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LAW AND LAWYERING:
LEGAL STUDIES WITH AN INTERACTIVE FOCUS*

PEGGY C. DAVIS**

I. INTRODUCTION

J. Max Bond, Jr., a contemporary architect of extraordinary skill and sensitivity, practices and teaches architecture that is centered, not upon objects, but upon process and relationship. Bond's vision extends beyond structures. Where others see constructed objects as manifestations of individual creative will, Bond sees objects that develop and evolve in "a complicated creative process . . . that begins before an architect designs and continues beyond the construction of a building to include revisions by its inhabitants."¹ He writes that "the creation of a building engages many people, in addition to the architect, in a process that evolves through a series of choices, responses, and insights."² He sees the many people involved in the architectural process, not as obstacles, but as respected collaborators. He aspires to participate in the design of structures that will "not simply house people, but . . . reflect their aspirations, respond to their 'will to form' and serve their . . . needs."³ He sees in the architectural process manifestations of the culture and the heritage of the participants. Building (as one must) in societies dominated by particular values and power centers, he has aspired "to give form to the strivings of average people."⁴ Bond's focus on process has enhanced his sensitivity to the ways in which the strivings of average people can be silenced in professionalized, complex, and expensive processes. At the same time, it has taught him strategies for contributing "to progress and popular empowerment."⁵

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1. J. Max Bond, Jr., *The Black Architect's Experience*, ARCHITECTURAL REC., June 1992, at 60, 61 (book review).

2. J. Max Bond, Jr., *Autobiographical Essay*, in AFRICAN AMERICAN ARCHITECTS IN CURRENT PRACTICE 22 (Jack Travis ed., 1991).

3. *Id.*

4. *Id.*

5. *Id.*

One can study, teach, or work with a rule of law as if it were an edifice; a creative product of the judicial or lawyerly mind; a thing unto itself. Increasingly, however, we have come to study, to teach, and to practice law as Bond has studied, taught, and practiced architecture: As something created, and regularly recreated, in a complex world. As an interactive process involving the choices, responses, and insights of a variety of actors. As a reflection of values and of power. As a product and representation of culture. As an enterprise that reflects the needs and the will to form of a few or the needs and the will to form of many, depending upon the manner in which it is practiced.

I have used the term contextual criticism to refer to the study of law in the manner of Bond—as interactive, culturally embedded process.⁶ Contextual criticism is exemplified by the work of Gerald Lopez who, in writing about civil-rights law, does not limit himself to the letter of a statute or to its reading by an appellate justice, but begins his analysis as a client's trouble brews. Lopez imagines the ways in which the trouble and the remedy are conceptualized by the client. He exposes the lawyer's struggle to cast the trouble in terms that fit opportunistically with the letter of a law or with its prior judicial readings. He challenges lawyers to give less deference to learned readings and more expression to the client's conceptualizations and will to form.⁷ Similarly, when Lucie White writes about public-benefits law, she focuses upon the lawyer-client interaction to expose the stories that emerge and the stories that are suppressed as flesh is given to skeletal legal terms like "necessity" and "reliance."⁸ And when Gerald Torres and Kathryn Milun analyze the law by which Native American land claims are determined, they focus upon the irony that tribe members, whose lives and histories gave meaning to the term tribe, are unable, in their interactions with lawyers and judges, to affect the construction of a legal definition of "tribe" that negates both their history and their claim.⁹

As the Lopez, the White, and the Torres and Milun examples show, contextual legal critics have been drawn to the lawyer-client interaction for insights concerning the evolution and uses of legal rules. Seeing lawyers as keepers of a repertoire of normative stories, and clients as bearers of troubles and aspirations, these scholars have taken a fresh look

6. See Peggy C. Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635, 1642-43 (1991).

7. See Gerald Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989).

8. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 24-31, 46-47 (1990).

9. See Gerald Torres & Kathryn Milun, *Translating "Yonnonديو" by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 647-55.

at the familiar process by which the lawyer decides and argues the fit between legal stories and real-world plights. They have urged lawyers to be self-conscious about interactive process, for they have found that the characteristics of interactive lawyering can determine whether the needs and values of consumers in the legal system are reflected, reshaped, or ignored.

This article reports preliminarily upon ongoing work in the tradition of contextual criticism. The work has been done within the New York University Lawyering Theory Colloquium, an interdisciplinary collaboration of students and faculty interested in the analysis of *lawyering* as a means to a deeper understanding of *law*. It involves a sustained effort to develop more formal methodologies for exposing the processes by which troubles and aspirations in the world become, or fail to become, "matters" or "cases" and move to formal or informal resolution through lawyering or judging.

In an earlier report of work in this tradition, I maintained the focus on lawyer-client interactions that was characteristic of earlier contextual legal criticism. Borrowing tools from disciplines concerned with discourse analysis, gender patterning, and narrative structure, I searched the language of simulated lawyer-client interviews in an effort to expose unconsidered ways of interacting that affect the evolution from trouble or aspiration to legal outcome. I found that people in the role of lawyers assumed a decidedly dominant role in interactions with their clients. They controlled the flow of topics and, after the initial telling of the client's story, talked more than their clients.¹⁰ People in the role of clients behaved consistently with the assumption of lawyer-dominance. They spoke more haltingly,¹¹ used more hedges,¹² and made more frequent use of other linguistic forms associated with tentativeness.¹³ Despite these rather consistent signs of attorney-dominance and client-deference, it was possible to identify interactive patterns that distinguished relatively controlled and relatively open interviewing styles. The more controlled style was suggestive of what Erving Goffman described as a "state of inquiry," directed by the professional, rather than by the client or subject.¹⁴ It was characterized by greater asymmetry in the lawyer's and

10. See Davis, *supra* note 6, at 1663-64, 1668-69.

11. See *id.* at 1665.

12. See *id.* at 1664-66.

13. See *id.* (reporting the use of superfluous intensifiers and the use of mental verbs).

14. ERVING GOFFMAN, FORMS OF TALK 142-43 (1981). Goffman illustrates the "state of inquiry" by reference to a study of words exchanged between a pediatrician and the mother of a patient:

the client's assertions of conversational control and expressions of tentativeness, with the lawyer asking far more questions, making far more requests, and dominating the choice and flow of topics, and the client far more likely to speak in halting, uncertain, and imprecise terms.¹⁵ The more open style was suggestive of what Goffman referred to as a mutually directed "state of talk."¹⁶ It was characterized by shared control of the flow of topics, client participation in the choice of topics and the making of requests, and greater symmetry in the use of uncertainty signs.¹⁷ These two styles of interviewing were suggestive of two styles of lawyering. The controlling lawyering style more quickly socialized the client into conceiving of a problem in terms of readily apparent legal categories. By contrast, the more open lawyering style exploited opportunities associated with the maxim of "relevance."¹⁸ The lawyer manifesting the more open approach operated with a presumption that everything the client said was relevant—that it made sense in terms of norms that might be recognized in law or in a more broadly conceived problem-solving context. Keeping sight of the possible applicability of a variety of norms, the more open lawyer interfered less with the client's ways of conceptualizing a problem and was able to consider a wider range of interpretive possibilities.

The use of formal, interdisciplinary methods for examining interactive aspects of lawyering seemed, on the basis of the initial-interview study, to hold promise. Microanalyses of lawyer-client interviews exposed learned and automatic ways of behaving like lawyers and behaving like clients. As a result, they provided the means to become self-conscious about aspects of the lawyer-client relationship that inhibit the unpredictable and constrain choice.

In this article, I attempt to put microanalytic methodologies to related but different uses. Looking beyond the discourse of the lawyer-client

[S]ocial and professional status allow [the doctor] to be very businesslike; he is running through the phases of an examination, or checklist, not a conversation [T]he mother may not know with any specificity what any of the doctor's acts are leading up to or getting at, her being "in on" the instrumentally meaningful sequence of events in no way being necessary for her contribution to it.

Id. at 142.

15. See Davis, *supra* note 6, at 1659-61.

16. GOFFMAN, *supra* note 14, at 143; see also Davis, *supra* note 6, at 1660 (illustrating Goffman's "state of inquiry" in a lawyer-client context).

17. See Davis, *supra* note 6, at 1660-61.

18. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 22-40 (1989); STEPHEN C. LEVINSON, *PRAGMATICS* 102-03 (1983); DAN SPERBER & DEIRDRE WILSON, *RELEVANCE: COMMUNICATION AND COGNITION* 118-23 (1986).

interview, I examine the discourse of advocacy. In doing so, I consider whether the interactive patterns that serve to maintain or reduce hierarchical role assumptions between professional and client function similarly—or analogously—as a case develops from the intake and counseling phase to the advocacy phase. Specifically, I examine an excerpt from a brief session of simulated informal advocacy, testing for uses of devices that signaled control or openness on the part of the lawyer in the interview setting. I then consider what functions those devices might serve when the aim is advocacy rather than lawyer–client communication.

II. THE TEXT

As the NYU Lawyering Theory Colloquium provides a context for the theoretical study of law as an interactive, culturally embedded process, the NYU Lawyering Program provides a context in which students can experience and analyze the wide range of intellectual and interactive processes that constitute lawyering. The program gives attention to lawyering functions that are often neglected in law-school curricula. It has a developed pedagogy for making students thoughtful and self-conscious in the processes of identifying issues and goals, gathering facts, planning, preparing documents, counseling, negotiating, arguing in formal and informal settings, and presenting evidence to a tribunal. The centerpiece of that pedagogy is a series of simulation exercises in which students act as lawyers, clients, and witnesses. The Lawyering Program is also a laboratory for developing, within the Colloquium, ways of studying and teaching the full range of lawyering functions. The text for this study is an excerpt from a videotaped and transcribed simulation drawn from a Lawyering exercise in informal advocacy for analysis in the Lawyering Theory Colloquium. It is a meeting between a lawyer and a bureaucrat during which the lawyer solicits action on behalf of a client. The lawyer is, then, functioning as an advocate, while the bureaucrat functions as a decision maker.

The client was fired from his job, arguably as the result of a garnishment. Federal legislation prohibits the firing of an employee on the basis of a garnishment for a single debt and places enforcement of the prohibition within the jurisdiction of the Department of Labor.¹⁹ After the firing, the client approached the bureaucrat, an investigator from the Department of Labor, but the investigator advised the client that she was unable to help him to regain his job. The client then took the matter to a legal clinic, and it was decided that a lawyer from the clinic would approach the investigator with the goal of persuading her to reconsider taking on the case. The role of the lawyer–advocate is played by a faculty

19. See 15 U.S.C. §§ 1674(a), 1676 (1988).

member teaching in the Lawyering Program and enacting a plan prepared by a team of students. The role of the bureaucrat–decision maker is played by a student with experience as a federal employee. The excerpt chosen for analysis consists of the lawyer’s initial telling of the case story—the lawyer’s opening narrative—and, for purposes of comparison, the investigator’s answering narrative—a narrative offered in response to the opening narrative and containing the bureaucrat’s version of the client’s situation. The text is reproduced as an appendix. You will find it helpful to read it now, before proceeding to Part III.

III. THE ANALYSIS

In the study of simulated lawyer–client interviews, an initial analysis of narrative form suggested themes that later proved to be characteristic of each interaction. The client’s ability to structure a complete opening narrative seemed inhibited or facilitated in ways that foreshadowed the linguistic patterns that made for closed or open styles of lawyering.²⁰ In the advocacy episode under consideration here, analysis of aspects of narrative form exposes conscious or unconscious negotiating strategies of the participants. In the interviews, a stunted or developed opening narrative suggested a lawyering relationship that was relatively closed or open to the client’s initiatives and conceptualizations. In the episode of informal advocacy, choices made in the structuring of the opening narrative establish themes that frame the negotiation concerning the client’s plight and introduce explicit and embedded value judgments against which the decision maker will judge the case.

The opening narratives of the advocate and the decision maker are similar in length and in structure. Each employs classic devices for structuring the tale and for orienting the reader to its intended message. In Part III.A., I describe these devices, review their uses in both the advocate’s and decision maker’s narratives, and highlight the ways in which themes are set and values are embedded as the devices are manipulated. In Part III.B., I explore the relationship between narrative structure and linguistic patterns of deference and domination.

A. *Narrative Form*

1. Designation of Hero and Establishment of Plight

Professor Bruner has offered a “minimal and austere” definition of narrative that provides concepts and vocabulary for classifying the

20. See Davis, *supra* note 6, at 1661.

ingredients of the advocate's and decision maker's tales. He describes narrative as

a text-like account [of] a sequence of events involving human (or human like) actors that starts with an implied or explicit steady or legitimate state of affairs that is then disrupted or interfered with by a precipitating event or state of affairs that creates a condition of crisis which is then either redressed or allowed to perdure as a new steady state.²¹

It is useful to dissect a tale, giving separate attention to the choice of actors, the definition of a steady or legitimate state, the description of a precipitating event, and the resolution. The following dissection of the opening narratives follows the Brunerian categories, touching first the matter of casting, then, under the broader label of plight definition, the delineation of steady state and precipitating event, and finally, the matter of resolution.

Actors in the tales woven by advocates and decision makers in the legal system are, for the most part, given, rather than chosen. They are the parties involved in the trouble for which legal redress is sought, the players in the legal system called to respond to the case, and the outsiders whose lives or interests affect or will be affected by the outcome. Nonetheless, players in the system have flexibility to make choices in casting their stories, and those choices can have surprising effects. Consider the choices of leading and supporting actors in the opening narratives under review. It is given that the situation of the client is a matter to which the decision maker has been asked to respond. What the client did and what the agency did are therefore predictable ingredients in both stories. The differences between the stories, and the effectiveness of the stories, depend in this first telling on their centering and focus. The stories begin to be centered as central and supporting roles are established.

The advocate's narrative stars a diligent client working hard to pay his debts. The advocate gives himself a supporting role in which he offers pro bono assistance to the client (thereby suggesting a conclusion that the client is worthy of help) and serves as a tempter, proposing ways for the client to evade his fiscal responsibilities (thereby suggesting that the client

21. Jerome Bruner, *Narrative, Legal and Otherwise*, Lecture Four of the Lawyering Theory Colloquium at New York University School of Law 7-8 (Spring 1991) (transcript on file with the author). For a less austere definition, see JEROME BRUNER, *ACTS OF MEANING* 43-55 (1990). For an additional valuable analysis of the bare bones of narrative, see William Labov & Joshua Waletzky, *Narrative Analysis: Oral Versions of Personal Experience*, in *ESSAYS ON THE VERBAL AND VISUAL ARTS—PROCEEDINGS OF THE 1966 ANNUAL MEETING OF THE AMERICAN ETHNOLOGICAL SOCIETY* 12, 41 (June Helm ed., 1967).

is noble). In addition, the advocate embeds the client's story in an incipient story starring the decision maker. The decision maker is introduced as a person, sympathetic to the central character, whose ethos, or way of working, or (to use Bruner's term) steady state, is unknown. The introduction of this character begins a narrative tension that well serves the advocate's purposes, for, as the interview progresses, the steady state of the decision maker comes to stand for the legal and policy position that serves, or fails, to provide a basis for helping the sympathetic client. But the decision maker's story cannot yet be developed. The character with a developed story—the character with an identifiable steady state that is disrupted, creating crisis and inviting resolution—is the client.

Although the decision maker briefly tells a story that features the client, the client's story is not central in the decision maker's opening, but embedded and incidental. Her central narrative is not the story of the client. Nor is it the story of an individual decision maker with the capacity to help a person in need. It is the story of a beleaguered agency with a worthy mission—an agency with limited resources that wants to help as many people as possible and must avoid getting into trouble by letting its sympathies lead it to waste resources and credibility on a losing case. The client appears as a young lad who transgressed by calling in sick and is suffering as a result of that behavior. But his story is not the central focus; it is a siren song tempting the agency from its course.

Having chosen leading characters, the advocate and decision maker have no difficulty in delineating their plights. For the client, the steady state is diligent, hard work and the reduction of debt. The precipitating event is not (at this stage of the conversation) precisely delineated, but it includes financial distress and garnishment with its sequelae of firing, irremediable unemployment, and deepening debt. For the agency, with its limited resources, the steady state is providing maximum public benefit by taking only winning cases with broad impact. The precipitating event—the problem—is the client's call for help.

In the advocate's tale, resolution does not come. The client remains in a "Catch-22," and the tension generated by his new and unhappy equilibrium begins to drive the interlocking story of the decision maker, who may hold the key to resolution. In the decision maker's tale, it appears that the resolution will be rejection of the client's call for help—a putting aside of temptation that leaves the agency on course and removes the threat to its success and progress. But what builds as a story of rejection, shifts as the tale nears its conclusion. In a move that should suggest to the advocate that there is time and room for negotiation, the decision maker moves out of the past tense and begins to speak in conditional terms. As she does so, the story of rejection becomes interpretable as speculation about rejection: "[T]he garnishment was just

one of many reasons."²² "[T]hat *would* get us into trouble. *Should—should* we decide to sympathize enough to engage any resources in this."²³

The selection of characters, the delineation of plight, and the hedging of resolution establish themes and tensions that continue throughout much of the conversation between the advocate and the decision maker. The advocate continues to focus on the sympathetic and unhappy situation of his client, and he attempts to construct an ethos or steady state for the agency that makes helping the client consistent with its mission rather than a threat to its mission. He continues to juxtapose the situation of the client and the idea that the decision maker holds the only hope of favorable resolution. He tries to keep the client onstage and to cast him with an individual decision maker rather than with an impersonal bureaucracy. The decision maker resists taking a major role. She continues to focus on the larger picture, to keep the agency onstage, and to define the agency's mission so that the client's case remains a diversion rather than an opportunity. Nonetheless, she avoids giving the story of the beleaguered agency a definitive resolution and thereby keeps open the door to negotiation with the advocate.²⁴

2. Orientation and Coda

The establishment of a steady state entails the embedding of values. It is "performative," not in the more fundamental sense described by J.L. Austin,²⁵ but in the subterranean sense described by James Boyd White.²⁶ It passes positive judgment upon a state by the very act of making that state a norm and making its continuation or return an objective of the protagonist and of other sympathetic actors in a story.²⁷

22. Appendix at p. 207 (emphasis added).

23. *Id.* (emphasis added).

24. In a complementary analysis, Professor Anthony Amsterdam has demonstrated that the advocate tells a story in which the agency moves from being *judgment maker* to being *doer*, while the bureaucrat tells a story in which the agency moves from being *doer* to being *judgment maker*.

25. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 6 (1962).

26. See JAMES B. WHITE, *HERACLES BOW* 139-65 (1985).

27. The persuasiveness of this kind of embedded valuation is analogous to the effectiveness of a suggestion embedded in descriptive form. Elizabeth F. Loftus and Edith Green exposed witnesses of a staged event to a misleading description of one of the persons witnessed. They were told that the person had a moustache when he did not. When the incorrect information was in the form, "Was the moustache worn by the tall intruder light or dark brown?" 26% of the subjects incorporated it in subsequent descriptions. When the incorrect information was in the form, "Did the intruder who was

The advocate centered his story around a client whose life was disturbed by events that made it impossible for him to work hard and pay his debts. He established the client as a sympathetic character whose goal was to return to his hard-working, debt-reducing state. With these moves, the advocate ascribed value to the client's lifestyle. In centering her story around an agency that worked by picking winning cases with broad impact, the decision maker ascribed value to that way of functioning.

The introductions and conclusions of the opening narratives—the sections identified as “orientation” and “coda”—were equally rich in evaluative import. Stories typically begin with a segment that orients the listener to time, place, and behavioral situation.²⁸ In some stories, this orientation section describes the steady state that will be disrupted as the tale progresses.²⁹ The orientation can also serve to alert the listener to what the tale means to the teller.³⁰ Similarly, as the end of a tale is signaled—usually by a shift of tense or perspective³¹—a evaluative coda is typically offered in the form of a comment upon the meaning of the tale.³² In the analysis of stories told in lawyering contexts, orientations and codas are check points at which the values and objectives of participants are often revealed with special candor and clarity. The opening narratives of the advocate and the decision maker are no exception.

The advocate's orientation frames the client's trouble as something that both parties to the conversation find sympathetic and as something that might be addressed by them or not depending upon the resolution of an *open* question. He begins his narrative by striking a grateful and hopeful tone, acknowledging that the decision maker has been understanding of the client's situation. He then refers to the decision maker's initial refusal of the call for intervention, ascribing it to local policy. He puts the local policy on the table as something open for discussion and interpretation by professing an inability to understand it. He weighs in with an implicit positive evaluation of the client by reporting

tall and had a moustache say anything to the professor?,” the percentage of subjects incorporating it rose to 39%. Elizabeth F. Loftus & Edith Green, *Warning: Even Memory for Faces May Be Contagious*, 4 *LAW & HUM. BEHAV.* 323, 331-32 (1980).

28. Labov & Waletzky, *supra* note 21, at 32.

29. Bruner, *supra* note 21, at 8.

30. *See id.*

31. Labov and Waletzky give examples of these transition devices, such as following an actor to the present tense: “And you know that man who picked me out of the water? [H]e's a detective in Union City, and I see him every now and again.” Labov & Waletzky, *supra* note 21, at 40.

32. *Id.* at 39-41.

his offer to try to resolve "this"—the trouble—without fee. The tense then shifts, and the trouble is told.

The advocate's coda is marked by a reference to the story of the client as a "this" upon which comment is made from another dimension. As Labov and Waletzky have pointed out, this transition device has the effect of standing in one moment of time and pointing to the narrative as if it existed in another.³³ The coda repeats the effort to hold open the premises upon which the appropriateness of a favorable action by the decision maker will be judged, asking why, in a situation like "this," agency intervention is not appropriate.

The decision maker begins her tale by establishing that she is in a superior position both to define the premises for agency action and to judge the worthiness of the client's case in terms of those premises. She points out that the advocate is admittedly "not familiar with dealing with" the agency.³⁴ The decision maker's coda is marked by a shift to present tense and a reference back to the subsidiary narrative of the client. Pointing to her story of the young man who acted somewhat irresponsibly and must suffer the consequences—the precipitating event that has caused the agency trouble—the case that cannot be won, she says "that" would get the agency into trouble.

3. Uncertainty and the Selection of Narrative Voice

Professor Bruner often calls attention to the "inward turn" of modernist literary narrative, observing that fiction writers have "dethron[ed] the omniscient narrator who knew both about the world 'as it was' and about what . . . protagonists were making of it."³⁵ Readers are no longer given certain realities in the voice of an all-knowing teller of tales; they are given thoughts and observations in the voices of presumably fallible characters. Bruner speculates that life has imitated art in this respect and that mundane narrative has also become less certain by shifting to the voice of real, rather than perfect, reporters.³⁶ Bruner's insight concerning the relationship between voice and certitude and his speculation concerning nonliterary narrative inform examination of the uses of voice in the opening narratives of the advocate and the decision maker.

33. *Id.* at 40.

34. Appendix at p. 206.

35. BRUNER, *supra* note 21, at 51.

36. *Id.* at 52.

The advocate opens his narrative in the voice of the client with a compliment to the decision maker,³⁷ but thereafter his opening narrative is told in his own voice or in the voice of an omniscient narrator. The decision maker refers to the perspective of the advocate,³⁸ and, consistently with her effort to posit an agency decision rather than an individual decision, she sometimes invokes the plural voice. But her tale is also told primarily from her own perspective or from that of an omniscient narrator. Shifts of voice in both narratives therefore consist primarily of shifts from reports of the speaker's thoughts and perceptions to reports of the pronouncements of an omniscient narrator. As a result, shifts of voice can be roughly tracked by a monitoring of "mental verbs."

A "mental verb" reports an operation of the speaker's mind concerning a thing external to the speaker's mind: "I think the car is red," or "The car seems red." The subjective account produced by mental verb use stands in contrast to the seemingly objective account produced when the voice of the omniscient narrator is used: "The car is red." Researchers who have studied linguistic signs of dominance and deference have interpreted mental verbs as signs of uncertainty and counted them as markers of a tentative and powerless discourse style.³⁹ It is true that the use of a mental verb hedges an assertion and therefore makes it more tentative. There are indications, however, that the use of mental verbs has more complex and more strategic meaning than the use of uncertainty signs that are not associated with the selection of voice. In the analysis of simulated lawyer-client interviews, mental verbs appeared in different patterns than did other linguistic signs of tentativeness, and they appeared to reflect an openness to discussion of the parties' states of mind rather than (or in addition to) simple tentativeness.⁴⁰ In this analysis, mental verbs were tracked as possibly strategic manipulations of voice.

Mental verbs appeared in the two opening narratives at a ratio of nine-to-three, with the decision maker using them nine times for every three uses by the advocate. Moreover, while mental verbs were used throughout the decision maker's narrative, they occurred in the advocate's narrative only in the orientation and in the coda. The patterns of mental verb use in these passages seemed to reflect strategic choices—at an indeterminable level of consciousness—to indicate explicitly that certain things are believed or thought and that certain other things simply *are*. The advocate speaks of the agency position *as he sees it*, but he paints the plight and

37. Appendix at p. 206.

38. *Id.*

39. See, e.g., John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, 1379-80 (1979); BENT PREISLER, LINGUISTIC SEX ROLES IN CONVERSATION 75-117 (1986).

40. Davis, *supra* note 6, at 1666-67.

justice of his client's situation *as it is*, using the voice of an omniscient narrator. The decision maker describes agency constraints *as they are*, but she signals a willingness to reconsider the merits of the client's case by describing the client's situation *as she sees it*.

More specifically, the advocate's narrative begins in the voice of the client, as the decision maker is told that she has been understanding. A positive value judgment is made by the client in need, about the prospective rescuer. Next, reference is made, in omniscient voice, to the decision maker's announced position about local policy. In a tentative version of his own voice, the lawyer expresses doubt about the meaning of the statement. There is an implicit request for clarification by the decision maker. In omniscient voice, the decision maker is told that her description was clear, but that the lawyer lacks the sophistication to understand it. She is also told that the advocate will act, but won't be paid, leaving the implication that the lawyer's ability to act is limited. The story continues in omniscient voice. The client *is* in a bad situation. It *is* a "Catch-22." With a new job, he *is* subject to another garnishment. With a garnishment, he *can't* pay his debts. He *is* anxious to pay. The advocate *suggested* ways out. The client *wanted* no part of it. He *was* serious about paying his debts.

After presenting the plight of the client in omniscient voice, the advocate shifts to his own perspective and out of the narrative. He *wasn't sure*. He *thought* he would explore the matter with the decision maker. The invitation is to move to the present tense and answer the question, "What really is your local policy?," and/or resolve the central dilemma. The return to the subjective voice reinforces the suggestion, implicit in the repeated move of asking about local policy, that the policy is subject to question rather than clear and fixed.

The decision maker opens her narrative with a reference to the advocate's perspective, noting that he has conceded unfamiliarity with agency operations. By this move, she establishes her authority with respect to the question that the advocate has left open. She begins, in omniscient voice, to report the agency's stance. Its resources *are* limited. She shifts for a moment to her own voice, *opining* ("I think") that everybody understands. In omniscient, but slightly tentative, voice, she says that the department strives for high impact and efficiency. Then, from the collective but subjective perspective of the "we," she *doubts* ("we're not sure" that the client's case is a winner. In her own voice, she *doubts* ("I can't really see") that it would have high impact. Continuing in the "I" perspective, she tells a different story of the client: *As she sees it*, he is an irresponsible kid. *She thinks* that the garnishment was not the reason for the firing. *She thinks* that these facts make the case unwinnable. *She really can't see* winning it.

In the decision maker's story, the hero is a conscientious agency looking for a good case that will help a lot of people. This is said in

certain terms. Good cases are provided by virtuous workers in distress, not by workers who are in distress as a result of their transgressions. The agency ponders the case of the client and opines, but does *not* state in certain terms, that the client lacks virtue and is therefore an inappropriate vehicle for making the case that will help the many. The turn passes to the lawyer to provide a better, more suitable, version of his client.

By these selections of voice, the parties to the conversation reinforced the evaluative contexts set by the selections of hero and plight and flagged by the orientations and codas. The advocate's choices of hero and plight set a context in which valuations would be made in terms of the client's steady state (diligently working and paying) and his need to resolve a crisis (financial distress followed by garnishment and firing). His orientation and coda suggested that the meaning of his story was that the client and his plight warranted sympathy and help, while a prior decision not to help was made on questionable grounds. His choices of voice complement these moves. He makes the plight of the client seem certain by offering it in certain voice. He makes the basis for denying help seem uncertain by referring to it, *and only to it* in his own voice. The decision maker's choices of hero and plight set a context in which valuations would be made in terms of the agency's steady state (doing good for the greatest number) and its need to resolve a crisis (the lure of the sympathetic but unworthy case). Her orientation and coda suggested that, although the advocate was not in a position to know it, the agency and its plight warranted sympathy. Her choices of voice only partially complemented these moves. She made the steady state of the agency seem certain by describing it only in omniscient voice, but she made the plight of the agency seem questionable by describing and judging the precipitating event (the client's story) in her own voice.

It is unlikely that any of these selections was consciously made. It is likely, however, that the advocate's conviction that his case depended upon a sympathetic portrayal of the client led him to speak in certain terms about the client's virtues, and his understanding that success might require negotiation of the meaning of local policy led him to speak in uncertain terms about that policy. The decision maker's choices of voice are more difficult to interpret. The advocate's choices have been interpreted on the assumption (reasonable, but not inevitable) that he intended to advance the interests of his client. The decision maker cannot, however, be presumed to be an advocate for agency policy, for her earlier view of the case at hand, or for any other position. Her role is more ambiguous and more complex. She is required not only to know and to uphold agency policy, but also to serve victims of statutory wrongs and, perhaps, to formulate or to interpret agency policy. Because of these ambiguities and complexities, it is possible to interpret her choices of voice in at least two ways.

On the one hand, we could say that they were a product of a stance of openness with respect to some, but not to all, of the issues at play. She had an investment in agency policy—a professional responsibility to know it and to implement it. She was not open to modification of her views with respect to that policy. But she was willing to be persuaded on the question of the worthiness of the client and his claim. The steady state of the agency was fixed, but the nature of its plight was an open question, and she was prepared to treat it as such.

The alternative interpretation is suggested by research indicating that the speech of women is habitually deferential and more heavily peppered with uncertainty signs like the subjective voice or the mental verb.⁴¹ In light of this research, it is reasonable to ask whether the female decision maker mitigated the force of her defense of the initial rejection of the client's claim out of a habit of deference rather than a stance of openness.⁴² Some evidence exists that she did not. As the following discussion of other signs of uncertainty will show, her speech was, on the whole, less deferential than that of the advocate. Moreover, when we look beyond the *frequency* of mental verb use to explore the *patterns* of mental verb use, the decision maker's tentative speech seems more strategic than habitual. She was as certain about the agency's steady state or policies as she was uncertain about its plight or the worthiness of the client's case. Whatever the truth of this matter, it is useful to focus upon the differential effects of the parties' narrative choices with respect to voice so that we might have the capacity to measure those effects against alternative stances and strategies.

B. *Uncertainty as a Sign of Deference*

The mental verb is one of a number of signals of tentativeness or uncertainty that have engaged the attention of conversation analysts. As a group, linguistic signs of uncertainty have been associated with the speech of: (1) women;⁴³ (2) people of low social status;⁴⁴ (3) people who tend to assume a "socio-emotional," as opposed to a "task-oriented" function in conversation;⁴⁵ and (4) those who tend to focus on relationships rather

41. See *supra* text accompanying notes 39-40; *infra* notes 43-48 and accompanying text.

42. In a similar spirit, we might ask whether the advocate's strategic choices were influenced by habits of domination, for it is possible to conceive a more deferential strategy that is equally consistent with furtherance of the client's interests.

43. See DAVID GRADDOL & JOAN SWANN, *GENDER VOICES* 83-88 (1989); PREISLER, *supra* note 39, at 284; Conley et al., *supra* note 39, at 1379.

44. See Conley et al., *supra* note 39, at 1380.

45. See PREISLER, *supra* note 39, at 284.

than upon rules or principles.⁴⁶ The use of linguistic signs of uncertainty has been taken to denote or suggest powerlessness and found to reduce the credibility of witness testimony.⁴⁷ Analysts have identified a "powerless" discourse style, characterized as tentative, supplicating, and oriented to human interaction, as contrasted with a "powerful" discourse style, relatively free of signs of uncertainty and characterized by certainty, assertiveness, and focus on principles.⁴⁸

In a context of informal advocacy, one might expect that the tentative discourse style would be associated with the supplicating, rather than with the decision-making, role. On the other hand, in the context of the fragment of informal advocacy under study, one might expect that the male supplicant would use a more "powerful" style than the female decision maker. Analysis of the text supports the former hypothesis.

In commenting upon this exchange between advocate and decision maker,⁴⁹ Jerome Bruner, a founding member of the Lawyering Theory Colloquium, identified three linguistic and narrative patterns that established a theme of a powerful decision maker and a helpless advocate and client. Anthony Amsterdam, the creator of the Lawyering Program and also a founding member of the Colloquium, had demonstrated in the interview analyses the value of focusing upon the sentence by sentence casting decisions that mark agentivity (is it, "why don't you describe the problem for me?" or is it, "what is the problem?").⁵⁰ Taking the same approach, Bruner observed first that the advocate's opening remarks consistently established the decision maker as agent, containing in the first sixty-seven words seven clauses in which her agentivity was recognized.⁵¹ Similarly, in the same sixty-seven words, there were "8 instances of *you* and its derivatives^{[52} but] . . . only two instances of the

46. See JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS* 80-81 (1990).

47. Conley et al., *supra* note 39, at 1379-80.

48. CONLEY & O'BARR, *supra* note 46, at 66-67.

49. Professor Bruner's observations were based upon different, but overlapping excerpts of the exchange between the advocate and the decision maker.

50. For a brilliant application of this insight in the advocacy context, see Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992).

51. The clauses are: "thank you very much"; "good of you giving me the opportunity"; "appreciated your letter"; "[the] care you took to write it"; "[your] willingness to meet with us"; "he had [a] good session with you"; "you'd been kind and understanding." Jerome Bruner, *Narratives of Pleading*, Lecture Twelve of the Lawyering Theory Colloquium at New York University School of Law 15 (Spring 1991) (transcript on file with the author).

52. The rate of occurrence was "roughly 1250 per 10,000 which is about as high

first person pronoun.⁵³ Finally, a narrative tone of dilemma was created as the advocate used, in 350 words of his opening narrative, eight expressions in a syntactical form (the hypothetical preclusive disjunction or its approximation) that represents the "Catch-22" that the client suffered.⁵⁴ This repeated use of the dilemma form played against the repeated identifications of the decision maker as agent. It therefore heightened the sense that the advocate and his client suffered a crisis that could not be resolved without the decision maker's intervention. The theme of the powerful decision maker and the helpless advocate and client suggests that in this advocacy example, as in the lawyer-client interviews,⁵⁵ a subordinate role is a better predictor of deferential or "powerless" discourse style than is the gender of the speaker.⁵⁶ An analysis of uncertainty signs reinforced that suggestion.

The language of the advocate and decision maker was searched for signs of tentativeness and powerlessness that have been identified in previous research.⁵⁷ Four characteristics associated with the "feminine" style appeared with some frequency:⁵⁸ the previously discussed mental verbs, hesitations,⁵⁹ hedges,⁶⁰ and intensifiers.⁶¹ With respect to

as the *article* count in spoken English." *Id.*

53. *Id.* Only one of these first-person pronouns was in the subject position, and it took an intransitive mental-state verb, "marking *I* as Experiencer rather than an agent." *Id.*

54. *Id.* at 18.

55. See *supra* notes 10-18 and accompanying text.

56. It is important to note that more extensive and sophisticated conversational analyses have found otherwise in the doctor-patient context. See Candace West, *When the Doctor Is a "Lady": Power, Status, and Gender In Physician-Patient Encounters*, 7 *SYMBOLIC INTERACTION* 87 (1984). Looking at the phenomenon of interruption, West concluded that gender might have "primacy over status" in the medical context. *Id.* at 102.

57. See Davis, *supra* note 6, at 1652-53, 1664-65 for sources and definitions of previously identified linguistic signs of uncertainty.

58. The Appendix has been marked to designate these signs.

59. Hesitation signs were defined to include false starts and filled pauses. A false start is a word or phrase that the speaker does not complete, either because the speaker discontinues speaking, without having been interrupted, or because the speaker switches to a new topic (other than an aside) or to a reformulation of the discontinued utterance (for example, "I want—I just want to know"). A filled pause is a hesitation, between speaker turns or within a turn, during which the speaker makes an utterance that is not subject-specific and is not responsive to or encouraging of another's speech. Filled pauses are sometimes words ("you know," "well," "like") and sometimes not ("ur," "uhm," "uh").

60. Hedges are modifiers that make an assertion less certain or precise (for example,

hesitations, hedges, and intensifiers, the difference between the advocate and the decision maker was in the direction one would expect in light of the lawyer's supplicating stance, and against the direction one would expect in light of the fact that the lawyer was male and the bureaucrat female. The supplicant hesitated far more frequently than did the bureaucrat. The ratio was 22-to-14.5.⁶² The participants were closer with respect to intensifiers, with the supplicant slightly ahead. The ratio was 10-to-7.9. The supplicant used two hedges, the bureaucrat, one, for a ratio of 2-to-1.3. When these signs of tentativeness are combined, the ratio is 34 for the advocate to 23.7 for the decision maker. Although the sample is small, the count, taken together with the tone of the exchange, is consistent with an expectation that the supplicant would manifest deference by the use of more halting and less certain speech. Moreover, it establishes a direct contrast with the manipulation of voice represented by the advocate's infrequent and carefully placed uses of mental verbs.

The sparing and strategic uses of mental verbs, taken together with the pervasive use of other signs of uncertainty, allowed the advocate to plead the essential facts of his case in terms that admit no uncertainty. The existence of competing factual possibilities was concealed by deftly, albeit unconsciously, chosen verbal formulations. Yet, the advocate's overall tone was "pleading" and deferential, emphasizing the power of the decision maker and suggesting powerlessness on the part of the advocate and his client. By contrast, the tone of the decision maker was relatively certain or "powerful," save for the subjective stance taken with respect to the facts and meaning of the client's plight.

IV. IMPLICATIONS FOR FURTHER STUDY

The most important thing to be said about this research is that it is entirely preliminary. The patterns reported above are not findings about how lawyers behave in advocacy settings. They are not the product of study of a sample of interactions; they may be entirely idiosyncratic. They are patterns of observation, determined both by the content of the interactions under study and by the focus of the observer. These patterns are reported to allow discussion and further

"I generally like ice cream").

61. Intensifiers are words that intensify an utterance but add little or nothing beyond intensification to the meaning of the utterance and do not express certainty (for example, "that person is really tall").

62. The lawyer's narrative was slightly longer than that of the bureaucrat (265 words as compared to 201). The ratios are calculated to account for this difference.

goal is to identify a repertoire of markers that serve usefully to direct our focus, to organize our observations, and to give meaning to the data presented as we study lawyering behaviors. Even this small analysis is suggestive for the process of identifying and interpreting prospective markers.

Designations of hero and plight can be thought of as markers of the stance and strategic bent of the teller of a lawyering story. Stance and strategy are decipherable if we bear in mind that these designations represent choices and that implicit in the choices are expressions of value. The case of garnishment and firing that was negotiated by the advocate and decision maker can be told with a variety of heroes and plights. It might be the story of the advocate, the decision maker, the employer, or the client's creditor. The protagonist's plight might be frustration in the quest to save the client, challenge in the quest to keep the agency true to its mission, interference in the quest to run a business, or disruption of a quest to collect a debt. In choosing to star the client or the agency and to set the plight in a quest to work and pay or to do good for the greatest number, the advocate and decision maker centered the negotiation around values that reflected their perspective, their goals, and their sense of appropriate means. To highlight these narrative choices enhances critical capacity and helps us to understand both intended and actual narrative effect.

The *orientation and coda* of a narrative are similarly revealing.⁶³ These introductions and concluding comments of narrative passages contain seemingly involuntary pronouncements about the perceived or intended meaning of a story. When the advocate began his story with the observation that the client had faith in the decision maker's sympathy and ended it with a "that's why" I did not understand your inability to help, he framed his story as evidence of the desirability and feasibility of helping. When the decision maker introduced her story with a reminder that the advocate did not know the ropes and ended it with a "that's why" we should not take the case, she framed her story as evidence that her initial decision had been correct despite the advocate's suspicions to the

63. The identification of orientation and coda are not, of course, precise sciences. They are interpretive choices that can be made in different ways by different analysts. The same is true of the identification of hero and plight. These realities complicate, but do not negate, the lessons of any particular narrative analysis. The defensibility of an interpretive choice suggests that its implications for the speaker's strategy and stance are also defensible, and this is so even if competing strategies and stances (implied by competing interpretive choices) might also be in play. To take an example from this study, the advocate's opening narrative is interpretable not only as the story of the client, but also as the less complete story of the decision maker who might be a savior. Neither interpretation is wrong. Both have defensible, and simultaneously defensible, implications for the advocate's stance and strategy.

contrary. Orientations and codas serve, then, as additional checkpoints in discerning stance, strategy, and effectiveness.

Foregrounding of the *selection of voice* problematizes the meaning and effect of the mental verb. The use of mental verbs has been counted as a marker of deference or subordination and has been found analogous to other uncertainty markers associated with "powerless" or "feminine" discourse styles. In analyzing the lawyer-client interviews, it appeared that the use of mental verbs was a sign, not only or especially of deference, but of a conversational focus on the thoughts, opinions, and feelings of the parties—an openness to exploration of matters beyond the "facts" narrowly construed. In the context of advocacy, it appears that when mental verbs are understood as means of designating voice, they can be seen as markers of the speaker's commitment to an utterance. In both the interview and the advocacy context, the mental verb seems to function differently than other linguistic signs thought to signal deference or subordination. The mental verb seems, then, to be both a more meaningful and a more ambiguous marker than other linguistic signs of tentativeness.

The separate consideration of mental verbs may improve the interpretive power of the device of tracking other *uncertainty signs*. Lawyers' talk is often referred to as "pleading." "Prayer for relief" is jargon as compatible for lawyers as is the term "claim." The plea carries an implication of deference, yet, in the capacity to move a decision maker to grant a prayer for relief, the lawyer exerts power. This power is exercised in complex and subtle ways. The advocate's greater use of hesitations, hedges, and intensifiers may have been idiosyncratic. On the other hand, it may have reflected a significant aspect of a strategy of pleading. Like the mental verb, these uncertainty signs may prove to be more revealing of strategy and issue-specific stances than of habitual stances of deference or subordination.

V. CONCLUSION

The study of law—or of architecture—as a culturally embedded, interactive process responds to the broader intellectual movement to rediscover culture by making the tacit explicit and the familiar strange.⁶⁴ This movement has stirred consciousness across the range of academic disciplines. In the words of Bruner, "the mark of our own era—in the law and in virtually every domain of human endeavor—is a quickened . . . [sense] of the importance of explicit awareness, of consciousness, of the

64. For a description of that intellectual movement, see Jerome Bruner, *On Making It Strange Again*, Opening Lecture of the Lawyering Theory Colloquium at New York University School of Law (Spring 1991) (transcript on file with the author).

dangers of hidden agendas.”⁶⁵ Feminist consciousness-raising exemplifies the spirit of this era, as does the post-modernist exhortation “to question over and over again what is postulated as self-evident, to disturb people’s mental habits, the way they do and think things, to dissipate what is familiar and accepted, to reexamine rules and institutions.”⁶⁶ The goal is to learn and to teach by exposing and taking control of patterns of behavior that have become automatic. The analytic process is not a certain science but an interpretive way of working. The work involves focusing, organizing, and understanding interactive events that mark strategy and stance. The reward is a measure of protection against the naïveté and the habits that stifle the will to form.

65. *Id.* at 3.

66. MICHEL FOUCAULT, *The Concern for Truth: An Interview by Francois Ewald*, in MICHEL FOUCAULT: POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984, at 255, 265 (Lawrence D. Kritzman ed. & Alan Sheridan trans., 1988).

APPENDIX⁶⁷

Attorney: Well,¹ you,¹ um,¹ uh¹ Kurt had said that you were quite³ understanding of his personal situation. And, uh,¹ that you expressed an understanding of his, uh,¹ problems. Uh,¹ in your letter to me you indicated that there was a local policy that made your intervention in the matter difficult. *I wasn't entirely*² sure what the, uh,¹ nature of the local policy was. Your description of it was quite³ clear, but I—¹we don't work in these matters very³ often. Uh,¹ I had told Kurt that we would take this and try to resolve it if we could without a fee. He is, as you know, in a—¹in a very³ bad financial situation. He's in a—¹a real³ Catch-22 position, essentially.² If he gets another job, uh,¹ he is subject to another garnishment and another discharge. If he doesn't get another job, he can't pay off the, uh,¹ loans that would, uh,¹ uh,¹ get the Friendly Finance Company, uh,¹ from garnishing any—¹any of his wages. He's very³ anxious to get his job back and very³ anxious to repay the loan. In fact,³ I suggested a number of things to him, such as bankruptcy, that would get him out from underneath the obligation. And, uh,¹ his reaction was that he wanted no part of those, that he, uh,¹ was, uh,¹ very³ serious about wanting money that he felt he did in fact³ owe. Uh,¹ *I wasn't sure* why in a situation like this it was not appropriate for your agency to intervene and *thought* I would explore that with you.

Administrator: Well,¹ um,¹ you explained that you're not familiar with dealing with our office. But generally² we have very³ limited resources. All of the government offices are—¹are cut back these days. *I think* everyone understands it with the¹—the,¹ uh,¹ the economic crunch. The problem is that we try to take the cases that affect the most amount of people. And by doing that we've allocated the resources in the best effective method. The problem with taking a case like Kurt's is that, aside from the fact that *we're not sure that* we would win on it should we do it, um,¹ *I can't really*³ see it affecting a good number of people. I

67. Mental verbs are *italicized*.

¹ designates hesitations.

² designates hedges.

³ designates intensifiers.

sympathize with his case. But really,³ *as I see it*, he's a kid out of high school who worked for a couple of years in a gas station and, uh,¹ was¹—called in sick a few times and, uh,¹ was just³ affected by that behavior. *I think that* the garnishment was just³ one of many reasons. And *I think that* that would get us into trouble. Should—¹should we decide to sympathize enough to engage any resources in this. *I really³ can't see* us winning on it.

