outer boundaries of excessive advocacy – little else is unlawful or unethical short of

213. See Ellen Yaroshefsky, *Balancing Victim's Rights and the Vigorous Advocacy for the Defendant*, 1989 ANN. SURV. AM. L. 135, 153 (1989); Gordon Van Kessell, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 527-31 (1992); and Paul Lowell Haines, Note, *Restraining the Overly Zealous Advocate: Time for Judicial Interventions*, 65 IND. L.J. 445 (1990), for arguments favoring regulation of appeals to bias.

214. *See* Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 21-44 (1994).

215. *See* J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 376-77; Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 433-36; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321-23 (1989); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 489-94; ACLU Policy Statement, *Free Speech and Bias on College Campuses* (Oct. 13, 1990) (on file with author).

216. *See supra* note 126 and accompanying text.

murder, material misrepresentation, destruction of evidence, bribery of judges, or some other gross subversion of legal process. Although this relevance norm purportedly serves as a barrier to separate material facts and law from the immaterial, relevance instead works to regulate only the grossest appeals to bias, e.g., the prosecutor's statement that a local Latino drug courier is the lackey of Colombian drug lords.[217]

But the relevance barrier is permeable with respect to the corrosive effect of indirect appeals to stereotypes and master stories of race, gender, class, sexual orientation, and disability. By code words, connotation, and metaphor, the "skilled" advocate can construct his or her party opponent around the cultural icons of race and gender: Anita Hill becomes a woman scorned or a woman deranged;[218] Rodney King becomes an enormous black man high on drugs speeding towards the suburbs.[219] The lawyers who are subtlest in fashioning their appeals to bias, those who seduce the decision-maker without raising suspicion, are credited with being the most skilled. Although these lawyers are ethically constrained in their ability to bribe a juror with money,[220] they are presently unconstrained to bribe one with "laundered" racist fear or misogyny.[221] Their laundering is harder to trace because of the power and opaqueness of the dominant culture and because of the subconsciousness of our own biased cognitive processes.

In response to the dilemma posed by lawyers' appeals to bias, the American Bar Association is considering, and several jurisdictions have adopted, ethical rules "regulating," but not eliminating, the practice. Under the ABA proposal,

it is professional misconduct for a lawyer to . . . manifest

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217. *See, e.g.*, United States v. Edwardo-Franco, 885 F.2d 1002, 1010 (2d Cir. 1989) (dismissing and remanding because of prosecutor's references to murders in Colombia); Commonwealth v. Gallego, 542 N.E.2d 323, 325-27 (Mass. App. Ct. 1989) (ordering new trial because of the prosecutor's attempt to sway jury by references to public anxiety about Colombian drug trafficking); Riascos v. Texas, 792 S.W.2d 754, 758-59 (Tex. Crim. App. 1990) (concluding that defendant received ineffective assistance of counsel because counsel failed to object to references to the defendant as an illegal Colombian alien).

218. *See generally* RACE–ING JUSTICE, EN–GENDERING POWER, *supra* note 185.

219. *See* Vogelman, *supra* note 207, at 576-77.

220. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980) ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law. . . ."); *id.* DR 7-102(8) (stating that "a lawyer shall not . . . [k]nowingly engage in . . . illegal conduct").

221. *See generally* Nilson, *supra* note 214.

> by words or conduct, in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status. This paragraph does not preclude legitimate advocacy with respect to the foregoing factors.[222]

Unfortunately, the ABA standard does not eliminate the problem of appeals to bias, but rather rationalizes it under the rubric of "legitimate advocacy." But what would make such appeals legitimate – mere relevance? If so, what would make race, gender, class, or sexual orientation "relevant" to the controversy? How far could one go even if "legitimate advocacy" were appropriate? Are indirect, subtle appeals through coded words, phrases, and metaphors more "legitimate"? Is appeal to "bias" against non-target groups – whites, men, heterosexuals, the L.A. police department – more legitimate than appeals against target groups?[223] As must be clear, the proposed regulation does little to guide principled choices between Machiavellianism and non-biased advocacy.

The difficulties in responding to bias are even more complex because of the backlash movement of color-blind, gender-blind, sexual orientation-blind, and class-blind jurisprudence. As Jody Armour documents, many occasions exist where courts condemn responsible efforts to countermand the pernicious effects of cultural bias.[224] He attributes this condemnation to the irrational application of color-blind formalism, a formalism which states that "race has no place in the courtroom."[225] Armour urges the courts, however, "to distinguish between rationality-enhancing and rationality-subverting uses of racial referents," because all references to

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222. ABA House of Delegates, Reports with Recommendations to the House of Delegates, Nos. 101, 104 (1994); *see also, e.g.*, MASS. CANONS OF ETHICS AND DISCIPLINARY RULES DR 7-106(C)(8) (1997) (permitting "legitimate advocacy" only "when race, sex, national origin, disability, age, or sexual orientation, or another similar factor, is an issue in the proceeding"); N.J. RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1984); COLO. RULES OF PROFESSIONAL CONDUCT Rule 1.2(f) (1993). The existing ABA standards merely prohibit misrepresentations of fact and references at trial to matters that are not relevant or not supported by admissible evidence. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5), DR 7-106(C).

223. *See* Valerie A. Batts, *Modern Racism: New Melody for the Same Old Tunes* 1 (1989) (unpublished manuscript, on file with author). "Old fashioned racism involved behaviors, practices and attitudes that overtly defined blacks as less than whites and thus entitled them to fewer of society's benefits." *Id.*

224. *See* Armour, *supra* note 194, at 734-36.

225. *Id* at 738.

disadvantaged groups are not equal.[226] Group references historically have situated current cultural meanings depending on use, audience, and purpose.[227] Armour draws on Lawrence's "cultural meaning" test[228] and Johnson's "racial imagery" test[229] to describe those usages which perpetuate and exploit current prejudices against outsider groups.[230] He distinguishes these usages, which he

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226. *Id.*

227. *See id.* at 767.

228. *See id.* at n.161 (citing Lawrence, *supra* note 194, at 355-56). "[G]overnment conduct would be 'evaluated to see if it conveys a symbolic message to which the culture attaches racial significance'." *Id.*

229. *See* Armour, *supra* note 194, at 767-68 n.162 (citing Johnson, *supra* note 207, at 1799-800). Armour cites Johnson's test as follows:

> "Racial imagery" is any word, metaphor, argument, comment, action, gesture, or intonation that suggests, either explicitly or through commonly understood allusion, that
>
> (1) a person's race or ethnicity affect his or her standing as a full, capable, and decent human being; or
>
> (2) a person's race or ethnicity in any way affects the credibility of that person's assertions; or
>
> (3) a person's race or ethnicity in any way affects the likelihood that he or she would choose a particular course of conduct whether criminal or noncriminal; or
>
> (4) a person's race or ethnicity in any way affects the appropriate sanctions for a crime committed by or against him or her; or
>
> (5) a person's race or ethnicity sets him or her apart from members of the jury, or makes him or her allied with members of the jury or, more generally, that a person's race or ethnicity allies him or her with other persons of the same race or ethnic group or separates him or her from persons of another race or ethnic group.
>
> Racial imagery will be conclusively presumed from the unnecessary use of a racially descriptive word.
>
> Where a metaphor or simile uses the words "white," "black," "brown," "yellow," or "red"; where any comparisons to animals of any kind are made; or where characters, real or fictional, who are strongly identified with a racial or ethnic group are referred to, racial imagery will be presumed, subject only to rebuttal through proof that the term in question could not have racial connotations with respect to any witness, defendants, attorney, or judge involved in the case.
>
> That a speaker disclaims racial intent, either contemporaneously or at a later date, shall have no bearing upon the determination of whether his or her remarks or actions constitute a use of racial imagery.

Id.

Contrary to Armour's intended use of Johnson's test, the test, on its face, would prohibit prophylactic references to race as well as prejudicial ones. Of the two tests, Lawrence's is probably more nuanced because it resists underinclusive categories and because it clearly distinguishes between hegemonic and subversive references to outsider groups.

230. *See id.* at 766-72.

would prohibit,[231] and those which attempt to counteract or countermand culturally and cognitively primed systems of negative stereotype.[232] He would tolerate the latter as long as they did not themselves unfairly tip the scales of justice.[233]

3. Diagnosing and Confronting Appeals to Bias

Unfortunately, the bias/relevancy debates and the color-blind jurisprudence debates do not illuminate diagnostics for detecting appeals to bias, let alone the discourse strategies for recalibrating justice. In the era of modern racism when appeals to racial superiority are in coded words (e.g., affirmative action), in coded stereotypes (e.g., welfare cheats), and in secondary characteristics in general (e.g., "aggressive" Black men), we must find diagnostics and countermeasures that work.

Thus, in order to avoid unprincipled appeals to bias or to counteract such appeals by others, the critical lawyer must first develop heuristics for detecting bias, such as: (1) having sympathetic readers check for bias, (2) using client/role-reversal to change perspective, and (3) using target-reversal to change imagery from target to non-target groups. As an initial diagnostic strategy, lawyers simply could show legal text to other readers asking them to be alert for direct and indirect appeals to oppressive bias. This technique holds promise, especially if one can rely on sympathetic

231. *See id*; *see also* Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 805-09 (1994) (arguing against the admissibility of statistically significant, race-based evidence of reasonable fear in cases involving self-defense).

232. *See* Armour, *supra* note 194, at 768 ("[R]eferences that challenge the factfinders to reexamine and resist their discriminatory responses enhance the rationality of the fact-finding process.")

233. *See id.* Armour does not exhaust all the ways in which the scales might be unfairly tipped in the opposite direction. First, legal decision-makers are not always from non-target groups; judges and juries are becoming increasingly diverse. Given the presence of "outsider" judges and juries, the race, gender, and sexual orientation of the judge and jury members may have some influences on which images affect whom. Second, some "positive" images can perform their own brand of long-term cultural harm despite their short-term benefit for a given client. Third, there are real limits on our current ability to recalibrate our scales of justice. One of the most problematic consequences of our inability to detect our patterns of subconscious bias is that we do not know how "far" we must move our judgment to counteract them. *See* Bargh, *supra* note 200, at 238-39. For example, is a suspect female job applicant automatically qualified for a job (using relevant criteria) simply because we don't *know* how much we must challenge our initial negative stereotypic response?

"outsider" colleagues to do this reading, though this chore imposes additional, perhaps unfair burdens on outsiders to educate insiders. As a second strategy for diagnosing advocacy images, themes, and contentions, lawyers might use role reversal to adopt the perspective of the other side in the case and to discover if the proposed image or arguments seem unbiased according to an "ouch" test. Experiencing a radically different, role-reversal response to a charged phrase should remind lawyers to question the cultural content of their own discourse. Finally, as a third strategy, the lawyer could reverse the direction of the proposed advocacy from a target/outsider to a non-target/insider. For example, if we doubted the credibility of the image that a "white" Rodney King was out of control as he was being beaten by four police officers, the lawyer should eschew such imagery for Rodney King as a Black man. In general, if we doubt the "truth" of the characterization as applied to a non-target group member, then we would choose not to use the image in our advocacy about a target group member unless the image is accurate in a vital way.

Even when the advocate has figured out how to navigate the cognitive, cultural, and regulatory contexts that constrain our discourse practices and even where the advocate has refined diagnostic strategies for detecting biased writing, the advocate still must develop robust discourse strategies for counteracting such bias. The clearest prophylactic strategy requires bringing the bias to the attention of the reader. In adopting strategies to counteract bias, the advocate can neither rely simplistically on appeals to positive bias, like victimization, nor on the glamour of a valorized client. Instead, we need to discover more nuanced strategies, strategies which contextualize the client's character and behavior – warts and all; strategies which pluralize the monolithic stereotype of the client group; and strategies which evoke conscious application of more egalitarian social values.

Although the color-blind jurisprudence movement may complicate efforts to bring bias to the attention of jurors, there may be some leeway to confront bias in written advocacy aimed at judges. Research in social psychology supports the conclusion that bringing bias to the decision-makers' attention helps to ameliorate the corrosive effect of latent stereotypes.[234] Armour, for example, re-

234. *See* Armour, *supra* note 194, at 765 ("As the recent research in social cognition demonstrates, avoiding stereotype-congruent responses requires conscious effort by the decisionmaker.").

ports experiments proving the benefit of gender-consciousness: "[W]hen the subjects were reminded of gender, they checked their stereotype-congruent responses more assiduously than when gender was less salient."[235] Researchers on subliminal processes have similarly concluded that people can counteract the social judgment effects of their prejudices *if* they are aware of the potential effects of those prejudices and *if* their values or motives so dictate.[236] Therefore, the premier discourse strategy to confront negative bias is a discourse strategy that says, "There's an elephant in the courtroom (or the judicial or legislative chambers); don't let it trample you." The direct reference to the possibility of bias should, at the same time, encourage readers to apply justice-enhancing principles of egalitarianism and social justice. If we appeal to the higher values which most people hold as an important part of their self-conception, we might be pleasantly surprised.

Two other strategies hold additional promise in counteracting bias. First, we should encourage decision-makers to use "fine-grain" analysis – to pay careful, methodical attention to the many details of fact, law, and policy before they make their judgments. As a general proposition, fine-grain analysis is less subject to the mistakes of bias than holistic, global judgment.[237] Secondly, as part of the same empathetic strategy implicit with outsider narrative, the writer should encourage the reader to change places with the outsider, to identify as much as possible with the realities of her life and perspective.[238] Just as race-reversal and client-reversal can help

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235. *Id.* at 761. Gender was made more salient by increasing the percentage of women in the decision-group. *See id.*

236. *See* Bargh, *supra* note 200, at 244-45; Thane S. Pittman, *Perception Without Awareness in the Stream of Behavior: Processes that Produce and Limit Nonconscious Biasing Effects, in* PERCEPTION WITHOUT AWARENESS, *supra* note 200, at 277, 288.

237. *See* David A. Schum & Anne W. Martin, *Formal and Empirical Research on Cascaded Inference, in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING, *supra* note 184, at 136, 160-67. "[A]s tasks are further decomposed, there is no chance that crucial evidence items, or factors concerning evidence items, will be overlooked, discarded, or 'integrated out.'" *Id.* at 162.

238. *See* Winter, *supra* note 128, at 2277. Winter comments:

> Through the process of projection that makes possible narrative understanding, the audience will imagine itself confronted by these experiences; it will be challenged to make sense of them through its own past experiences in order to understand the story-events as a coherent story-experience of its own. . . . The audience 'lives' the story-experience, and is brought personally to engage in the process of constructing meaning out of another's experience.

Id.; *see also* French, *supra* note 133, at 427, 433.

in diagnosing bias, they can help in recalibrating bias as well.

4. Avoiding Appeals to "Positive" Bias

After attempting to counteract negative bias, one of the most difficult remaining judgments facing a critical writer will be whether to make appeals to "positive" bias which might occasionally help a client/victim to obtain short-term sympathy from a decision-maker.[239] Even though blaming the victim is a national pastime,[240] it is also true that "preserving fetal life," "rescuing child abuse victims," "protecting the little woman," "saving the disadvantaged," "accommodating the handicapped," and "safeguarding the elderly" are all cultural images with some positive salience which might benefit a "victim."[241] For example, some elderly citizens are made to feel vulnerable to crime in general and some are in fact specially targeted for purse-snatchings, fraud, and other crimes. As a result, it might be both effective and fair to argue that a landlord has a special obligation to protect "vulnerable" elderly tenants from third-party crime.

Despite being "effective," the stereotype which gains partial advantage in personal injury litigation might come back to bite the client later on if she attempts to maintain more independent living arrangements.[242] The temporary victory gained in a victim-based disability claim might undermine the empowerment engendered

239. *See* Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1413-15 (1993). Minow acknowledges that victim-talk can elicit a favorable response from others because there is a moral requirement to respond to innocent suffering. *See id.* at 1413. Moreover, victimhood has developed a stylish chic which moves some to claim victimhood for its vicarious pleasures of moral immunity, solidarity, and emotionalism. *See id.* at 1413-15.

240. *See, e.g.*, WENDY KAMINER, I'M DYSFUNCTIONAL, YOU'RE DYSFUNCTIONAL: THE RECOVERY MOVEMENT AND OTHER SELF-HELP FASHIONS (1992); WILLIAM RYAN, BLAMING THE VICTIM 3 (1971); Carol Tavris, *Beware the Incest-Survivor Machine*, N.Y. TIMES, Jan. 3, 1993, § 7 at 1 (book review); John Taylor, *Don't Blame Me! The New Culture of Victimization*, NEW YORK, June 3, 1991, at 26, 28.

241. *See generally* Minow, *supra* note 239, at 1428-29 ("Victimhood can solicit expressions and acts of sympathy, relieve responsibility, promote a sense of solidarity, and cultivate compassion . . . ."). In the courtroom, sympathy and compassion can translate into judgments and dollars. *See generally* Mansfield, *supra* note 129, at 908-13 (arguing that many poverty law clients are both victimized and dependent and that responsible advocacy requires bringing these equitable elements to the attention of legal decision-makers).

242. *See* Minow, *supra* note 239, at 1429. There is a danger of pity, condescension, and backlash all culminating in multiple charges of cross-victimization. *See id.*

by prior involvement in a political movement of people with disabilities.[243] Sympathy turns to pity, support turns to condescension, claims of victimization turn to cross claims of prior victimization.[244] But the dangers of victim-talk are not all externally imposed – internally, victim-talk can sap human agency from the victim as well. "[C]ontemporary victim talk tends to suppress the strengths and capacities of people who are victims. Victim talk can have a kind of self-fulling quality, discouraging people who are victimized from developing their own strengths or working to resist the limitations they encounter."[245]

In addition to second-guessing victim-talk, the advocate must reconsider strategies which would valorize and essentialize the client or client group.[246] Few people are saints. Few groups are systematically "better" than other groups in human virtue. The client who reads "too good to be true" probably won't be credible to the decision-maker. Moreover, not only does valorization belie the full complexity of the individual client, it inevitably sets her apart, as an exception, from the despised group of whom she is now a favored member. Therefore, one discourse strategy, however counterintuitive it seems, is to present the client warts and all and, if necessary, to contextualize those warts.[247] A second discourse strategy is to pluralize the otherwise stereotypic image by making it clear that there is infinite variety within the group: There are Princess Dianas and Mother Teresas, and myriad women – white, black, yel-

243. *See* Lucie E. White, *Mobilizations on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 547-57 (1987-88).

244. *See* Minow, *supra* note 239, at 1430 ("[I]n the victim[-]talk world, people exchange testimonials of pain in a context over who suffered more. Paradoxically, this blurs distinctions between degrees of harm, leveling all suffering to the same undifferentiated plane of equal seriousness and triviality.")

245. *Id.* at 1429.

246. *See* Mansfield, *supra* note 129, at 914-18. "One of the major defects with a [reconstructive] poverty law theory . . . is its reliance on a romanticized and biblically based generalization of the poor that fails to recognize the normative, moral, ethical and legal differences in individual client's stories." *Id.* at 915.

247. *See* Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1990, 2039-41, 2057-71 (1995) (giving a deeply nuanced account of an "imperfect" foster mother's struggle to regain custody and to adopt her three sons); Williams, *supra* note 137, at 1195-96 (discussing the need to contextualize the life of a mother who scalded her child's hands almost to the bone). Two authors have demonstrated this strategy by contextualizing the character of Sethe in TONI MORRISON, BELOVED (1987) as a mother who killed her child in a desperate attempt to save the child from the brutalization of the slavemaster. *See* Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017, 1022-29 (1992); Tobin, *supra* note 170, at 239-42.

low, and brown, working-class and middle-class, high caste and low caste, urban and rural, young and old – in between.[248]

The client clearly has some say, in fact arguably the final say, in deciding whether to appeal to "favorable" bias or to an essentialized group portrait. Nonetheless, the judgment to do so has serious impact on the lawyer's ability to craft a more critical, less biased discourse. Even when personal stories of victimization are contextualized to address the historical, social, and cultural structures of public and private oppression, there are risks that a victim-based, critical discourse might do as much to undermine critical consciousness as to challenge cultural hegemonies. Even when a client is acknowledged to be one of many, if the many are all essentially the same, the pluralism of multiple identities and unique personal history and perspective of the individual are denied. Despite all of these complexities and contradictions in monitoring, diagnosing, regulating, and confronting appeals to favorable and unfavorable bias, the values of zealous advocacy should be tempered, where possible, by countervailing values of reducing bias and stereotyping.[249]

E. Developing a More Critical, More Feminist Dialogue

Because narrative's power can be subverted so easily and because not all legal audiences will accept the counter-hegemonic moves and appeals of outsider stories, critical legal writers might need to rely on linear "rationality" and more familiar forms of proof in developing a critical legal discourse. Similarly, because addressing appeals to bias may be treating the symptom rather than curing the disease of overzealous advocacy, critical legal writers may need to challenge the Machiavellian goal of winning at all costs – of routinely using discourse means which we otherwise might find abhorrent. Instead of addressing discourse bigotry in isolation, we should challenge the broader norm of over-strident

248. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 612-15 (1990) (asserting that "woman as victim" is a way to highlight women's unified existence and deny or minimize individual differences, thus perpetuating the sexist notion that "to be female is to be a victim").

249. *See* Hing, *supra* note 110, at 915-17, 922-38 (arguing that not only must discourse change, but advocates should direct racially charged disputes between communities of color to ADR to advance goals of coalition-building and racial harmony); Brook K. Baker, Teaching Values Through Legal Writing (1992) (conference paper for panel presentation Legal Writing Institute 1992, on file with the author).

advocacy – a norm, at its extremes, that favors hyperbole, negative imaging, and savaging one's opponent in pursuit of the Holy Grail of victory.[250]

1. Using Critical Rationality and Non-Local, Nonlegal Authority

As a matter of form, legal argumentation ordinarily requires proof and citation to authority that supports rhetorical propositions. Nonetheless, conventional legal writing is stultifying in its near total reliance on statutory language, legal holdings, and legal authority in general. To gain support for novel, challenging propositions, critical legal writers must turn to less traditional, but still familiar, sources of authority. For example, how far can they contort the dissents of progressive jurists to advance their claims for reform? Can they rely on international treaties and conventions[251] and human rights jurisprudence[252] for their legal authority? Where do they find nonlegal authority – moral,[253] philosophical, historical,[254] cognitive,[255] psychological,[256] linguistic,[257] sociological,[258]

250. This list itself is probably hyperbolic since most legal writing texts do not encourage exaggeration, character assassination, and ad hominem attack.

251. *See* Lee P. Breckenridge, *Protection of Biological and Cultural Diversity: Emerging Recognition of Local Community Rights in Ecosystems Under International Environmental Law*, 59 TENN. L. REV. 735, 775-85 (1992) (using international environmental law paradigms to recognize local communities' roles in protecting biological diversity and ecosystem viability and human rights paradigms to propose pluralistic partnerships in the management of environmental resources).

252. *See* Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995) (offering a remarkably robust discussion of multicultural/feminist perspectives on human rights discourse). Professor Lewis presents a nuanced discussion of the cultural clash between the fundamental rights and abolitionist perspective of many Western human rights and feminist scholars and more culturally sensitive African feminist perspectives that propose less "legal" intervention and more community building as a means for addressing widespread female genital mutilation. *Id.* at 33-45. Especially in her reliance on diverse human rights perspectives and her insistence on respecting African sources and local knowledge, Professor Lewis evidences a method of dialogue holding forth great promise for developing a more critical human rights jurisprudence. *See id.* at 48-55.

253. *See* Edward O. Correia, *Moral Reasoning and the Due Process Clause*, 3 S. CAL. INTERDISC. L.J. 529, 550-65 (1994) (canvassing several moral philosophers to revitalize the Due Process Clause of the United States Constitution).

254. *See* Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437, 444-93 (1988) (articulating an extended historical investigation of spousal support); Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury De Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777, 783-96 (1994) (investigating the history of ethnically constituted juries to show that an affirmative peremptory choice is necessary to

and cultural[259] – for their transformative arguments about what the law should be? How will the reports of ethnographers and anthropologists help advance complaints of cross-cultural oppression and differential justice?[260] How will empirical social science research and expert investigations – the scientific method in general[261] – serve to promote critical claims?

Assuming such untraditional support can be located, marshaled, and transformed to meet the needs of a critical discourse agenda, are there additional sequences and forms, as well as styles and voices of "rational" discourse, that advance the possibilities of social justice and legal change? Will judges accept new Brandeis briefs that are even more heavily footnoted to nonlegal sources or will there be increased reliance on expert testimony at trial? Can the rigors of scientific investigation and the novelties of different disciplines be reported concisely within the page limits of local

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create racially mixed juries).

255. *See* Winter, *supra* note 128, at 2230-71 (exploring the interplay between cognitive and narrative processes and the institutionalization of legal thought and structure).

256. *See* Lawrence, *supra* note 194, at 331-36 (discussing the psychological irrationality of racism).

257. *See generally* Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 WIS. L. REV. 761 (studying cognitive processing of bilingual jurors and concluding that it is both impossible to disregard Spanish in order to follow the English translation only and irresponsible and undemocratic to exclude bilingual persons from juries).

258. *See generally* Martha Minow, *Learning from Experience: The Impact of Research About Family Support Programs on Public Policy*, 143 U. PA. L. REV. 221 (1994) (exploring public policy-makers' failure to respond to social science findings).

259. *See* Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L. J. 769, 777-828 (1992) (identifying, assessing, and appraising "the dominant ideals of benevolence and discipline in the context of disability advocacy"); Judith Olans Brown et al., *The Mythogenisis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN'S L.J. 457, 467-37 (1996); Williams, *supra* note 137, at 1163-68 (investigating media accounts depicting egregious instances of child neglect to stigmatize welfare recipients and the close connection between those media accounts and contemporaneous legislative debate and legislative enactment aimed at reducing "welfare abuse and welfare dependency").

260. *See generally* SCIENCE, MATERIALISM, AND THE STUDY OF CULTURE (Martin F. Murphy & Maxine L. Margolis eds., 1995) (presenting an anthropological perspective that addresses pressing social issues – exploitation, inequality, violence, hunger, and underdevelopment).

261. *See, e.g.*, Daniel Givelber, *The New Law of Murder*, 69 IND. L. REV. 375 (1994) (reporting multiple studies on the imposition of the death penalty). For a more traditional analysis of the tension between science and law, see *Developments in the Law: Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1532-57 (1995).

rules?[262] At present, except in academic scholarship, legal writing specialists have done little to answer these questions about expanding and revitalizing the most common form of legal reasoning as it might advance a more critical purpose.

2. Challenging Strident, Adversarial Advocacy

Even with new forms and sources of proof, there are strong reasons to reject the norm of contentious advocacy. At the risk of essentializing male and female writers, we must challenge the whole genre of adversarial "male" writing which seems so strident, so positional, so hyperbolic, and ultimately so ill-suited to seeking justice. Is legal writing really mortal combat? Is it a pissing match – to use yet another male metaphor? Is it a series of legal sound bites, character assassinations, and legal spin-doctoring, all in the service of client victory by any means?

Even in its milder, less strident form, traditional adversarial advocacy uses a cool rationality[263] to hide a ferocious competitive instinct. Under the guise of rationality, "[a]rgument must be supported by relevant reasons and evidence that are internally consistent, and logical"; in being "rational," the advocate must adhere to the alleged "canons of rationality."[264] However, the six characteristics of effective argumentation – detail, multidimensionality, balance, subtlety, emphasis, and emotionality – are all enlisted in order to persuade someone of the merits of one's claims and the deficiencies of opposing claims.[265]

> Each attorney must attempt to establish his argument as the stronger, not the truer. To achieve this end, the lawyer does not necessarily argue purely logically[;] instead, he argues rhetorically. He must connect his argument to the concerns, biases, interests, morals, or to whatever appeals to his audience. He strengthens his verified argument by any means which can be imagined. The lawyer must strongly connect his argument . . . to the imagination of the [judge or] jury.[266]

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262. *See* Burns, *supra* note 182, at 200.

263. *See* Robert J. Condlin, *"Cases on Both Sides": Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 84 (1985) ("The minimum obligation of good argument is ordinary rationality.").

264. *Id.*

265. *See id.* at 84-89.

266. James E. Murray, *Understanding Law as Metaphor*, 34 J. LEGAL EDUC. 714, 730 (1984).

Although effective advocacy in pursuit of victory ordinarily requires lawyers to acknowledge and respond to opponents' arguments – to evidence balance[267] – they usually do so merely to refute those claims as insubstantial. Thus, a more critical, nonadversarial advocacy might tone down excessive rhetoric, decrease competitive posturing, and instead engage in a more serious legal, moral, and political dialogue with opponents and legal decision-makers. This less adversarial advocacy would decrease reliance on a Western male ideology of verbal combat and victory-at-all-cost for other cultural values, including those offered by non-Western and feminist perspectives.[268]

3. Adopting a More Feminist, Dialogic Discourse

In challenging overzealous advocacy, certain feminists have encouraged the adoption of a more feminist style of discourse – one that is more dialogic, nuanced, contextual, multidimensional, and less confrontational. This discourse style acknowledges complexity, multiplicity, and reality of conflicting, but valid, interests and perspectives. It invites exploration and nuanced discussion instead of bombastic threats and decrees to decide in a particular way. Although this less adversarial feminist style includes a formal written discourse, it is not limited to discourse in the courtroom; it also applies to problem-solving negotiations, alternative dispute resolution, and mediation processes.[269] Nonetheless, a lively dia-

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267. *See* Condlin, *supra* note 263, at 86-87. "Legitimate consideration on each side must be acknowledged . . . ." *Id.* at 87.

268. *See, e.g.*, Carolyn Jin-Myung Oh, *Questioning the Cultural and Gender-Based Assumptions of the Adversary System: Voices of Asian-American Law Students*, 7 BERKELEY WOMEN'S L.J. 125, 127-28, 136-39 (1992) (discussing Asian cultural values of interpersonal harmony, avoidance of direct conflict, and rejection of assertiveness that are at variance with the dominant adversarial ethic of the American legal system). Oh's research concludes that gender plays a larger role than ethnicity in Asian-Americans' aversion to adversarialism, at least in the limited study she undertook. *See id.* at 129.

269. *See, e.g.*, Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 44-49 (1985) (breaking new ground as the first legal feminist to use Carol Gilligan's analysis of a feminist ethic of care as the basis for a different kind of lawyering – one with a greater emphasis on alternative dispute resolution and problem-solving). Some Canadian feminists generally have eschewed constitutional litigation and discourse as a feminist method because it "co-opt[s] feminist argument into abstract liberal arguments" and because it enhances the authoritarian power of inherently undemocratic judicial institutions. *See* Colker, *supra* note 182, at 152-53 (discussing Judy Fudge's argument that constitutional discourse is essentially liberal).

logue has developed among feminists about the possibilities of a less adversarial, more "feminist" style of lawyering and legal discourse.

Ruth Colker is the leading proponent of a good faith "dialogue" in litigation, a less strident and feminist discourse that respects countervailing interests even while arguing for a particular antidiscrimination outcome. According to Colker, "[d]ialogue is deeply feminist"[270] and hinges on "openness and empathy."[271] Colker justifies her conviction in a feminist dialogue by reference to the antifoundation premises of feminist epistemology.[272] "An approach that denies the possibility of objective truth and insists upon the need to maintain openness makes it difficult to justify the strong, forceful tone of legal argumentation."[273] Instead, when calling on the empathy of a decision-maker, a feminist should not try to get that empathy with a sledgehammer; thus, feminists "can afford to speak in a more open voice in the courtroom."[274] The openness Colker calls for specifically in the context of abortion litigation is urging "pro-choice" advocates to recognize the value of what she calls "prenatal life" even though the interests of women individually and collectively outweigh that value.[275] She laments that none of the feminist briefs in the *Webster* case "demonstrate[d] a deep commitment to protecting the values of prenatal life in society; none of them recognized that the destruction of prenatal life to protect women's well-being is an unfortunate rather than a welcome outcome."[276] Colker also urges feminist litigators to rely less on liberal individualistic (male) legal theory – privacy – and more on group-based "pro-woman" legal theory, especially equal protection.[277] Thus, the ideological content of an argument is as important to Colker as the dialogue she seeks to advance.

Colker's call for a more feminist discourse in abortion cases prompted a spirited, even caustic rebuttal.[278] Sarah E. Burns, in

270. Colker, *supra* note 182, at 143. "Dialogue refers to conversation in which we may offer an opinion, but are genuinely interested in learning [or valuing] the perspective of the other person." *Id.* at 142.

271. *Id.* at 143.

272. *See id.* at 155-58.

273. *Id.* at 155.

274. *Id.* at 156 (citing Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987)).

275. *See id.* at 158.

276. *See* Colker, *supra* note 182, at 187.

277. *See id.* at 157-59.

278. *See generally* Burns, *supra* note 182, at 194 (stating that "feminist litiga-

opposition to Professor Colker, defines feminist litigation by its outcomes, not by its methods, and thus she implicitly adopts a more Machiavellian ethic.[279] "Feminist litigation serves the purpose of resisting these subtle and powerful forces that obscure women's interests. Our first duty to ourselves as litigators and to our clients is not to acquiesce."[280] Burns accuses Colker of valorizing passive femininity rather than active feminism:

> In describing feminist litigation, Professor Colker mistakes feminine stereotypes – a gentleness that eschews fights, a valuation of feeling, a concern for others and their relationships – [for feminism]. However, feminist litigation is not measured by its form, but rather is governed by its contribution to the larger feminist enterprise of transforming established social, economic, political, and legal power relations that work to the detriment of women.[281]

In Burns' view, "[f]eminist litigation is not, and cannot be . . . a dialogue. Litigation is a conflict between two or more adverse parties who seek to deploy the state's coercive power in favor of one party's interests over the interests of the other."[282]

Naomi Cahn joined the Colker/Burns debate and proposes that feminist litigation combine an interest in outcome, as urged by Burns, and an interest in process, as urged by Colker.[283] "Feminist litigation is not defined solely by its focus on the goal of enhancing women's rights through substantive outcomes. It requires the integration of substantive goals with the actual process of representation."[284] As a clinician, however, Cahn invokes the traditional clinical emphasis on the (feminist) lawyer's relationship with her client – so-called client-centeredness – as being constitutive of a feminist method of representation. "This process includes listening to the client and reinforcing the client's autonomy . . . ."[285] According to

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tion is not, and cannot be, as [P]rofessor Colker would have it, a dialogue").

279. *See id.* at 194-96. Burns points out that Colker's argument is lacking in concrete, practical rationale because Colker "does not advance any argument as to how, or whether, briefs that were more 'feminist' according to her prescription would lead to different or better results." *Id.* at 202.

280. *Id.* at 191.

281. *Id.* at 193.

282. *Id.* at 194.

283. *See* Cahn, *supra* note 163, at 2-3.

284. *Id.* at 2. The goals of a feminist discourse are not limited to victory in the traditional sense: "[W]omen may use the legal system for many reasons, including redressing harm, telling their stories, or shaping legal rules." *Id.*

285. *Id.*

Cahn, a feminist process occasionally might "use techniques that are traditionally identified as feminine [displaying values of intimacy and connection], but only as a means toward the goal of ending subjugation of women."[286] Cahn chides Colker for urging good-faith dialogue, because in doing so, "she overlooks power relationships in litigation and the law and ignores the need for the lawyer and client to develop a client-centered strategy."[287] Cahn also chides Burns, implicitly, for suggesting that there is no feminist limit on mortal combat, arguing that "feminist litigation depends on a feminist legal process."[288]

Cahn identifies three useful aspects of feminist litigation: (1) consciousness raising to name, rename, and overcome oppression;[289] (2) using the (female?) lawyer's personal experience of gender oppression to inform litigation strategy and to increase one's personal identification with and commitment to the client's case;[290] and (3) listening to the client's story empathetically.[291] Paradoxically, Cahn validates Colker's call for dialogue, but primarily within the context of the lawyer-client relationship.[292] Conversely, like Burns, she concludes that dialogue has little role in litigation: "Without recognizing and overcoming structures of power, dialogue cannot exist in the litigation context."[293] Unfortunately, Cahn offers no advice or experience on how one would determine if and occasionally when dialogue might successfully confront power.

Mary Joe Frug has offered perhaps the most complicated analysis of a "different" feminist voice in litigation,[294] though her analysis was tragically cut short by her murder.[295] In developing her thesis, Frug offers a more sympathetic, more progressive reading of Carol Gilligan's 1982 book, *In a Different Voice*, and of an evolving

286. *Id.* at 4.
287. *Id.* at 6.
288. *Id.* at 8.
289. *See* Cahn, *supra* note 163, at 8-12.
290. *See id.* at 12-15.
291. *See id.* at 15-20.
292. *See id.* at 17.
293. *Id.* at 18.
294. Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice"?*, 15 HARV. WOMEN'S L.J. 37 (1992).
295. *See* Paul Langer, *Professor's Murder Unsolved*, BOSTON GLOBE, Oct. 16, 1994, at 34. Mary Jo Frug, a law professor at New England School of Law, was stabbed on April 4, 1991, while on her way to a convenience store. *See id.* The murder remains unsolved. *See id.*

feminist "strategy of difference."[296] According to Frug, "a progressive reading would interpret Gilligan's use of sex differences as a *methodology for challenging gender*, as an example of how contingently-formed gender differences can be strategically deployed to unsettle existing inequities between the sexes."[297] Frug expands on this point later in her piece to suggest the content of a "different," more feminist discourse:

> Under a progressive reading of Gilligan, sex-linked differences in discourse function as a clue, as a "logic of identification" to the location of silenced, marginalized, or subordinated groups for whom legal assistance may be helpful. This use of sex-linked differences [in feminist discourse] is cautious, non-dualistic, partial, contingent, and sensitive to many constituencies of women.[298]

Although Frug does not directly address the possibilities or forms of a more "cautious, non-dualistic, partial, contingent, and sensitive" discourse in practice,[299] the tenor of her analysis clearly supports the strategic use of a "different voice" – a less adversarial voice – in certain discourse settings.[300]

IV. CONCLUSION – BUILDING A CRITICAL DISCOURSE PRACTICE

No matter how clear we are about traditional purposes and transformative visions in legal writing, the novelties and complexities of purpose in legal discourse will confound law students as they enter a new community of practice. The challenge for legal writing instructors is to create engaging, transformative contexts; to assign authentic, meaningful tasks; and to explicate the conventions of an evolving legal discourse to help smooth students' rough entry to the profession. As our students gradually become more self-conscious about canonical argumentation strategies, as they become more familiar with the architecture of law, and as they better understand the special purposes of legal writers and legal readers, they will accelerate their acculturation into a new community of practice. If we are good, we will mentor and guide the students

296. *See* Frug, *supra* note 294, at 47.
297. *Id.* at 52.
298. *Id.* at 64.
299. *Id.*
300. *See id.* Frug stresses the importance of this "different voice" at a very basic level: "[I] am unable to imagine how we can advance the position of women in law without thinking what the position of women is." *Id.*

through this transitional acculturation process. If we are better yet, we will demonstrate, explicate, and empower critical consciousness and transformative discourse practices that will reinvent the justice mission of legal writing.[301]

In pursuit of these different, but hopefully complementary goals, legal writing instructors must learn more about the literacy and discourse traditions our students have inherited and about the patterns these legacies impose on their initial efforts at legal writing. Just as important, we must learn to reveal the hidden, the assumed, and the customary both to ourselves and our students. Even more important, however, legal writing specialists must develop a more transformative vision of social justice and law reform, "one that specifically challenges the racism, sexism, homophobia, ableism, and class privilege in ourselves, our students, our profession, and our society. We cannot be content to turn out lawyers who uncritically acquiesce to the harmful demands of powerful clients while ignoring the quiet desperation and violent oppression of others."[302] Because writing too often leaves trails of blood in the service of injustice,[303] we must enable our students to discover a critical discourse and its most effective strategies, a discourse which might expose the realities of existing social wounds and inspire a new human vision where people are decent to their neighbors and share their well-being.

Ultimately, no matter what narrative strategy the critical writer employs, no matter how much she avoids unprincipled appeals to bias, and no matter how convincingly she marshals a "rational" and "feminist" presentation of legal and nonlegal authority, a critical perspective will require constant negotiation with the demands and purposes of legal discourse within a fluctuating matrix of situational constraints and opportunities. This critical discourse typically will face the unyielding momentum of the status quo where atypical forms of discourse-leverage will be necessary to overcome existing power dynamics. Nonetheless, that leverage will increase as outsider narratives become increasingly common, as direct and subliminal appeals to bias are supplanted with more cogent appeals

301. *See* Quigley, *supra* note 8, at 44-46 (arguing the same mission for poverty law clinics).

302. Baker, Implications for Research, Analysis, and Writing Programs, *supra* note 6, at 91.

303. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609-18 (1986).

to individual and collective well-being, as advocacy becomes informed with empirical and normative findings from other disciplines, and as excessive adversarialness is replaced with more nuanced and textured dialogue. Under the impetus of a more critical discourse, the currents of legal doctrine can be redirected to more sustainable visions of legal equality and social justice. To create and sustain this redirection, critical legal writers will have to discover a whole new set of situation assessment skills and discourse strategies in order to change the ways of the world. Legal writing's study of these new, more challenging discourse practices and the situation variables which support them barely has begun.

It would be tempting to think of a new critical discourse as consisting of a set of retooled, instrumentalist skills. Under the sedative of this simplistic formulation, legal writing specialists could become increasingly sophisticated in theorizing about the contents and uses of such skills; these easily transferable skills could be packaged, even sold, through a textbook, and then readily and reliably deployed under appropriate circumstances. Unfortunately, the world of practice that our students face is not nearly so simple. There are economic realities of having a sustainable practice and paying off exorbitant student debt. There are real relationships with actual clients whose values and goals may or may not be consistent with the lawyer's. There are colleagues and support staff and future clients placing demands on a lawyer's reputation and causes. And even more to the point, there are legal decisionmakers who can turn off their reading lamps and consign "critical" texts to the dustbin. In other words, critical discourse is significantly structured by the local, changing circumstances of each lawyer within a larger socio-economic, political, and legal system that is increasingly mean-spirited and cold-hearted.

Instead of focusing on the replication of transferable instrumentalist skills, we need to help our students develop situation sense and a critical practical reasoning which will assist them in analyzing the status quo constraints and subversive possibilities in each discourse project. They have to develop a keen sensibility to the legacies of literacy they have adopted and to how those legacies affect both them and their audience. They have to have sophisticated situation assessment skills with which they explore and create their critical discourse out of the opportunities and constraints of any given moment. They must fight the fight they might win, but avoid the one that does more harm than good. They must come to

consider critical discourse as more than a strategy, but a project – one to be developed with others over a lifetime of practice. Their victories must be celebrated, consolidated, and shared in the same way that their defeats must be mourned, circumvented, and transcended. If we succeed in building this vision of a practice, we might succeed in birthing many instances of a more critical discourse.