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Language Acculturation Processes and Resistance to In"Doctrine"ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz's Critical Anthropology of the Socratic, Doctrinal Classroom, 34 J. Marshall L. Rev. 131 (2000)

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LANGUAGE ACCULTURATION PROCESSES AND RESISTANCE TO IN"DOCTRINE"ATION IN THE LEGAL SKILLS CURRICULUM AND BEYOND:

A COMMENTARY ON MERTZ'S CRITICAL ANTHROPOLOGY OF THE SOCRATIC, DOCTRINAL CLASSROOM

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INTRODUCTION

Elizabeth Mertz has brought a sophisticated outsider's perspective, that of an anthropologist, to the legal classroom, a place she once rented as a student and now inhabits as a professor.[1] Via tape recordings, transcriptions, and linguistic analyses, she explores the role of classroom discourse in the process of language acculturation. This process takes people with perfectly normal moral sensitivities and transforms them into legal technocrats who use the sterile language of law to solve legal disputes while obscuring the mechanisms of power that animate legal rules and channel legal decisions. To investigate this process of acculturation to textual authority, Mertz interrogates both the deep structures of classroom discourse and the patterns of class participation that erase context, disrupt narrative forms, and eviscerate moral sensibilities and cultural perspectives. To achieve a façade of formal rationality, the legal educational system trains lawyers, according to Mertz, to participate in a discourse that selects and abstracts salient facts according to the imperatives of legal categories. However, in so selecting, this legal discourse robs legal disputants and legal trainees of the narrative, social, and ethical factors that animate moral discourse about

* Professor of Law, Northeastern University School of Law. I would like to thank The John Marshall Law School for inviting me to participate in its conference "The Languages of Race, Feminism, Philosophy and Anthropology: Translating for the Legal Skills Classroom" and my fellow panel members, Elizabeth Mertz and Susan Hirsch.

1. Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91 (2000).

social disputes and systematic oppression in the "real world." In particular, she finds that Socratic dialogue, a form of guided in"doctrine"ation, reproduces the categorical imperatives of the law by placing parties in particularized but denatured social positions and by making certain, legally relevant facts pivotal. This in"doctrine"ation renders the local setting of the dispute, the life histories of the disputants, and the cultural perspectives of the parties (and students) legally irrelevant. Law students must then compare these denaturalized caricatures of life against the definitional matrices of statutes or the skeletal forms of past disputes, which implicitly, according to the standard account, suggest a legally proper outcome. In these categorical and analogical processes, equity succumbs to law, life to text. In Mertz's account, learning to think, read, and talk like a lawyer means more than learning to think, read, and talk about the law. It means casting off one's moral compass, shutting down one's empathetic response, and putting grander concerns about social and political justice aside in favor of satisfying the surface requirements of formal rationality. "When viewed through this lens, traditional legal pedagogy symbolically mirrors and reinforces an epistemology that is vital to the legal system's legitimacy."[2]

Mertz examines legal discourse through an uncommonly close analysis of the words actually spoken within the classroom (an unflattering report of law professors' collective incoherence), listening for what is deselected as well as what is selected—silence as well as speech. Instead of looking to written accounts of the law for evidence of a canon of doctrinal rationality, she focuses on first-year contracts classes where the epistemological rites of passage are particularly poignant. Here, legal pedagogy subjects the naïve readings and worldviews of students to a ritual of ridicule and reorientation.[3] This pedagogy replaces an attention to the drama of people embroiled in an embedded dispute with an attention to the requirements of law—to offer and acceptance, breach, and other sediments of legal doctrine. "Instead of putting priority on the content of the 'conflict stories' told in legal texts, law professors urge their students to analyze how the texts point to (or 'index') authority."[4] When storied accounts of misfortune trigger emotional responses or when tales of injustice resonate with moral

2. *Id.* at 94. Of course, many other commentators from the legal realist movement to the present have noted the reliance on doctrine to teach students to "think like a lawyer." *See, e.g.*, Kurt Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121 (1994).

3. Mertz emphasizes how frequently professors violate norms of polite speech to interrupt students and to ignore or fail to "uptake" the content of their classroom responses. Mertz, *supra* note 1, at 102-03.

4. *Id.* at 100.

commitments, legal novices learn to relegate these unsophisticated responses to the margin through express disavowal or doctrinal refocus.[5] Thus, the typical first-year classroom creates a discipline of the material and the immaterial; this discipline trains the student away from empathy, moral outrage, and social justice concerns and, in Mertz's account, refocuses the student toward the rule of law absolutism and toward instrumental relativism.

Mertz observes two conventional forms of legal reasoning revealed by linguistic analysis, namely: (1) rule-based reasoning that rests strongly on statutory language and legal rules contained in previously decided cases and (2) analogical reasoning that compares legally the salient fact patterns from prior cases against the reconstructed factual matrix of the problem case.[6] Mertz primarily describes the anthropological violence of legal language in the rule-based paradigm, noting how legal language damages the narrative and contextual structures that might otherwise animate ethical discourse about social conflict.[7] In the case of rule-based analysis, she notes how the concrete particulars of past disputes are abstracted to such a high degree that the underlying dispute loses its humanity and complexity, replaced instead by categorical certitudes and legal edifices that create a false aura of inevitability.[8] In addition, reliance on the abstract authority of legal rules not only hides the social power of those most advantaged by the existing legal order, it also hides the discretionary choices of encultured social actors who articulate such formalities in the first place and who perpetuate them within a socially conservative, under-reflective tradition of doctrinal continuity, ignoring the interactive effects of latent political and moral commitments.[9]

Such anthropological violence also exists in the case of analogical reasoning. Although Mertz pays less attention to this form of reasoning, she detects a primary source of narrative dislocation, and I detect two additional kinds of deformation that legal "analogies" impose on the narrative structure of the original dispute. First, according to Mertz, analogical reasoning picks

5. *Id.* at 101. *See also* Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 278-79 (1999) (discussing how lawyers are trained to resist emotional awareness and how the Socratic method introduces and disciplines that avoidance).

6. *See* Mertz *supra*, note 1, at 92. *See, e.g.*, Scott Brewer, *"Exemplary Reasoning": Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); Cass R. Sunstein, *Commentary on Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

7. Mertz, *supra* note 1, at 104-05.

8. *Id.* at 107-08.

9. *See* Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 159 (1998) (maintaining that rule choices constitute a compromise between legal authority and ideological projects).

apart the client narrative to select only those facts that relate to pre-established legal imperatives contained in the master-stories of law. Thus, this method of reasoning erases many contextual and embodied human traces of the conflict.[10] Second, analogical reasoning reformulates relatively concrete facts at higher levels of abstraction in order to provide a meaningful comparison to "analogous" facts in previously decided cases. Thus, in order to achieve this level of commensurability, legal analogy sacrifices the detailed particulars of a socially situated narrative. Third, the general process of comparison—looking for similarities, dissimilarities, and gaps—disrupts what small amount of phenomenological narrative coherence remains in a case. Because legal analogies are "made" not found, in manufacturing comparisons, lawyers further deform the case at bar. The legal viability of the underlying conflict in each story—the core meaning of a case—ultimately rests not on its own merits or equities but, rather, on its comparisons and distinctions with previous exemplars.

Mertz's anthropological insights extend beyond noticing the formalism of indoctrination into legal discourse and how that process removes the contextual, narrative, and emotive features from both the disputes themselves and the classroom discussions. She also notices how Socratic discourse places students in fixed social positions, usually in disputant roles, in order to articulate competing legal arguments.[11] These arguments are expected to flow naturally from the abstract social position disciplined only by the language of law.[12] Although Mertz notices this phenomenon and notes how it reinforces the alleged "objectivity" and authority of law, she does not pay as much attention to the amorality of arbitrary assignments to such roles and the consequences of being asked repeatedly to change roles. In other words, in addition to being formalistic and authority-based, the traditional first-year classroom, simultaneously, is also consistently adversarial, normatively relativistic, and amorally multi-variant.[13] Professors

10. Mertz describes a process in which "key facts" are selected and become *key* only because they become "token instances of legal types." Mertz, *supra* note 1, at 105. "[T]his apparent concern for specificity wrenches detail from its particular social and narrative context in ways that can obscure or erase the features of the story that lay people look to when effectuating moral judgments...." *Id.*

11. *Id.* at 108. "[T]he law student's [refocused] vision locates people in conflict in terms of categories that place them in defined argumentative positions." *Id.*

12. "Thus, students are placed in the shoes of people occupying legal 'positions,' located in landscapes whose key referents are legal requirements." *Id.* at 109.

13. For a discussion of how the ordinary religion of the classroom includes skepticism about legal rules, instrumental manipulation of doctrine and

do not ask students how party A might see her interests and social needs as congruent with party B's. Professors do not ask students to imagine how society might intervene to help mediate multi-value dispute resolution. Professors do not ask students how perspectives on race, gender, and class underlie the dispute and how alternative visions of social justice might inform decision-making. Instead, professors ask students to enter into a binary system of verbal combat where each legal argument is matched by a nearly equal and opposite counter-argument. Still more pernicious, instructors assign students to argumentative roles without reference to personal morality, and then paradoxically—in order to demonstrate true professional neutrality—students must often make the opposing argument as well. Thus, law students learn to switch allegiances easily, to be voice boxes, word processors, or verbal combatants for hire. They learn to be indifferent about client selection and unmoved by client ends, so long as such ends are lawful. Thus, Mertz acknowledges that lawyers come to believe or, at least, speak and write as if the law is so loaded with unquestioned authority or is so fair, neutral, and objective in its application that the lawyer needs no personal, moral relationship to the dispute or to the arguments that positional necessity might "require" them to advance. At the same time, however, I believe that the legal educational system trains them in a form of intra-psychic, nihilistic neutrality, where everything is argument and counter-argument, where suspending solidarity is a virtue, and where no normative value is at stake in deciding (or not deciding) who to represent and what "legal" goals to pursue.[14] The neutrality valued in the Socratic classroom is *personal*, doctrinal, and decisional. Rather than use a felt or experiential connection to social dispute, students are encouraged to develop a more "professional" detachment and to deny anything but an intellectual and doctrinal connection; however, even this analytical connection is distant and Olympian.

At a higher level of abstraction, Mertz compellingly equates the role of money as a neutral medium of exchange in the unequal global economy with the role of law as an allegedly neutral

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precedent, and deployment of formal linear logic all in the service of Machiavellian ends, see Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 248 (1978).

14. *See, e.g.*, James R. Elkins, *Thinking Like a Lawyer: Second Thoughts*, 47 MERCER L. REV. 511 (1996) (discussing the amoral, instrumentalist nature of "thinking like a lawyer"). The development of detachment and distance are key attributes of the process of professionalization in general and legal professionalization in particular. *See* Eric Margolis & Mary Romero, *"The Department is Very Male, Very White, Very Old, and Very Conservative": The Functioning of the Hidden Curriculum in Graduate Sociology Departments*, 38 HARV. EDUC. REV. 1, 9, 14 (1998) (examining the "hidden curriculum" on women of color graduate students in sociology).

medium of exchange "across all areas and levels of society" despite systematic inequality.[15] "In converting virtually every event or conflict into a shared rhetoric [of formal equality], legal language generates an appearance of neutrality that belies its often deeply-skewed institutional workings."[16] The false certainty of law, its facial neutrality, and its linear logic all combine to obscure privilege and power in the real world. Instead of race and other systems of oppression being salient, even central, in many disputes, the form and content of legal language promises that race will not matter because the law will serve as a neutral medium of exchange that will flatten power differentials.[17] Legal training replaces the law student's previous ability to discern contextual guideposts and perceive pervasive patterns of discrimination in moral disputes with what Mertz calls "cultural invisibility."[18] This "invisibilization" of power, privilege, and cultural advantage (and the correlative invisibilization of subordination, oppression, and stigmatization) is the hidden curriculum of professional training, a training that simultaneously reproduces and camouflages the dominant social order.[19] Just as the dominant culture naturalizes white privilege and black subordination as the "way things are"—unremarkable and unremarked, suspect only by a strong act of critical consciousness—the legal culture also naturalizes them.[20] Although Mertz acknowledges that the disadvantaged may occasionally rights talk and/or from doctrinal and decisional neutrality,[21] she

15. Mertz, *supra* note 1, 102.

16. *Id.* at 103.

17. *See id.* at 110. "[T]his removed approach to people and human conflict feeds into an ideology of universal translatability in which legal language serves as a discursive medium of exchange across all areas and levels of society." *Id.*

18. *Id.* at 113.

19. *See* Margolis & Romero, *supra* note 14, at 3 (describing the strong form of a hidden curriculum as the part that reproduces stratified social relations).

20. *See, e.g.*, BARBARA FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW (1998); ROBERT L. HAYMAN, JR., THE SMART CULTURE: SOCIETY, INTELLIGENCE, AND LAW (1998); STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996); PEGGY MCINTOSH, WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES THROUGH WORK IN WOMEN'S STUDIES (Wellesley C. Center For Res. on Women Working Paper No. 189, 1988).

21. Mertz, *supra* note 1, at 114. *See generally* Eric Blumenson, *Mapping the Limits of Skepticism in Law and Morals*, 74 TEX. L. REV. 523 (1996) (discussing the relevance of universal human rights principles in moral dialogue about just outcomes); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331 (1988) (discussing the importance of exposing the racist nature of ostensibly neutral norms and devising strategies that include the pragmatic use of legal rights).

maintains:

> On the other hand, erasing many of the concrete social and contextual features can direct attention away from grounded moral understandings that some see as crucial to achieving justice. Moreover, the abstraction and alienation provides the law with a "cloak" of apparent neutrality, which conceals the ways in which law participates in and supports unjust aspects of capitalist societies.[22]

Law professors, acting as vigilant guardians of the established legal order, patrol the "borders" of these patterns of permissible and impermissible subjects, these privileged forms of rule-based and analogical reasoning, and these indifferences to positional argumentation and assertions of misleading neutrality.[23] Moreover, the voices actually heard and silenced in the classroom also reproduce these patterns, forms, and indifferences. It comes as no surprise to any observer of the patterns of participation in the legal classroom that middle-class, able-bodied, deep-voiced white males feel more freedom to speak than previously excluded groups of women, gays and lesbians, and students-of-color.[24] Persons who are more powerful in the dominant social order often feel more privileged to speak. Part of their social power is their reflexive, unexamined ease of dialogic (or monologic) participation. They slip and slide into and out of conversations via blunt interruptions or diplomatic appropriation of the stage in order to vie for status by speaking confidently in the "tribal tongue"[25] that is but a refinement of their birthright. Mertz describes these voices as the "kinds of voices [that] can actually speak in this decontextualized language of the law[.]"[26]

Outsiders, on the other hand, have a triple border to pass. First, they must circumvent the implicit dialogic pecking order that would have them speak last and briefly, if at all. Along with

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22. Mertz, *supra* note 1, at 114.

23. *Id.* at 107. Although I agree that Mertz captures one aspect of the doctrinal classroom, she fails to explore instances when doctrinal teachers emphasize the indeterminacy and incoherence of legal doctrine and when they bring extra-judicial factors to bear in discussing the merits of legal decisions. In my experience, most law professors, especially, perhaps, at my law school, are legal realists and their progeny. They frequently (but perhaps not frequently enough) offer critical perspectives on the doctrine they are "covering" in their first-year classes. Although doctrine may constitute the "core" experience of these classrooms, there are alternative perspectives at the periphery.

24. *See* Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1 (1998) (reporting data on class participation in eight semester-long Contracts classes and noting contextual complexity and patterns of reduced participation by women and minorities).

25. Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089, 1102 (1986)

26. Mertz, *supra* note 1, at 114.

the insider professor, who, as a community elder and role model, polices this participation queue, the other discourse partners facilitate or impede outsider participation with verbal elbows and lip-checks.[27] Of course, self-silencing also occurs because of internalized oppression—the self-doubting feeling that one has nothing of value to offer or that one will embarrass one's group by substandard performance.[28]

Second, legal pedagogy expects outsiders to learn a dialect and a register, a form of reasoning and speaking, which is far different from their natural or home language. For example, if the home language of women is frequently a language of reciprocity and relation,[29] then learning a new language of objectivity, rights, and confrontation presents special risks of speaking inartfully, which in turn saps the outsider's will to participate.[30] Thus, many outsiders stay near the margin and eavesdrop on the classroom conversation because they might not otherwise learn the cadence and etiquette—let alone the content rules—of the discourse.[31]

Third, because those favored by law and by the language of law have marginalized, stigmatized, and colonized outsiders and their communities, speaking in this new language of power is a

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27. *See, e.g.,* DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1990) (discussing male-gendered communicative strategies and men's tendency toward competition).

28. The risks of self-censorship are particularly acute if outsider law students feel the risk of stereotyping—that they and the groups to which they belong are being judged or assessed according to socially primed negative expectations. This risk, imposed by the outside world as a persistent form of racial stigmatization (for example), saps outsider students' energy, compromises their actual performance in law talk, and/or leads to involuntarily silence, a form of self-censorship and alienation that is all the more problematic because it feels like it is internally generated. Claude Steele, *Thin Ice: "Stereotype Threat" and Black College Students*, THE ATLANTIC MONTHLY, Aug. 1999, at 44.

29. For a discussion at the forefront of delineating a feminist ethic of relationship, interdependence, cooperation, and care, see CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). *See also* TANNEN, *supra* note 27. For a discussion of the feminist ethic in the legal context, 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 (1990); 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) (describing the use of a feminist ethic of care as a style of lawyering).

30. *See* Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 41-51 (1998) (citing Sandra Janoff, *The Influence of Legal Education on Moral Reasoning,* 76 MINN. L. REV. 193, among other sources).

31. *See* Mertz et al., *supra* note 24, at 33-36 tbls.1-4 (reporting previous studies of women's participation and alienation in the classroom), 45-61 (reporting results of their own study including higher non-participation rates in Socratic classrooms).

form of self and community betrayal and creates conscious and unconscious resistance to the process of socialization.[32] Outsiders certainly notice and frequently seethe at contextual disavowals in the classroom. Examples include the erasure of race in a case involving a great-white-hope boxing match[33] and the discussion of implied consent in rape cases. Contributing to this artificial silence by talking *around* the issues of race or gender can deeply debilitate students-of-color and female students. Thus, the prospect of joining the discourse and talking like a lawyer—*not* about race and *not* about gender—creates an internal psychological phenomenon of border resistance.[34]

At the same time, learning the language of the law often requires outsider students to incorporate negative images and stereotypes about their communities of origin. Thus, when the legal language does not ignore outsiders, it frequently slanders them instead.[35] Rather than being sucked into or walking boldly into the belly of the beast, the Law incarnate, outsider students

32. *See, e.g.*, Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991); Janice L. Austin et al., *Results from a Survey: Gay, Lesbian, and Bisexual Students' Attitudes About Law School*, 48 J. LEGAL EDUC. 157 (1998); Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1988); Charles Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L.J. 140 (1995); Kimberlé Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 3-6 (1989) (discussing objectification); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School,* 143 U. PA. L. REV. 1 (1994); Paula Lustbader, *Teach In Context: Responding to Diverse Student Voices Helps All Students Learn,* 48 J. LEGAL EDUC. 402, 404 (1998) (discussing alienation); Margaret Montoya, *Voicing Differences,* 4 CLINICAL L. REV. 147 (1997); Stanchi *supra* note 30, at 37 (describing betrayal of personal mores); Catherine Weiss & Louise Melling, *Essay: The Education of Twenty Women,* 40 STAN. L. REV. 1299 (1988).

33. Mertz, *supra* note 1, at 115-16.

34. *See* Stanchi, *supra* note 30, at 31-33, 34 (discussing Professor Montoya's experience as a Latina, studying a case in which issues of race had been effaced and citing Margaret E. Montoya, *Maxcaras, Trenzas, Y Brenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 1 (1988)). Stanchi discusses another similar instance in her own legal writing class where a student resisted writing about the statute of limitations defense to recovered memories of child abuse. *Id.* at 38-40. The student felt "that communicating, especially in writing, law and reasoning that she considered not only fallacious but also harmful, gave legitimacy to it." *Id.* at 39. Margolis and Romero talk about the common experience of graduate students-of-color in sociology departments where the curriculum artificially excludes and devalues authors-of-color both in assigned readings and what is considered polite or professionally appropriate topics. Margolis & Romero, *supra* note 14, at 19-24. They refer to these practices as being problems of silence and exclusion. *Id.*

35. In a non-legal context, Margolis and Romero have noticed how professionalization in sociology requires women-of-color to internalize negative stereotypes *and* to internalize white, male, middle-class norms—a double-form of alienation. Margolis and Romero, *supra* note 14, at 16-17.

expend considerable psychic effort and cognitive resources fighting their figurative emigration from their communicative homeland and their dialogic immigration to the language of a powerful elite who primarily serve the masters of the political economy. Instead of capitulating to language apartheid, they resist; instead of assimilating to the canon of doctrine, they pluralize.

I. IMPLICATIONS OF ANTHROPOLOGICAL PERSPECTIVES WITHIN LEGAL WRITING PEDAGOGY

My invitation to this particular panel is premised on the possibility that I have something to say not only about what Mertz says, but also about whether what she says has any resonance in the skills curriculum in law school, particularly the legal writing curriculum. In short, it does in many ways. As a discipline, legal writing specialists not only cooperate with the language in"doctrine"ation Mertz describes, we teach it explicitly both with our doctrinal research and writing assignments and with our self-reflective use of process and socio-cultural approaches to legal writing.[36] However, at the margins, legal writing professors have also begun to challenge unreflective socialization processes and the uncritical reproduction of canonical discourse practices.[37] The

36. *See, e.g.*, Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719, 722 (1997) (discussing the focus on the students' final output); Jessie C. Grearson, *Teaching the Transitions*, 4 J. LEGAL WRITING INST. 57, 61-67 (1998); Phelps, *supra* note 25; Jill J. Ramsfield, *Is "Logic" Culturally Biased: A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. LEGAL EDUC. 157 (1997) (discussing cross-cultural perspectives on logic and persuasion); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994); Joseph Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1 (1991).

37. A growing number of legal writing specialists urge that legal writing pedagogy develop a more critical edge. *See, e.g.*, Brook K. Baker, *Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice*, 23 WM. MITCHELL L. REV. 491 (1997) [hereinafter *Transforming the Traditional Repertoire*]; Beth Britt et al., *Extending the Boundaries of Rhetoric in Legal Writing Pedagogy*, 10 J. BUS. & TECH. COMM. 213 (1996); Calleros, *supra* note 32; Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105 (1998); Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993); Grearson, *supra* note 36, at 71-72; Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 MERCER L. REV. 709 (1998); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561, 597 (1997) (discussing why students should have the opportunity to formulate and express original ideas concerning issues of importance to the students and to society); Diana Pratt, *Representing Non-Mainstream Clients to Mainstream Judges: A Challenge of Persuasion*, 4 J. LEGAL WRITING INST. 79 (1998); Lorne Sossin, *Discourse Politics: Legal Research and Writing's Search for a Pedagogy of Its Own*, 29 NEW ENG. L. REV. 883 (1995); Stanchi, *supra* note 30.

good news is that some of Mertz's concerns about the narrowness and formalism of doctrinal pedagogy are counteracted in the legal writing classroom; the bad news is that writing instructors do not do nearly enough to train our students to be transformative in their approach to the law.

As confirmation of Mertz's observation about language acculturation, legal writing specialists note, correctly I think, that practice communities inevitably have their own distinctive discourse practices, and processes of acculturation and law is no exception. As Mertz would surely admit, every specialized discourse community adopts a plastic core of discourse conventions that embody the forms of analysis, evidence, and argument that "count." Although there is variation, pluralism, and contestation within a discourse community about styles of communicative practice and although these conventions mutate over time, a discourse community will invariably recognize and accept certain forms of discourse to be legitimate while rejecting other forms. To make legal decisions, give legal advice, and participate in legal dialogue, new community members need to know what kinds of evidence and argument currently count. In the legal discourse community, what counts, in substantial part, is the social authority embedded in texts. In other communities, like the scientific community, authoritative evidence and argumentation might consist of experiments and accompanying explanatory theories. In basketball (hardly a *discourse* community), evidence is performative; it consists of picks and rolls, team defense and blocked shots, rebounds and outlet passes, alley-oops and fade-away jumpers.

Although all commentators seem to agree that reliance on textual sources is at the heart of the legal impulse, many important disputes exist concerning the nature of the interpretative dilemma. The more traditional accounts maintain that the legal community interprets texts purposefully, "logically," and formalistically, using plain meaning and legislative/judicial intent heuristics; lawyers then apply such interpretations deductively, inductively, abductively, and analogically to resolve present dilemmas.[38] Alternative accounts of legal interpretation emphasize widespread use of narrative heuristics in legal decision-making, even by legally trained decision-makers, though those interpretations tend to cluster around the stock stories and the

38. *See* Scott Brewer, *Logic in the Intellectual Kingdom of Law: Rethroning Deduction*, 34 J. MARSHALL L. REV. 9, 10-11 (2000) (arguing for more and better use of deductive reasoning in law); Dan Hunter, *No Wilderness of Single Instances: Inductive Inference in Law*, 48 J. LEGAL EDUC. 365, 384 (1998) (championing inductive reasoning and classifying abduction as a "qualitative form of inductive reasoning"); Anita Schnee, *Logical Reasoning: "Obviously,"* 3 J. LEGAL WRITING INST. 105, (1997) (discussing induction).

master-narratives of law.[39] The decision maker, under such alternative accounts, assesses narrative plausibility and decision criteria in order to make a decision, basing his or her degree of confidence in story "selection" on coherence, coverage, and uniqueness.

In contrast, more "critical" accounts of interpretation emphasize textual indeterminacy and focus on the conscious and unconscious seepage of moral and political projects into the practice of legal interpretation. Certainly, proponents of the critical legal studies, critical race, and critical feminism movements argue that deployment of textual authority places a patina of rationality and principle to socially motivated, result-driven decisions. Like the legal realists before them, they argue that traditional legal argumentation is almost exclusively justificatory and that it applies easily discerned but normatively deceptive conventions of argumentation.[40] They argue instead, that lawyers and legal decision-makers should recognize their interpretive authority and the impact of their moral, political, and cultural perspectives; moreover, legal decision makers must answer to the social consequences of their practice, whatever form it may take.[41] However, even if this more critical description of interpretation is the most accurate and even if more transparent, principled forms of political and moral judgment should be applied to legal decision-making, law schools will necessarily continue to socialize their students to the centrality of textual authority in a legal work.

If humans are to coordinate speech and action within the behavior settings of resilient, yet settled, social institutions,[42] then it is difficult to imagine that they would not develop conventions of proof, argumentation, and justification that allow them to participate and communicate meaningfully, even if they pursue change. They will need to speak *within* the discipline and *about*

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39. *See, e.g.*, Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 192 (Reid Hastie ed., 1993); Jane Larson, *"A Good Story" and "The Real Story,"* 34 J. MARSHALL L. REV. 161 (2000); Gerald Lopez, *Lay Lawyering*, 32 U.C.L.A. L. REV. 1 (1984) (discussing "stock stories"); Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989) (discussing idealized cognitive models including those with narrative form).

40. *See, e.g.*, Duncan Kennedy, *Strategizing Strategic Behavior in Legal Interpretation*, 1996 UTAH L. REV. 785 (1996); Duncan Kennedy, *Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991).

41. *See, e.g.*, Klare, *supra* note 9, at 156-72.

42. For a brief discussion of "behavior settings," local contexts that have routinized discourse and behavioral protocols, see Brook K. Baker, *Beyond MacCrate: The Role of Context, Experience, Theory, and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287, 319 n.123 (1994) [hereinafter *Beyond MacCrate*].

the discipline in order to perform appropriate tasks, to signal membership, and to challenge conventional approaches with more transformative ones. Nonetheless, although the discipline psychologically, cognitively, and culturally constrains their interpretive activities, communicative practices, and adjudicatory decisions,[43] lawyers and judges can also push at the borders, but only if those borders are acknowledged, revealed, and questioned. Therefore, law students, like novices in any other discourse community, must learn the language of the realm in order to meaningfully participate in the activities and discussions that instantiate their socialization. If a basketball player starts throwing a basketball at the rim as though it were a baseball, then the basketball coach needs to redirect the player's shooting strategies to more appropriate performance criteria. Similarly, if the law student's argument starts skipping into pure ethnography[44] or pure narrative,[45] the legal writing coach will redirect the novice's attention toward relevant sources of legal authority, at least as a reference point. Doctrine, even indeterminate doctrine, is a necessary part, perhaps even a predominant part, of the interpretive, argumentative, and justificatory practice of legal discourse. Thus, doctrine must play an important role in the socialization process at law school. At the same time, as discussed below, legal writing specialists can do much more to reveal the conscious and unconscious contours of constraint and to urge a more critical practice of interpretation, argumentation, and adjudication.

Legal writing specialists believe novices' socialization to doctrine to be so important that they tend to be more explicit about it than other first-year teachers. However, legal writing pedagogy is not a locus of Socratic dialogue, though some legal writing commentators urge that it be one.[46] Nor is it currently a laboratory in formal rhetoric or formal logic, though others suggest it.[47] Instead, it is a classroom that typically trains law students to understand the forms and content of traditional legal discourse not by questions but by didactic instruction and recursive practice. We legal writing professors also police the borders of permissible

43. Klare, *supra* note 9, at 160-61.

44. Regina Austin, *Contextual Analysis, Race Discrimination, and Fast Food*, 34 J. MARSHALL L. REV 207 (2000).

45. Jane B. Baron, *Language Matters*, 34 J. MARSHALL L. REV. 163, 158 n.17 (2000).

46. Mary Kate Kearney & Mary Beth Beasley, *Teaching Students How to "Think Like A Lawyer": Integrating Socratic Method with the Writing Process*, 64 TEMP. L. REV. 885 (1991); Richard Neumann, *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725 (1989).

47. *See, e.g.*, Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. LEGAL EDUC. 108 (1993); Kurt M. Saunders, *Law As Rhetoric, Rhetoric as Argument*, 44 J. LEGAL EDUC. 566 (1994); Brewer, *supra* note 38, at 46-47.

and impermissible discourse—the borders of persuasive and unpersuasive argumentation—but we do so by explicit, rather than implicit, instruction in the conventions of the legal discourse community. We are typically explicit about assessing the rhetorical context, about the problem-solving and strategic purposes of legal writing, and about the forms of factual, legal, and policy-based arguments that might persuade or inform other legal audiences. We are every bit as doctrinal as the Contracts teachers Mertz describes because we also emphasize case analysis, rule synthesis, and doctrinal clarity. We instruct students in the doctrine-of-the-case, with some interpretive freedom around the edges, but with great acquiescence to legal authority nonetheless.

However, we do not merely model a philosophy of doctrinal authority through the form of our tasks, we describe it explicitly in our classroom and require students to reproduce it with clarity, using the insights of linguistics and other disciplines if appropriate.[48] If Mertz asked why we do this, we would answer: "We are training law students, as we must, to meet the expectations of legally trained readers."[49] Thus, to meet these expectations, we explicitly instruct students about the forms of argumentation and proof that satisfy readers' pragmatic concerns of coherence, comprehensibility, and plausibility. Similarly, we explicitly address the advocate's need to authenticate her claims and the judge's correlative need to justify her decisions by reference to legal authority, precedent, and policy. We certainly are explicit in telling students that judges cannot merely say: "I

48. *See, e.g.*, Elizabeth Fajans & Mary R. Falk, *Linguistics and the Composition of Legal Documents: Border Crossing*, 22 LEGAL STUD. F. 697 (1998). According to Fajans and Falk, linguistics offers prescriptive tools which "can help lawyers create documents that communicate with clarity, force, and candor." *Id.* at 698. Linguists present three particularly useful foci for studying, teaching, and improving legal composition: semantics (the meaning of words independent of context), syntax (the set of rules used to combine words and phrases into sentences), and pragmatics (the additional meaning communicated via context and shared cultural understandings). *Id.* at 701-02. When legal writing instructors and legal novices incorporate lessons from the field of linguistics, they are better able to convey the intended meaning and understand the conventions of legal discourse. Fajans and Falk also warn, however, that linguistics offers cautionary tales that can help legal writers "learn our limits:" "The slipperiness of meaning, the inevitability of syntactic ambiguity, and the coercion inherent in seemingly innocuous language practices offer hard truths as well as heuristics." *Id.* at 698. They also mention that conversation maxims are "something of a danger to critical thinking and writing." *Id.* at 727. For me, these caveats concern linguistics' normative silence about substantive content, the importance of critical perspectives, the inappropriateness of appeals to bias, and a overly unified conception of law.

49. Stanchi observes how this "outer" focus towards audience expectation intensifies language acculturation and the exclusion of outsider perspectives. Stanchi, *supra* note 30, at 20-21; *accord* Eichhorn, *supra* note 37, at 134-35.

have been moved by your story—judgment for the plaintiff."

Thus, we teach the conventions of rule-based and analogical reasoning previously discussed. We teach students how to frame narrower and broader rules from the gloss and dross of legal opinions where clarity and precision are often absent.[50] In addition, we teach students how to synthesize a defensible and persuasive rule from a series of cases[51] and how to establish the "proof" of the synthesized rule through case illustration.[52] We instruct students how to set forth the arguments addressing whether or not a case satisfies the elements test, factors test, or balancing test, which provides the analytical structure of the rule.[53] Although it is certainly possible, indeed likely, that rule-based reasoning creates a false aura of inevitability, masks contested social premises, and provides an impoverished account of moral decision-making, it is difficult to imagine legal decision-making that does not rely on some degree of abstraction (beyond the abstraction of language in and of itself).

The quibble with traditional liberal or conservative rule-based reasoning is not so much that it uses rules and abstraction to guide decisions, but rather, people disagree with many of the underlying principles and values the law advances—market efficiency, for example, is not the only value upon which the world rotates. In contrast, some developing nations offer the hope of advancing principled jurisprudence based on human values. For example, the new South African Constitution, which contains visionary human rights provisions in its Bill of Rights, will hopefully animate the South African judiciary to decide cases based on *positive* rights and *human* values.[54] Although South African human rights provisions are significantly indeterminate and ambiguous, although its provisions reflect competing values, and although its interpretation necessarily reflects the extra-textual legacies of apartheid, abstract principles like dignity, equality, and children's best interests form a desirable and

50. *See, e.g.*, LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 45-47 (2d ed. 1999); RICHARD K. NEUMANN, LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 33-34, 40-41, 128-29 (3d ed. 1998). For a discussion of the abductive process in legal reasoning that not only induces a generalization for a series of cases, but also provides a warrant for justification, see Hunter, *supra* note 38, at 384-91.

51. STEVEN L. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 37, 44-48, 58-68 (1985); EDWARDS, *supra* note 50, at 64-65, 68-70; NEUMANN, *supra* note 50, at 131-32; DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, SYNTHESIS: LEGAL READING, REASONING, AND WRITING 41-50 (1999); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 49-52 (4th ed. 1999).

52. *See, e.g.*, NEUMANN, *supra* note 50, at 15-25, 89-102.

53. *See, e.g.*, EDWARDS, *supra* note 50, at 20-23; SCHMEDEMANN & KUNZ, *supra* note 51, at 13-17.

54. *See, e.g.*, Klare, *supra* note 9.

integral part of both human and judicial deliberation.[55]

Similarly, analogical reasoning plays an important role in legal discourse and adjudication, and legal writing instructors teach such reasoning explicitly.[56] *Stare decisis*, deciding like cases alike, is one of the principal ways that the legal past funds the legal present. However, it also preserves the myths of legal tradition and sacrifices reconsideration of present values and immediate social conflict to the altar of precedent.[57] But, the truth is that there is no real alternative to this form of reasoning because reasoning from exemplars is *the* prototypical cognitive strategy for dealing with novel dilemmas.[58] Moreover, there is no "pure," uninterpreted human drama waiting to be discovered, even by the client herself. Since all interpretation, legal and lay, in socially constructed and iterative, interpretation of underlying narratives and categorical rules is the result of human activity in which multiple meanings await anyone but the most uni-focal observer[59] and where meaning mutates over time. Legal analogies may debilitate and deform the more original and authentic accounts of the underlying human conflict, but it is hard to see why legal analysts would not want to be guided, at least in part, by the prior deliberations and vicarious exemplars of other legal professionals.

In addition to being explicit about conventions of legal rhetoric and analysis, legal writing pedagogy unabashedly promotes the combative/hired gun amorality Mertz describes. We assign students to argumentative positions with little or no attention to students' preexisting moral commitments or life experience.[60] We always exhort our students to use the convention

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55. *Id. See also* Blumenson, *supra* note 21.

56. *See, e.g.*, BURTON, *supra* note 51, at 27-40, 68-77, 140-42, 163-64; EDWARDS, *supra* note 50, at 108-16; NEUMANN, *supra* note 50, at 130; SCHMEDEMANN & KUNZ, *supra* note 51, at 91-96;

57. *See* Litowitz, *supra* note 37, at 723 (stating "[o]bedience to tradition is inevitable if one is to play the game of law, but lawyers tend to get trapped in a hermeneutic circle that endlessly affirms the existing arrangement").

58. *See* Baker, *Beyond MacCrate*, *supra* note 42, at 310-13, 342-43 (discussing the implications of contextual perception, memory, and patterned categorization).

59. Social science clearly demonstrates that, to achieve cognitive consistency, frequently people see or experience what they expect to see or experience. *Id.* at 311. *See also* Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2090 (1989) (discussing how presuppositions, conceptual schemata, and expectations influence perception).

60. A particularly painful example of this is described by Stanchi when a student objected to being assigned to write about a statute of limitations defense in a recovered memory case. *See* Stanchi, *supra* note 30, at 38-40. One could wonder why we persist in forcing students to convert to "the ordinary religion" of positional instrumentalism by asking them to continue writing about positions they abhor. The possibility of adverse student reaction arises most acutely the more "relevant," i.e., controversial, we make our

of argument and counter-argument, to anticipate the other side's legal position, and to respond in order to rebut, refute, or negate it.[61] We emphasize that the client's best argument is one that both anticipates and responds to the opponent's best argument. We too urge our students to loosen their identification with a client personally and positionally, to open their eyes to all the arguments, and to take on the other client's perspective just as easily as changing a pair of shoes. On the other hand, it is hard to imagine lawyering without paying some heed to the other side or without having the mental ability to switch perspectives fluidly. A lawyer who sees only one side of the case, even a human rights lawyer, certainly does his or her client a disservice. Nonetheless, legal writing pedagogy remain unnecessarily complacent about the ordinary religion of inter-positional amorality when we urge students to evaluate the strength of legal arguments by flip-flopping between exaggerated legal claims with no overarching concern for social justice or the interests of absent parties. Although we should certainly discourage myopia and encourage expanded visions, we must also problematize the too easy exchange of empathetic commitments that might otherwise animate representation.

However, legal writing instructors' explicitness is an important pedagogical step in revealing the invisible legal culture, which the doctrinal classroom purposefully leaves latent, but we must still do a better job unearthing assumptions and describing prevailing conventions.[62] The real question posed by Mertz to legal writing specialists, however, is not whether we participate in the doctrinal acculturation of our students or serve valid pedagogical aims by revealing it, but whether we are willing to criticize its misconceptions and self-deception, reform or transcend its flaws, and transform its application. Although we could certainly do much more to criticize that which we reveal, in answer to this question, we have started to urge students to reflect more consciously on that which was previously obscured in order to transform legal discourse both inside and outside the classroom.

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problems. Therefore, one of the difficulties of composing assignments that address cutting edge issues of subordination is that students on the "wrong" side might feel especially alienated and disempowered by their assigned role.

61. *See* Laura E. Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372, 377-80 (1996) (discussing the processes of destructive characterization or direct negation as an argumentative strategy). Little notes that constructive characterization models are often superior to destructive ones since they "ask" decision-makers to reconceptualize a dispute on terms favorable to an adversary rather than merely reject an opponent's argument. *Id.* at 383-92.

62. *See* Ramsfield, *supra* note 36, at 157 (discussing the value of using a contrastive approach to clarify even more directly the cultural conventions of American legal literacy).

To accomplish these goals, we have proposed: (1) placing legal literacy within the context of other literacy traditions in the United States, (2) recommending that students read legal texts much more critically, (3) recommending that educators pluralize the content of the classroom and facilitate participation by outsiders, and (4) recommending experimentation with more narrative, less biased, and more feminist discourse strategies and with a collaborative ethic of client empowerment.

First, to contextualize Mertz's anthropological observation that legal training teaches passivity towards legal authority (in both senses) and emphasizes formal rationality and facial neutrality of the law, some legal writing specialists place the traditions of legal discourse within the broader traditions of American literacy that reinforce this passivity.[63] Legal literacy valorizes coherence, closure, and unity at the expense of ambiguity, openness, and multiplicity.[64] It also shrouds the subject—the actual author of a legal text—behind a false veneer of bureaucratic certainty.[65] This epistemology of textual authority and certainty in law is exemplary of a more encompassing literary culture of allegiance to the printed word.[66] Under this more pervasive regime, students are culturally predisposed leads to over-rely on the written word, reported decisions, and statutory language to resolve legal disputes. However, the language of legal doctrine does not exist in a vacuum; it exists in a nested array of complementary literary traditions that simply accept the assertion of power and the silence of oppression in most textual forms. Accordingly, students must not only overcome the legal culture of textual dependency—the illusion that law is given, that law is good, and that passive reading somehow discovers determinate legal meaning. They must also overcome the underlying literacy tradition. Only if they do so, hopefully with the encouragement of legal educators, will students develop more critical perspectives on the law and more transformative writing in practice.

Second, although many legal writing specialists are passive towards law—thus evidencing an implicit jurisprudence of legal positivism—others urge that students should read law critically.[67]

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63. *See, e.g.*, Baker, *Transforming the Traditional Repertoire*, *supra* note 37, at 512.

64. *See* Kathleen McCormick, *The Cultural Imperatives Underlying Cognitive Acts*, *in* READING-TO-WRITE: EXPLORING A COGNITIVE AND SOCIAL PROCESS, SOCIAL AND COGNITIVE STUDIES IN WRITING AND LITERACY 194, 199 (1991).

65. *See, e.g.*, Eichhorn, *supra* note 37, at 124-28, 133-35; Little, *supra* note 61, at 401; Stanchi, *supra* note 30, at 35-41.

66. McCormick, *supra* note 64, at 214-15; Fajans & Falk, *supra* note 37, at 173 (referring to the common-sense realist paradigm); Beth Britt et al., *supra* note 37, at 214-15.

67. *See* sources cited *supra* note 37.

For example, Kristin Woolever and her colleagues strongly advise that students critically interpret legal text as human artifacts.[68] They urge the use of critical interpretative strategies to deconstruct legal text in order to uncover its assumptions, privileges, and exclusions. "Critique, as a literacy skill, evidences resistance to the dogmas of text and to the customs of community—both in text interpretation and in text production."[69] Deconstructionist critique draws on critical traditions, which include critical legal studies, legal feminism, critical race theory, and critical literary theory, to challenge the canon and conventions of the rule of law and legal discourse.[70] Once open to criticism, however, the text's silences, gaps, and omissions are available for analysis. By deconstructing the text, the critical reader locates the author and information about the author's status, power, and political interests. Using this analysis, students can see law as a contingent social construct containing assumptions about the world and reproducing a set of preferred power relationships. As students criticize legal texts, they learn to question this power structure by exploring and exploding master-stories of race, gender, class, ability, age, sexual orientation—all the systems of stereotype and oppression that plague our society.[71] Through critical readings, students awake to their own interpretive agency and discover a potent power to transfigure the law in pursuit of social justice.

Third, some of us, especially Charles Calleros and Kathryn Stanchi, urge that the silence about outsiders be broken, that professors pluralize the legal classroom, and that legal writing instructors ensure that outsider students' life experiences, perspectives, and voices be included in the classroom and in legal discourse.[72] Calleros, for example, recommends that legal writing professors could do much more to include multicultural issues in writing assignments.[73] Not only can we name parties with diverse ethnic names,[74] we can address issues of Native American law, Chicano cultural traditions, and discrimination against people of color, women, and gays.[75] When we add multi-cultural issues to the classroom, we encourage outsider students to become expert witnesses about *their* own cultural practices.[76] In the process of

68. Britt et al., *supra* note 37, at 213, 225-26.
69. Baker, *Transforming the Traditional Repertoire*, *supra* note 37, at 512.
70. *Id.* at 513; Sossin, *supra* note 37.
71. Fajans & Falk, *supra* note 37, at 165; *see* Sossin, *supra* note 37, at 901.
72. Stanchi, *supra* note 30.
73. Calleros, *supra* note 32, at 150-56
74. *Id.* at 150-51.
75. *Id.* at 153-55.
76. *Id.* at 151-53; Brook K. Baker, Dilemmas of Cross-Cultural (and Inner-Cultural) Lawyering and Teaching: Six Months in South African Classrooms and Clinics, 5-19 (1998) (unpublished manuscript, on file with author).

explaining traditions, students feel more ownership and less alienation. They will collaborate to create a more inclusive and trusting atmosphere of participation and exchange.

Stanchi, on the other hand, uses linguistics' "muting" theory, to describe how outsider voices are systematically excluded from the legal writing classroom because legal language does not accurately convey experiences of subordination.[77] Compared to the doctrinal first-year class, the legal writing class, in one sense, is undoubtedly more inclusive. Each student creates legal texts, which she then continues to edit and revise. Additionally, each student receives a significant portion of the instructor's time and interacts with the instructor through written comments and writing conferences. Moreover, many schools teach legal writing in smaller sized classes. Some very small writing classes attempt to create collaborative learning groups by employing teaching assistants and adjunct professors. Notwithstanding the inclusivity of the legal writing classroom, Stanchi argues that legal writing pedagogy asks outsiders to write in the inauthentic, alienated, and disempowered forms mirrored from the doctrinal classroom.[78] To remedy this marginalization, Stanchi catalogues ways to include outsider voices by both incorporating critical outsider texts in the curriculum and fostering "expressive" articulation of outsider voices in the classroom and in student's writing.[79]

Similarly, Jessie Grearson suggests that legal writing instructors make a heightened effort to recognize the experiences law students gain while working in other discourse fields, and on maturing in different cultural traditions. She discusses how professors may facilitate transitions between discourse communities more directly. Grearson also observes that emphasizing expressive orientations can help pluralize legal discourse.[80]

Other commentators, particularly from the clinical context, urge legal skills instructors to use difference explicitly in their teaching as a way of improving legal understanding, fighting discrimination, and enhancing client problem solving.[81] One of the

77. Stanchi, *supra* note 30, at 19.

78. *Id.* at 20-51.

79. *Id.* at 51-57.

80. Grearson, *supra* note 36, at 73-78. Parker also focuses on the use of more "expressive" orientations to permit students to find their own "voice" and to develop their own values. Parker, *supra* note 37.

81. *See, e.g.*, Beverly Balos, *Learning to Teach Gender, Race, Class and Heterosexism: Challenge in the Classroom and Clinic*, 3 HASTINGS WOMEN'S L.J. 161 (1992); Kathleen S. Bean, *The Gender Gap in the Law School Classroom—Beyond Survival*, 14 VT. L. REV. 23 (1989); Richard Boldt & Mark Feldman, *The Faces of Law in Theory and Practice: Doctrine, Rhetoric and Social Context*, 43 HASTINGS L.J. 1111 (1992); Leslie G. Espinoza, *Legal*

complexities of using difference, however, is getting mainstream students to understand worldviews and to understand the narratives of people with radically different life experiences.[82] A second complexity of using difference as an instructional device is learning to avoid putting outsider students on the spot as having an obligation to represent their entire group.[83] A third complexity is avoiding a classroom culture of essentialism and/or stereotype in which the class interprets the experiences of a particular subordinated group member as uni-dimensional and immutable rather than intersectional, contingent, and individualized.[84]

Fourth, some critics of legal writing pedagogy argue that it is not enough to nurture critical literacy practices in the classroom. Instead, the legal writing classroom must also prepare students for critical discourse strategies under the constraints and opportunities of practice. Although many professors teach students to be bound by tradition and doctrine, a few inform students about their ability to push the boundaries of legal discourse and encourage students to transform the social injustices within the legal system. Legal instruction holds the key to exposing students to post-conventional strategies for changing the world of practice.[85] For example, increasingly, legal writing specialists consider three promising discourse strategies for representing outsider clients: (1) using subversive/outsider

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Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender, 95 MICH. L. REV. 901 (1997); Mary Jo Eyster, *Integrating Non-Sexist/Racist Perspectives into Traditional Course and Clinical Settings*, 14 S. ILL. U. L.J. 471 (1990); Carolyn Grose, *A Field Trip to Benetton . . . and Beyond: Some Thoughts on "Outsider Narrative" in a Law School Clinic*, 4 CLINICAL L. REV. 109 (1997); John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide?*, 6 CLINICAL L. REV. 85 (1999); Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLINICAL L. REV. 6, 96-97 (1997); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993); Peter M. Shane, *Why Are So Many People So Unhappy?: Habits of Thought and Resistance to Diversity in Legal Education*, 75 IOWA L. REV. 1033 (1990). For the argument that race should be the core curricular focus in legal education, see generally Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991).

82. Grose, *supra* note 81, at 109.

83. Calleros, *supra* note 32, at 160; Crenshaw, *supra* note 32, at 6-7 (describing an expectation of minority "testifying" that pose barriers to participation in the classroom).

84. *See* Calleros, *supra* note 32, at 156-58 (discussing the problem of stereotyping); Mertz et al., *supra* note 24, at 80-86 (discussing contextual variables).

85. Baker, *Transforming the Traditional Repertoire*, *supra* note 37, at 525-35. Calleros and Pratt have documented circumstances where legal writers brought outsider claims to legal decision-makers. Calleros, *supra* note 32, at 152; Pratt, *supra* note 37, at 82-97.

narrative;[86] (2) detecting, confronting, and avoiding appeals to bias;[87] and (3) utilizing a more nuanced, less adversarial, less legalistic, and more feminist dialogue.[88] More recently, I proposed that we not only teach issues of professional responsibility more pervasively, but also project an ethic of increased client control and a more transformative ethic of client empowerment for outsider clients in our legal writing pedagogy.[89] Legal writers

86. Baker, *Transforming the Traditional Repertoire, supra* note 37, at 524-38; Teresa Godwin Phelps, *Narratives of Disobedience: Breaking/Changing the Law*, 40 J. LEGAL EDUC. 133 (1990); *cf.* Mitchell, *supra* note 81, at 85-97 (discussing use of client narrative in the clinical context). Stanchi notes that legal writing pedagogy already relies strongly on a more narrative jurisprudence because we require students to write narrative fact sections for their memos and brief. However, she also criticizes the conservative impulse of our teaching and criticizes the narratives law routinely produces; she too proposes more reliance on disruptive outsider narratives. *See* Kathryn M. Stanchi, *Exploring the Law of Legal Teaching: A Feminist Process*, 34 J. MARSHALL L. REV. 193, 197-202 (2000). Reliance on outsider narrative to persuade legal decision makers, particularly as propounded by the Theoretics of Practice movement, has been soundly critiqued by Professor Mansfield. She argues that clients come to lawyers to solve legal problems and therefore they need *legal* expertise, not sympathy, not romanticizing, not bedside stories. Otherwise, the legal field is left open to opposing attorneys and judges who will control the impact of clients' authentic stories in *their* world. *See generally* Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: Practiced-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 BROOKLYN L. REV. 889 (1995). Mitchell has proposed reliance on expert witnesses as a way to introduce cultural information that legitimates client's otherwise unfamiliar or implausible stories. Mitchell, *supra* note 81, at 120-24.

87. Baker, *Transforming the Traditional Repertoire, supra* note 37, at 538-52. Although I acknowledge the ubiquity of bias and stereotype in my analysis, I am optimistic that we can and should produce less biased texts, texts that rely less on harmful social stereotypes. *Id.* Professor Baron is deeply skeptical that legal language in general and legal narratives in particular can avoid the cultural/cognitive field where stereotypes abound. *See* Baron, *supra* note 45, at 5-6. "We may be able to acknowledge the presuppositions with which we make our inquiries, but we cannot do without them altogether, so our new notions—of women, of others who are demarked as 'different'—will in this sense be but new alternative stereotypes." *Id.* at 6; *accord* Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 U.C.L.A. WOMEN'S L.J. 457, 538-39 (1996).

88. Baker, *Transforming the Traditional Repertoire, supra* note 37, at 552-60. Stanchi calls her entire project an effort to create a more feminist discourse, one that can include emotion and narrative as well as doctrine. Stanchi, *supra* note 82. Austin makes a related point when she urges use of ethnographies as part of the repertoire of lawyers seeking to challenge under-examined forms of oppression. *See* Austin, *supra* note 44.

89. Brook K. Baker, *Traditional Issues of Professional Responsibility and a Transformative Ethic of Client Empowerment for Legal Discourse*, 34 NEW ENG. L. REV. 809, 857-904 (2000). *See also* Parker, *supra* note 37, at 592-94 (discussing the desirability of using legal writing to let the client "represent" herself).

must not only be willing to give up near term control over their texts, they must also engage in contextualized and contested moral dialogue with clients about the social justice aims of representation.[90] After reaching the necessary degree of agreement, future lawyers must learn how to understand, collaboratively reconstruct, and then amplify the *client's* voice in a way that produces intra-psychic and communal rewards for the client and her community, *and* the redistribution of social goods. All of these client-centered reforms in legal writing necessitate the inclusion of clients, real or simulated, into the legal writing classroom. More importantly, these reforms would put social justice concerns at the center of legal instruction rather than at the margin.

II. ANTHROPOLOGICAL PLURALISM IN OTHER SKILLS TRAINING

Fortunately, the legal skills curriculum extends far beyond the legal writing classroom. Many of these contexts offer even richer alternatives to the doctrinal classroom. Law clinics, for example, offer a greater range of interpersonal and situational sensitivities and skills and provide for more informed critique of legal rules and the legal system. In the law clinic, an anthropologist would hear far less about legal doctrine and far more about narrative accounts of injustice,[91] the service needs of poor clients,[92] the importance and indeterminacy of facts,[93] and the bureaucratic structures of power.[94] Although doctrinal analysis

90. For a discussion of how this ethic of outsider empowerment is contextualized within systems of power, impulses to autonomy, and imperatives of culture, see generally Baker, *supra* note 89.

91. *See, e.g.*, Clark D. Cunningham, *A Tale of Two Clients: Thinking about Law as Language*, 87 MICH. L. REV. 2459 (1989); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Patrick Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 L. & SOC'Y REV. 197 (1995); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992); Mitchell, *supra* note 81; Richard Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994).

92. *See* David Fagelson, *Rights and Duties: The Ethical Obligation to Serve the Poor*, 17 LAW & INEQ. J. 171 (1999).

93. *See, e.g.*, DAVID BINDER & PAUL BERGMAN, FACT INVESTIGATION: FROM HYPOTHESIS TO PROOF (1984); William Twining, *Taking Facts Seriously*, 34 J. LEGAL EDUC. 22 (1984); Ian Weinstein, *Facts: The Mysterious Other Half of Thinking Like a Lawyer* (1997) (on file with author); Walter Weyrauch, *Fact Consciousness*, 46 J. LEGAL EDUC. 263 (1996).

94. *See, e.g.*, Gary Blasi, *What's Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063, 1069-80 (1994) (discussing theories of capital flight, bureaucratic disentitlement, and postmodern critical theory in application to proposals for a model "homelessness" camp in Los Angeles).

and legal argumentation play an important role in clinical practice, a much broader array of skills like interviewing, counseling, fact-gathering, case planning, and negotiating supplant more traditional, doctrinal focus. Since many clinicians encourage critiques of the dominant legal order and since students have ample opportunity to view the underbelly of the law, clinical contexts afford rich opportunities for professors and students to question—and actively resist—legal norms on behalf of outsider clients.[95] Similarly, externships provide a slightly less structured but nonetheless interactive opportunity for students to engage in real lawyering activity. Externships create more practical contexts for self-directed learning, a form of learning and empowerment absent in most doctrinal classrooms.[96] Externships are laboratories where experience is text[97] and task-focused language forms matter, sometimes positively sometimes negatively.[98] Although some critics conceptualize externships as a place of unreflective and uncritical absorption of substandard and unethical norms of practice,[99] externships are also sites where students can learn to reflect critically, not just on their own work, but also on systematic defects in the legal culture.[100]

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95. "Seeing, participating in, and, most importantly, reflecting upon the law in action provides the student with an opportunity for engaging in self-conscious critical analysis of legal institutions, rules, and procedures that is rooted in, yet transcends, the student's own experience." Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 140 (1993-1994). *See, e.g.*, Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality,"* 4 CLINICAL L. REV. 1 (1997) (discussing the role of clinics in revealing and opposing systems of oppression); Calleros, *supra* note 32, at 147-49; Jon Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461 (1998); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 60-61 (1995).

96. *See* Brook K. Baker, "Self-Directed" Learning Post-Modernized: Autonomy, the Search for Self, and Self-Realization in Law Student Work Experience, 4-16 (1997) (unpublished manuscript on file with author); Stephen Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education*, 69 NEB. L. REV. 537 (1990) (focusing on student-centered learning and self-directedness); Janet Motley, *Self-Directed Learning and the Out-of-House Placement*, 19 N.M. L. REV. 211 (1989); Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLINICAL L. REV. 413, 419-20 (1996).

97. Peter Jaszi et al., *Experience as Text: The History of Externship Pedagogy at the Washington College of Law, American University*, 5 CLINICAL L. REV. 403, 404-05 (1999).

98. *See* Robert Condlin, *Learning from Colleagues: A Case Study of the Relationship Between "Academic" and "Ecological" Clinical Legal Education*, 3 CLINICAL L. REV. 337 (1997).

99. *See, e.g.*, Lawrence K. Hellman, *The Effect of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537 (1991).

100. *See, e.g.*, Robert Condlin, *"Tastes Great, Less Filling": The Law School*

Alternative dispute resolution (ADR) skills courses also hold promise in countering the hegemony of doctrinal language and legalistic perspectives. Although some commentators urge that law should play a larger part in legal negotiations,[101] other commentators champion integrative or interest-based negotiation and mediation precisely because they open the fabric of legal disputes to include other human and contextual factors that may be more important to fair or just outcomes than "law" alone.[102] Clients and lawyers in negotiations can disclose information and calibrate goals to reach ends not otherwise attainable in court. More significantly, in mediation and in other party-friendly procedures, clients can directly participate in resolving what might otherwise be a legalistic dispute handled by lawyers who might silence and control them.[103] Law students working in ADR contexts learn a broader array of interpersonal and process skills, and the students ordinarily remain closer to the human beings actually embroiled in conflict.[104] Thus, with ADR, client stories can count, hurt feelings can count, and private senses of justice can prevail.

In addition to clinics and ADR programs, the legal skills curriculum offers additional courses that put law in cultural context and directly address the social justice concerns capable of

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Clinic and Political Critique, 36 J. LEGAL EDUC. 45 (1986) (arguing that externships are a superior forum for critiquing the legal system); J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55 (1996); Harriet N. Katz, *Using Faculty Tutorials to Foster Externship Students' Critical Reflection*, 5 CLINICAL L. REV. 437 (1999); Seibel & Morton, *supra* note 96, at 420.

101. *See, e.g.*, Robert J. Condlin, *"Cases on Both Sides": Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 84 (1985).

102. *See, e.g.*, ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 U.C.L.A. L. REV. 754 (1984); *see also* James M. Cooper, *Toward a New Architecture: Creative Problem-Solving and the Evolution of Law*, 34 CAL. W. L. REV. 297 (1998) (discussing a new paradigm of creative problem-solving that uses integrative bargaining and other planning and dispute resolution methodologies to heal and strengthen social bonds of multiple stakeholders); Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351 (1998) (arguing that not all problems require "legal" solutions).

103. *See, e.g.*, Jonathan M. Hyman, *Slip-Sliding Into Mediation: Can Lawyers Mediate Their Clients' Problems?*, 5 CLINICAL L. REV. 47, 55-63 (1998) (discussing multiple ways that mediation can help clients).

104. *See* James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 476-97 (1996) (addressing some of the non-traditional skills that students learn in mediation clinics); Kathy Kirk, *Mediation Training: What's the Point, Are the Tricks Really New, and Can an Old Dog Learn?*, 37 WASHBURN L.J. 637 (1998) (discussing interpersonal skills learned through interactive/interpersonal mediation training methodologies).

animating the law. For example, my law school, Northeastern, has a mandatory first-year course called Law, Culture, and Difference, which tries to acknowledge how law structures society and, conversely, how culture impacts law. We pay particular attention to the systems of oppression—racism, sexism, homophobia, class elitism, etc.—that plague our society. After discussing and role-playing topical issues like welfare reform, hate-speech codes, and the commercialization of human body parts, students work in lawyering teams to provide direct representation for community organizations seeking legal change. The express goal of this course is to impart a public interest/social justice perspective and introduce lawyering skills in a multicultural society and within a diverse profession. Other law schools have similar programs. Maryland has a first-year lawyering course that directly exposes students to the responsibilities of client representation.[105] Boston College has a first-year course called Introduction to Lawyering and Professional Responsibility and NYU has a Lawyering Program, both of which introduce skills of interviewing, counseling and negotiation within an ethical framework of traditional rules of professional responsibility and extra-legal moral perspectives as well. Other legal writers have identified "more feminist" classrooms where contextual dialogue and even consciousness-building supplant doctrinal analysis.[106] I am sure that there are many other examples of courses and/or classrooms where skills teachers recognize the poverty of doctrine and prioritize contextual, narrative, and critical perspectives for public and private disputes.

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105. Barbara Bezdek et al., *Students and Lawyers, Doctrine and Responsibility: A Pedagogical Colloquy*, 43 HASTINGS L.J. 1107 (1992).

106. *See, e.g.*, Katherine T. Barlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Patricia A. Cain, *Teaching Feminist Legal Theory at Texas: Listening to Difference and Exploring Connection*, 38 J. LEGAL EDUC. 165 (1988) (describing a feminist pedagogy of trust, listening, sharing, and relationship); Mary Jo Eyster, *Analysis of Sexism in Legal Practice: A Clinical Approach*, 38 J. LEGAL EDUC. 183 (1988); Ann E. Freedman, *Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School*, 24 GA. L. REV. 849 (1990); Melissa Harrison, *"A Time of Passionate Learning:" Using Feminism, Law, and Literature to Create a Learning Community*, 60 TENN. L. REV. 393 (1993); Linda Morton, *Creating a Classroom Component for Field Placement Programs: Enhancing Clinical Goals with Feminist Pedagogy*, 45 ME. L. REV. 19 (1993) (describing a feminist pedagogy in an externship program); Paul J. Spiegelman, *Integrating Doctrine, Theory, and Practice in the Law School Curriculum: The Logic of Jake's Ladder and the Context of Amy's Web*, 38 J. LEGAL EDUC. 243 (1988) (advocating a legal curriculum that employs an ethic of care); Stephanie M. Wildman, *The Classroom Climate: Encouraging Student Involvement*, 4 BERKELEY WOMEN'S L.J. 326 (1989-1990). *See also e.g.*, Clare Dalton, Commentary, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1 (1988).

III. OTHER SITES OF RESISTANCE TO IN"DOCTRINE"ATION

As much as I admire the detail and sophistication of Mertz's anthropological analysis and her recognition of the mirroring of legal authoritarianism within legal pedagogy, I worry about how much her account misses both other sources of self-denial and alienation for outsider students[107] and the resistance to doctrinal formalism found at other sites in the law school environment.[108] Of course, we cannot fault Mertz for choosing a small sample and a particular type of class to investigate. Mertz focuses her linguistic and anthropologic lens on an important component of the legal training environment, a first-year doctrinal, Socratic classroom. Moreover, there is no doubt that first-year doctrinal classes play a powerful role in the socialization of law students. However, literal acceptance of Mertz's thesis might result in despair, a sense that the power elite has seized the high ground once again and that their class allies, law professors, patrol the borders of legal training with an efficacy that rebuffs all insurgency. Although there is plenty of reason to be pessimistic about the explicit and implicit messages of legal education, critics, outsiders, and students must remain optimistic about the individual and collective cultures of resistance, which oppose the cultural momentum of the Socratic classroom. Moreover, these in"doctrine"ation messages of cultural elitism provide every incentive to challenge law professors' efforts to exert hegemony over the meaning of law and the process of professional acculturation. Without undermining Mertz's thesis, I would like to supplement it with a short inventory of places and mechanisms which nurture resistance.

For example, in addition to having classroom and clinical opportunities, law students nationwide have the ubiquitous experience of working part-time and during the summers of law school in law offices, judges' chambers, and government agencies.[109] Northeastern provides its students with a greatly

107. Outsider students' sense of marginalization does not arise from the classroom alone. As Margolis and Romero have documented in the sociology context, students experience a hidden curriculum in the "formal and informal social structures of graduate programs; financial and mentoring support; relationships with faculty and other graduate students; research, publishing, and teaching opportunities." Margolis & Romero, *supra* note 14, at 5. This hidden curriculum produces eight forms of marginalization: "stigmatization, blaming the victim, cooling out, stereotyping, absence, silence, exclusion, and tracking." *Id.* at 12.

108. Outsiders always resist their oppression and there are strong reasons to value this resistance even as we deplore its necessity. *See id.* at 24-28; bell hooks, *Talking Back: marginality as site of resistance, in* OUT THERE: MARGINALIZATION AND CONTEMPORARY CULTURES 337-43 (Russell Ferguson et al. eds., 1993).

109. *See* Daniel J. Givelber et al., *Learning Through Work: An Empirical*

expanded opportunity to work in the real world through its co-operative legal education program that alternates four upper-level academic quarters with four full-time co-op work quarters. Admittedly, law students working or co-oping often do doctrinal research and writing, but their work also exposes them to clients, witnesses, opposing lawyers, and legal decision-makers. Their social world is rich; their forms of participation varied; and their dialogic resources decidedly non-doctrinal.[110] Even though most students participate in law office experiences only after socialization to the first-year doctrinal classroom, there is still a much richer narrative and contextual world in the hurly-burly of real practice than in the desiccated text of an appellate casebook and its correlative Socratic classroom.

Similarly, students get out-of-the-classroom exposure to critical perspectives on the legal system through their public interest work. Many law schools have instituted voluntary and mandatory public-interest requirements in which students work on behalf of economically disadvantaged clients and communities.[111] At Northeastern, nearly 85% of students fulfill their public-interest requirement by working full-time for three months in a public interest placement. Certainly, these *pro bono* activities hope to provide a deeper appreciation of the legal needs of the poor, the legal system's disregard of those needs, and the profession's increasingly recognized obligation to serve these constituencies.[112] In addition to these formally organized outside service opportunities, students—sometimes by themselves and sometimes with faculty—engage in a bewildering array of volunteer activities. Such activities at Northeastern include: the Court Watch program where students study criminal charges and sentences in a local district court for racial disparity; mentoring programs for teenage girls in a residential placement program and for high school students attending a special program based on weapons violations; and the Domestic Violence Project where students volunteer at local emergency rooms to study the incidence of partner violence and to triage services for survivors.

Students get broader exposures not only *outside* of the law

Study of Legal Internship, 45 J. LEGAL EDUC. 1, 4-7 (1995) (noting opportunities for law students).

110. Brook K. Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 CLINICAL L. REV. 1, 8-23 (1999) (discussing how students learn in the clinical setting).

111. Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415 (1999). Rebecca Cochran has recommended that legal writing programs assist in this effort. Rebecca A. Cochran, *Legal Research and Writing Programs as Vehicles for Law Student Pro Bono Service*, 8 B.U. PUB. INT. L.J. 429 (1999).

112. David Fagelson, *Rights and Duties: The Ethical Obligations to Serve the Poor*, 17 LAW & INEQ. J. 171 (1999).

school but *inside* as well. Mertz studied only a limited subset of legal conversations and discursive reactions to legal authority in the law school environment. In short, her tape recorder missed many other areas rich in contextual analysis. In the first instance, students struggle on their own as they engage in a private dialogue with legal texts in their law libraries and at their desks at home. In doing so, students elaborate cognitively on text, interweaving and superimposing their own life experience onto the template of the author's justificatory account of his or her decision.[113] Students talk about cases and their reactions to classroom discussions in the lunchroom, in the hallways after class, in study groups, and in the student organizations that are on-going sites of resistance in the law school. In identity group environments in particular, students question authority and critique legal orthodoxy. Several curricular innovations at my law school, for example, the "Law, Culture and Difference" course previously discussed and a course on sexuality and the law, are outgrowths of student activism aimed at opening the legal classroom to normative values and social perspective other than the purely doctrinal. During the past year at my law school, students and faculty-organized panels and other activities that have dealt with such topics as capital punishment, immigrant workers' rights, domestic violence, institutional racism at the law school, tobacco liability, international law and the United Nations' air raids on Serbia, and grassroots human rights work in the United States. In addition, we have a standing law school committee, the Committee Against Institutional Racism, that addresses structural issues of racism, including those that arise from neglected issues of race and unresponsiveness to troubling statements in doctrinal classrooms. Although we could marginalize these non-classroom discussions as extra-curricular and as non-central to the law school culture, if we change our perspective ever so slightly to focus on the students' experience of law school, we will see that these non-classroom locales are central not only to critical discussions about law but as alternative sources of identity about what it means to be a lawyer.

CONCLUSION

Elizabeth Mertz reveals a normatively impoverished world of doctrine institutionalized as a formative socialization experience for first-year law students. The Socratic "dialogue," as a pedagogical method, reinforces the centrality of doctrine, as a way of maximizing the authority of legal rules at the expense of all the other contextual, narrative, and emotive forces that might animate

113. Baker, *Transforming the Traditional Repertoire*, *supra* note 37, at 499-500.

just dispute resolution. To complete the hegemony of doctrine, first-year doctrinal professors push the actual voices and perspectives of legal outsiders to the margin. Instead of exploring complexity, pluralism, and power, the doctrinal classroom presents legal meaning as relatively determinate, neutral in application, and uncontested. Of course, to the contrary, law is contested; its doctrinal platitudes, its Olympian objectivity, its self-referential universality belie a world of resistance and contestation. Although articulation and application of pluralistic meanings, perspectival insights, and social complexity is difficult, Mertz urges us to acknowledge that unity, formal rationality, and unquestioned authoritativeness come at a cost. In particular, assumptions of normalcy, normativity, and acquiescence damage and diminish the claims of the historically disadvantaged and dispossessed.

Full acceptance of legal culture and unquestioning acquiescence to the status quo of legal language is deeply troubling in the legal writing and skills curricula as well. As important as developing facility with doctrine might be for legal professionals, fulfilling expectations, particularly those of a legal elite like lawyers, judges, and legislatures, can often lead to careless reproduction of the existing legal, economic, and political order. The interests of powerful people and privileged constituencies underlie the communicative practices and unchallenged world-view of far too many lawyers. Rather than always meeting the background assumptions of legal decision-makers, the critical lawyer must, in many instances, disrupt those assumptions. Thus, through critical discourse,[114] this new breed of critical lawyers must challenge the substantive and stylistic status quo of subordination and marginalization through rebellious lawyering.[115]

Although Mertz holds our discipline up to the mirror, we might ask her what anthropology has to offer, especially what it has to offer normatively with respect to systems of oppression. Anthropology itself has been roundly criticized for its history of exoticizing non-Western cultures,[116] its allegedly neutral and non-participatory stance, its attention to the personal and physical, and its avoidance of the normative and political. At the same time that Western anthropology was studying indigenous cultures, Western imperialism destroyed and colonized those cultures. Admittedly, much has changed in the anthropological impulse, particularly its desire to collaborate with and to participate in local cultures, to offer situated assistance. But we may still criticize this impulse as being more at the margin than the core.

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114. *See id.* at 538-552 (identifying critical discourse strategies).

115. *See, e.g.*, GERALD P. LOPEZ, THE REBELLIOUS IDEA OF LAWYERING AGAINST SUBORDINATION (1992); Lucie White, *"Democracy" in Development Practice: Essays on a Fugitive Theme*, 64 TENN. L. REV. 1073 (1997).

116. *See generally* EDWARD W. SAID, ORIENTALISM (Vintage Books 1979).

So our question to Mertz might well be: "Does your discipline offer anything but a critical perspective on our own? Has anthropology in general, or linguistic anthropology in particular, mapped the language forms of moral discourse that increase participation, broaden perspectives, and motivate social justice?"

Legal education, in general, and skills pedagogy, in particular, like everything else, needs a critical edge in a world of inequality. Although legal texts frequently reproduce—and classroom practices often perpetuate—the existing legal order and power structure of the world around us, we must remember that the law alone does not mediate power. In fighting racism and other systems of oppression, many of us in the legal educational system are trying to find a human facility or disciplinary orientation that provides reliable guidance. Yet, on some level, everything fails us—cognition fails us, individual and group psychology fails us, law and public policy fail us, emotion fails us, and now anthropology fails us as well. This does not suggest that we abandon Mertz's suggestion that we open legal language and the process of acculturation to a broader range of human perspectives. Nor does it suggest that we loosen the false hold of unquestioned authority. Instead, we must continuously strive to create a multifaceted system of legal education that is responsive to the dynamics of social justice. We must continue to struggle to find principles of law, forms of reasoning, and varieties of legal discourse that might assist the transformation of the world.