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Against the Tyranny of Paraphrase: Talking Back to Texts

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AGAINST THE TYRANNY OF PARAPHRASE: TALKING BACK TO TEXTS

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"[D]ifferent notions of what it is to read . . . are finally different notions of what it is to be human."
- Stanley Fish, IS THERE A TEXT IN THIS CLASS?

"In reading we produce *text within text*; in *interpreting* we produce *text upon text*; in *criticizing* we produce *text against text*."
- Robert Scholes, TEXTUAL POWER

INTRODUCTION

If imagination is "the prime agent of all human perception,"[1] then most law students (and the lawyers they become) perceive very dimly indeed the text-world they inhabit.[2] Even the best and brightest students too often scan judicial opinions for issue, holding, and reasoning and call that "reading," produce a paraphrase of the text and call that "writing." Yet surely, the callings of advocate, counselor, judge, and scholar all require more. Such, at least, were our thoughts after two years of co-teaching a seminar in advanced legal writing.

To be effective counselors and advocates, lawyers cannot take legal documents at their word. They ought to be able to read between the lines and to link texts to larger contexts. Yet our students are all too often simply seduced by the text; their gullibility as readers has become a source of perplexity and frustration in our writing class. Although we spend hours focusing students on the invisible workings of a text—what you must do to create or eliminate semantic or syntactic ambiguity; why and how to use "metadiscourse,"

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1 Ann E. Berthoff, *'Reading the World . . . Reading the Word': Paulo Freire's Pedagogy of Knowing*, *in* ONLY CONNECT: UNITING READING AND WRITING 124 (Thomas Newkirk ed., 1986).

2 All humans, Berthoff says, "read the world; we all make sense of our experience, construing and constructing and representing it by means of language." But, she adds, our students are much less successful at "reading the word" than at "reading the world." *Id.* at 124, 126.

those necessary signals to our readers about our organization, point-of-view, and ideas; how to manipulate space, syntax, silence, and diction to influence the audience—when our students revert to being readers, they forget the lessons they learned as writers. In a shocking suspension of disbelief, they fail to see how another author "worked" the text on them.

In thinking about this problem, we acknowledged that our classroom practices (while seeming to help our students become better and more versatile communicators) fell short of producing readers who could write what we value most, namely, insightful and original texts. We began to feel that we should address some of our time and energy to the activity of reading. We speculated that close, critical reading—reading which attends to the implicit text as well as the explicit text and which puts more of it in question[3]—might inspire our students to go past conventional notions of reading and writing to meaningful analysis.

Helping law students to get beyond purely denotative, case-briefing notions of reading is, however, no easy thing. In an age of reading comprehension tests, students are trained to read only for facts, for information.[4] Conventional "product" notions of reading and writing are thus almost always among students' most firmly held beliefs, a "sociocultural epoxy resin"[5] that resists efforts to strip it away. Indeed, mainstream legal education too often creates the conviction that class rank and future earnings are dependent on consuming facts-holding-reasoning (reading) and producing a paraphrase of them (writing). This transaction too often comes to *be* reading and writing for law students, just as breathing is taking in some gases and putting out others. These habits of mind are all the more difficult to change because they are in a conventional sense efficient, enabling students to get through large masses of course material in relatively small amounts of time. And few full-time law students have the leisure to devote themselves full-time to the intellectual project of reading law; they have tuition to earn and families to care for. Close and critical reading and the strong writing it promotes take more time than case-briefing and paraphrase. Indeed, they take even more than the actual reading and writing time, requiring solitary moments of percolation and germination.

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3 Critical consciousness, Berthoff says, requires "initiating and sustaining the dialectic of *what is said* and *what is meant* as we read what others and what we ourselves have written." *Id.* at 127.

4 *See* Nancy R. Comley, *Composing, Uniting, Transacting: Whys and Ways of Connecting Reading and Writing*, 50 C. ENG. 193 (1989).

5 David Kaufer & Gary Waller, *To Write Is to Read Is to Write, Right?*, *in* WRITING AND READING DIFFERENTLY: DECONSTRUCTION AND THE TEACHING OF COMPOSITION AND LITERATURE 66, 70 (G. Douglas Atkins & Michael L. Johnson eds., 1985).

The central challenge is to help students learn techniques of patient intellectual inquiry, even though this lesson goes against the grain of a society that wants results in a hurry.[6] Further, although those few students with a background in the close reading of texts are better equipped to dig below the surface of judicial opinions, almost all students will come up against an inhibition present in no other secular discipline. Judicial opinions are not just interpretation—they are adjudication, and adjudication is power, coercion, even violence.[7] To read judicial opinions closely and critically is to talk back to power.

Yet, there are at least three good reasons to talk back to power, to resist the tyranny of paraphrase. First, ours is explicitly a "text-oriented"[8] democracy—from the Declaration of Independence to the Constitution to the written opinions of courts—and unexamined authority is incompatible with democracy. Second, the close examination of legal rhetoric is fun of a particularly edifying sort; there is a healthy zaniness to searching for *all* of a text's texts, intended and

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6 The conditions for inspiration and the difficulty of serious reading and writing in an unquiet life are described by the novelist A.S. Byatt, writing about a young mother of the 1950s trying to focus anew on her studies:

> She decided to read the "Immortality Ode," just to read, clearly. She had the vague idea that if she could pull her thoughts together she might be able to write a Ph.D. on Wordsworth for the new university. She felt panic. She had with some pain cleared this small space and time to think in and now thought seemed impossible. She remembered from what now seemed the astonishing free and spacious days of her education the phenomenon of the first day's work on a task. One had to peel one's mind from its run of preoccupations: coffee to buy, am I in love, the yellow dress needs cleaning, Tim is unhappy, what is wrong with Marcus, how shall I live my life? It took time before the task in hand seemed possible, and more before it came to life, and still more before it became imperative and obsessive. There had to be a time before thought, a wool-gathering time when nothing happened, a time of yawning, of wandering eyes and feet, of reluctance to do what would finally become delightful and energetic. Threads of thought had to rise and be gathered and catch on other threads of old thought, from some unused memory store. She had snatched from [her family] barely time for this vacancy, let alone for the subsequent concentration. She told herself she must learn to do without the vacancy if she was to survive. She must be cunning. She must learn to *think* in bus queues, in buses, in lavatories, between table and sink. It was hard. She was tired. She yawned. Time moved on.

A.S. Byatt, STILL LIFE 162-63 (1985).

7 *See, e.g.*, Robert Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed and the Role*, 20 GA. L. REV. 815, 817-20 (1986); Robin L. West, *Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203, 244 (1987).

8 Robert A. Ferguson, *'We Do Ordain and Establish': The Constitution as Literary Text*, 29 WM. & MARY L. REV. 3, 24-25 (1987) [hereinafter Ferguson, *We Do Ordain*]. Ferguson argues that our "text-oriented culture requires [of us] the knowledge of the scholar, the craft of the writer, the sympathy of the accomplished reader . . . ." *Id.* at 25.

hidden.[9] Third, cognitive psychology teaches that *all* readers of legal texts, judges as well as law students, subconsciously supply multiple contexts when they read, whether they believe they do or not.[10] When judges interpret precedent, they respond "personally" to the text, and bring their subjective readings into their decisions, even while claiming in good faith that they merely "find" the law in the first case and "apply" it to the second. Thus, close reading not only helps readers to understand and make use of their own reading response, but also illuminates the judicial decision-making process.

This article charts our thinking on the nexus between reading and writing. In part I, we detail the experiences that have led us to give reading an increasingly prominent place in our advanced writing class. Part II summarizes some of the reading we did to become better informed about the connection between reading and writing and its implications for our seminar; this part reports on the work of composition and literature teachers, cognitive psychologists, and philosophers who have been researching reading and writing processes and designing curricula responsive to their findings. Finally, part III suggests ways in which the insights and practices of those working on the undergraduate level might be coupled with contemporary legal scholarship to produce classroom activities and writing assignments which encourage law students to read closely in order to write strongly.[11]

I
BACKGROUND: READER'S BLOCK

We began teaching our advanced legal writing seminar with the hope of helping our students to become sophisticated and self-conscious writers, as nearly and as finely in control of their texts as the muddle of langnage allows.[12] To this end, we relied heavily on the

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9 Once students are convinced that irreverent free play of language and association is not only acceptable but desirable, a close-reading class becomes an animated, intellectually exciting occasion. When a student—reading that "the Constitution does not sweep so wide as to validate petitioner's claim"—asks herself and the class whether the court really thinks the Constitution is a broom, insight as well as laughter is on the way.

10 *See* Martin Davies, *Reading Cases*, 50 MOD. L. REV. 409, 422-23 (1987).

11 We have limited ourselves in this article to the critical reading of judicial opinions, though surely students should approach all texts critically—transcripts, law review articles, newspapers. *See* William L. Twining, *Reading Law*, 24 VAL. U. L. REV. 1, 15-18 (1989).

12 Our course is a two-credit upper-class elective. It is organized around genres—statutes, letters, pleadings, judicial opinions, briefs, contracts, and scholarly writing. Although it is not a traditional drafting course, we include units on drafting because drafting is a terrific tool for alerting students to the dangers of semantic and syntactic ambiguity. Moreover, despite our students' belief that statutory drafting lacks practical

methodology of the New Rhetoric,[13] a theory of composition stressing the writing process itself and the rhetorical situation latent in every writing project. For each out-of-class writing assignment, therefore, we required our students to hand in a comment sheet in which they analyzed the audiences and purposes of the document, and described in detail the substantive, structural, and stylistic choices that flowed from their analyses.[14] Both of us read and commented on all the papers and comment sheets.[15] In addition, to encourage audience awareness through peer review, we created composite documents fashioned from bits and pieces of our students' responses. We used the composites as the subject of classroom discussion. Following this group critique, students rewrote both the assignment and the comment sheet. We also used a good part of class for other types of group writing and editing exercises[16] as well as for detailed discussions of syntax, usage, and punctuation.[17]

By the end of the term, the students' writing seemed to have improved. The students were responsive to the constraints of audience and to the purpose or purposes of a document. They organized their ideas well and wrote cohesive paragraphs introduced by cogent topic sentences. They demonstrated control over syntax, attending to modifiers and showing an ability to choose the passive voice only when it was appropriate. We were pleased with much of their work, and so were they with their newfound control.

Ultimately though, we were disheartened, most keenly by the students' attempts at scholarly writing—the case comments they

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relevance to their own study of writing, they often admit the exercise has transformed the way they read statutes and regulations.

13 *See infra* part II.A (detailed discussion of the New Rhetoric).

14 We are indebted to Kristin R. Woolever for this suggestion. She has long required her advanced legal writing students at Northeastern University School of Law to write such commentaries. These comment sheets force students to articulate their thoughts about the rhetorical situation. They also enable us to assess the writer's success in achieving her stated objectives.

15 In this, we followed the procedure of Mary Barnard Ray and Barbara J. Cox, who have taught advanced writing at University of Wisconsin Law School. We hope this double feedback, and even periodic disagreement between us, invites dialogue about a broad range of writing concerns.

16 We assign at least one editing exercise in which the piece under scrutiny is so ambiguous that rewriting it is impossible without further research into the purpose of the document. The point is to show readers that some texts cannot be made to cohere, particularly if the initial conceptualization is flawed.

17 We use JOSEPH M. WILLIAMS, STYLE: TEN LESSONS IN CLARITY AND GRACE (3d ed. 1989), because the text demonstrates how rules of style and grammar generally promote meaning. Yet Williams is also sensitive to the occasions when meaning requires bending the rules. *Id.* at 189-200. Our students turn in weekly exercises from his text.

wrote as term papers. Analyzing *Braschi v. Stahl Associates*,[18] a surprising decision by the New York Court of Appeals, almost all our students concluded that the decision was correct for the very reasons stated by the majority, and that the dissent was wrong for those same reasons. An interesting, scolding concurrence was ignored. In short, our students presented us with detailed and readable paraphrases that could have substituted handily for the reported case itself. But they had asked the text no questions, had expressed no ideas about it, had in no sense been inspired by it.

Yet it was not only the students' failure to write thoughtful scholarly papers that troubled us. Their other, more practical, out-of-class assiguments (client and advocacy letters, university regulations and judicial opinions) rarely made creative use of caselaw.[19] Indeed, their interpretation of precedent was most often spare and numbingly rote.[20]

Looking for a way forward, we hypothesized that our students were stalled in their writing because they were stalled in their reading. In their first months of law school, they had gone from being "novice" readers of judicial opinions to being "expert" readers, through their mastery of case-briefing.[21] Perhaps, we thought, that very professionalization held them back, so long as they lacked (or repressed) the skills to go beyond mechanistic issue-holding-reasoning reading. We theorized further that teaching our students close-reading techniques might free them to be strong, original, self-aware writers, and thus, more skillful counselors and more effective advocates.

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18 543 N.E.2d 49 (N.Y. 1989) (holding that the term "family" in noneviction provision of rent-control laws includes adult life partners unrelated by blood or law whose relationship is long-term and characterized by emotional and financial commitment and interdependence).

19 For instance, one assignment asked students to write a judicial opinion. The issue was whether a two-year statute of limitations in malpractice actions was tolled by a physician's willful failure to inform the patient that a laboratory procedure had been badly bungled. The jurisdiction in question recognized a "concealment" exception to the two-year statute, but all of the other reported cases on point involved doctors who lied to their patients—unlike the doctor in the students' problem, who omitted crucial information. Although the plaintiff in the problem had an excellent (even heart-rending) case on the merits, the student "judges" considered themselves bound by precedent to find for the defendant. One student was so moved by the plaintiff's situation tbat, by way of consolation, she announced that she would file a letter of complaint against the doctor with the local medical society.

20 All of the problems were "closed-universe," with all case-law supplied, so research skills were not implicated.

21 Metacognitive research suggests that "expert" and "novice" legal readers process texts differently. Each uses different reading strategies in order to understand and analyze case-law. *See* Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 READING RES. Q. 407, 412-16 (1987).

We came to these hypotheses in part through our own history: we both have graduate training in literature, and particularly in textual analysis. Out of a sense that something that was such a powerful part of our own lives as readers and writers might well be useful for our students, we had already included a homeopathic amount of close-reading in our curriculum that first year—but as an "extra," not as an integrated component. In our last class of the semester, we had discussed non-traditional legal writing, focusing on legal story-telling and its contribution to legal discourse.[22]

As encouraged by our students' enthusiastic reaction to this class as we were discouraged by much in their writing, we devoted more time to close reading in our advanced seminar the following year. Dissatisfied also with our earlier fragmented approach to close reading, we treated it more extensively this time, as the complement and ground of controlled, self-conscious writing. Mid-semester, we spent four class-hours discussing close reading as an intellectual enterprise in the law and analyzing some representative judicial opinions.[23] We asked students not to stop dead after case-briefing, but to read beyond what is explicit on the page. We asked them to read cases for what is implicit there—literary style and jurisprudential or interpretive posture—and for what is not there at all—legal and historical context and omissions of fact or lapses in logic.[24]

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22 The class read Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989). The class also examined some of the concerns raised in Toni M. Massaro, *Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099 (1989), and Kim L. Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073 (1989).

23 Although in this article we are concerned solely with the close reading of judicial opinions, throughout our course we stressed critical reading of *all* texts: statutes, transcripts, motion-practice boilerplate, will forms, and, of course, student drafts.

24 Before the first close-reading class, we distributed a packet of materials that discussed each of our four close-reading categories briefly, offering examples and exercises. For instance, the section "Reading for Omission" gave the example of Braschi v. Stahl Assocs., 543 N.E.2d 49 (1989), where (as none of the previous year's student commentators noticed), the Court of Appeals, unlike the lower courts, nowhere mentioned a circumstance that must have weighed heavily on the court's heart and mind: the tenant of record had died of AIDS in a city where thousands of other HIV-positive unmarried life partners also lived in rent-regulated apartments to which only traditional "family" had succession rights.

In "Reading for Context," our second section, we encouraged students to be sensitive to the transformation that the appellate process inevitably works on the historical facts of a case, and urged them to seek out lower court opinions and other sources of raw fact to understand whether and how an appellate court molds facts to fit its decision. For jurisprndence and interpretive posture, we supplied a brief over-view of contemporary trends and some equally condensed historical perspectives.

Our major focus, however, was on the judicial opinion as a literary genre. We asked our students to question the assumption that language is a neutral medium for the replication of reality, and to understand both the effects of literary style on the reader and how those effects are achieved. We asked them to look for both intentional multiple meanings (irony, paradox and metaphor) and for unconscious ambiguity and bias. As a

During these classes, most students needed constant urging to react and analyze rather than to summarize and paraphrase. By the end of the first class, however, several students were willing to take on the texts rather than just take them in. In the second class, the tide turned against paraphrase during one student's analysis of a sentence from Justice O'Connor's majority opinion in *City of Richmond v. J.A. Croson*.[25] Striking down a minority set-aside program, the Court warned: "the dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."[26] The student saw this sentence intertextually, as a deliberate and exploitive echo of Martin Luther King's speech "I have a dream. . . ."[27] She also felt that the weak metaphor (a *shifting* mosaic?) sacrificed intelligibility to rhetoric.[28]

Whether our emphasis on close reading helped our seminar students to improve their writing is a question without a clear answer. Certainly, their work overall was more mature and thoughtful than that of the previous year's students, a heartening circumstance no matter what the cause. Several of their term papers were excellent, original works of scholarship, although the rest were as mired in paraphrase as the previous year's *Braschi* comments. In their (anonymous) responses to our course-evaluation questionnaire, students were enthusiastic about close reading. All of them believed that the course had taught them to read more critically. When asked which one (if any) of the twenty or more class handouts was "particularly helpful," a third of the students chose our close-reading materials.

We ended the semester tentatively optimistic. Our hope that the process of close reading would foster stronger writing began to seem founded. Yet all of our work so far had been ad hoc and instinctive, coming from our own academic backgrounds, unsystematic reading here and there, and ideas in the air. We felt the need to explore more systematically our posited connection of close

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group, we parsed brief excerpts from Justices Holmes, Cardozo and Jackson, then moved on to contemporary judicial prose, analyzing and contrasting Justice O'Connor's majority opinion and Justice Blackmun's dissent in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

25 488 U.S. 469 (1989). Our use of *Croson* was suggested by Williams, *supra* note 22.

26 *Croson*, 488 U.S. at 505-06.

27 MARTIN L. KING, *I Have a Dream*, *in* THE TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217, 219 (James W. Washington ed., 1986).

28 Examining Justice O'Connor's choice of words, another student wondered how, without further explanation, all claims of past discrimination could be characterized as "*inherently* unmeasurable." Patricia Williams similarly questioned this transformation of "clear, hard, statistical data." Williams, *supra* note 22, at 2129.

reading and strong legal writing. Two lines of inquiry suggested themselves: contemporary composition and reading theory on the one hand, and on the other, close reading in contemporary legal scholarship. We set out to see what we could learn from teachers and researchers in other fields—college English, philosophy, critical theory, cognitive psychology—about the nexus between reading and writing, and how the insights and debates of scholars in our own field could be brought to bear on that connection. Parts II and III detail these inquiries.

II
COMPOSITION AND READING THEORY

Current composition theory focuses primarily on how to bring "basic" readers and writers into the community of academic discourse. Although there are some obvious differences between undergraduates and students entering law schools, legal writing professionals have become increasingly aware of the parallels. For example, Theresa Godwin Phelps recognizes the need to initiate first-year students into a new discourse community and to find "their legal personalities by mastering a new 'tribal speech'."[29] In addition, legal writing teachers do not want their students merely to sound like lawyers, to produce within weeks or months legal documents superficially comparable to those a practitioner might produce. They also want them to appreciate the dialognes and debates that occur within that discourse community, to contribute to the "ongoing conversation of the law."[30] This is no mean task.

Part of the difficulty in teaching reading and writing is the apparent chicken-egg nature of the enterprise. "[S]tudents must know the 'meaning' of what they read in order to develop the reading 'skills' " they need to interpret or write the "meanings" of what they read.[31] In other words, a reader's ability to make sense of a new text depends not only on the knowledge presented in the text but also on a reader's prior knowledge and the "level of inference that can be reasonably expected of [her]."[32] Readers need, for example, to learn how to brief a case before they can apply or evaluate a decision.

Yet a too rigid or superficial schematization of what they are reading blinds students to the text's indeterminacies and openness

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29 Theresa G. Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089, 1091 (1986).

30 *Id.* at 1102.

31 *See* Michael L. Johnson, *Hell is the Place We Don't Know We're In: The Control-Dictions of Cultural Literacy, Strong Reading, and Poetry*, 50 C. ENG. 309, 312 (1988).

32 Marilyn S. Sternglass, *Writing Based on Reading*, *in* CONVERGENCES: TRANSACTIONS IN READING AND WRITING 151, 151 (Bruce T. Petersen ed., 1986).

to interpretation. After learning to read a case for its holding, for instance, they need to learn that holdings are not cast in stone, inextricably memorialized in the language of the court, but can be framed for persuasive purposes. Without this openness to a text's possibilities, reading becomes solely a matter of retrieving knowledge fixed in a text, writing solely a means of channelling that knowledge back to the world.[33] This is a very simplistic notion of the reading process. Mariolina Salvatori writes:

> The reading process . . . is an extremely complicated activity in which the mind is at one and the same time relaxed and alert, expanding meanings as it selects and modifies them, confronting the blanks and filling them with constantly modifiable projections produced by inter-textual and intra-textual connections. Because of the nature of the reading process, each reading remains as "indeterminate" as the text that it is a response to. But this is precisely the kind of activity—demanding, challenging, constantly structuring them as they structure it—that our students are either reluctant or have not been trained to see as reading. Specifically, it is with the indeterminacy of the text that they have their major difficulties. In their responses to a literary text most students do perform that one action, consistency building, that is central to the reading activity, and they identify what they consider the main idea. They fail, however, to realize that the identification of one idea among many others is only one step toward a more complete and dynamic reading. They perform one synthesis rather than various syntheses and tend to settle too soon, too quickly, for a kind of incomplete, "blocked" reading. Interestingly, the same "blocked" pattern has a tendency to characterize their writing as well; they lift various segments out of the text and then combine them through arbitrary sequential connections (usually coordinate conjunctions)—a composing mode that is marked by a consistent restriction of options to explore and develop ideas.[34]

Efforts to "unblock" student reading and writing have led to two important transformations in composition programs: first, a shift from writing instruction focused on the product of composition to a focus on the composing process; and second, an increased interest in reading as a creative rather than passive interaction between the reader and the text. Recent developments in composition theory demonstrate a growing conviction that reading and writing are interrelated acts concerned with the making of meaning.[35]

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33 *See* Kaufer & Waller, *supra* note 5, at 72.

34 Mariolina Salvatori, *Reading and Writing a Text: Correlations between Reading and Writing Patterns*, 45 C. ENG. 657, 661-62 (1983).

35 *See infra* parts II.A. and B.

A. Product to Process: The Shift from the "Current-Traditional" to the "New Rhetoric" Paradigm

Before poststructuralism, most writing instruction was dominated by the "current-traditional" paradigm, an approach concerned with the written product rather than the process that generated it.[36] The theoretical underpinning of current-traditional rhetoric is akin to common-sense realism, a metaphysics which claims that "seeing is believing,"[37] that our experience reveals the world the way a mirror reveals what it reflects or a window what it frames. The world that is represented in experience, but which is outside and independent of experience, is comprised of individual objects that have common or universal properties. To common-sense realism, language is a surrogate for experience. Language captures and conveys reality, and it captures and conveys it truthfully when it corresponds to, or, as Wittgenstein put it, when it "pictures" reality.[38] Communication succeeds when the trnthful utterances of one person, which refer to some particular state of affairs in the world, call to mind in another person precisely that state of affairs.[39]

Because current-traditional rhetoricians hold that truth exists prior to language and is independent of the writer, they tend to neglect invention, "the process whereby a writer discovers ideas to write about."[40] Indeed, "[t]he writer's role in producing the text remains mysterious, and a tacit assumption of the current-traditional paradigm is vitalism, which stresses the natural powers of the mind and 'leads to a repudiation of the possibility of teaching the composing process'."[41] One consequence of the assumption that writing is a mysterious activity is that teachers concentrate on the composed product rather than the composing process.

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36 *See* Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. COMPOSITION AND COMM. 76, 78 (1982).

37 *See* James A. Berlin, *Contemporary Composition: The Major Pedagogical Theories*, *in* THE WRITING TEACHER'S SOURCEBOOK 47, 51-52 (Gary Tate & Edward P.J. Corbett eds., 2d ed. 1988).

38 LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 37 (D.F. Pears & B.F. McGuinness trans., 2d ed. 1971).

39 For a fuller explanation of common sense realism and its relation to current-traditional rhetoric, see Berlin, *supra* note 37, at 51-52, 56-58.

40 Paul Northam, *Heuristics and Beyond: Deconstruction/Inspiration and the Teaching of Writing Invention*, in WRITING AND READING DIFFERENTLY: DECONSTRUCTION AND THE TEACHING OF COMPOSITION AND LITERATURE, *supra* note 5, at 115, 116 (quoting W. ROSS WINTEROUD, *Invention*, *in* CONTEMPORARY RHETORIC: A CONCEPTUAL BACKGROUND WITH READINGS 39 (W. Ross Winteroud ed., 1975).

41 Phelps, *supra* note 29, at 1093 (quoting Richard Young, *Paradigms and Problems: Needed Research In Rhetorical Invention*, *in* RESEARCH IN COMPOSING 29, 31 (Charles Cooper & Lee Odell eds., 1978)).

For current-traditionalists, the study of rhetoric thus focuses on the modes of discourse that parallel our modes of understanding: exposition, description, narration, and argument.[42] Each mode permits us to view reality in a certain way, and each has its own logic, organizational patterns, and stylistic characteristics.[43] One current-traditional classroom activity is therefore the study of the forms of writing appropriate for each mode of discourse. Further instruction comes in the form of critiques focused on students' finished work, work corresponding to the mode of discourse currently under classroom scrutiny. Teachers provide suggestions for revising organization or syntax, as well as comments on ambiguities or inaccuracies in content.

As a practical matter, however, the current-traditional method of instruction often failed to produce good writing. If rewrites were generally more comprehensive, clearer, and grammatically correct, they were by no means more insightful or more sensitive to the rhetorical situation—to the purpose of and audience for the document. Moreover, writing teachers became increasingly convinced that the theoretical foundation of the current-traditional paradigm was naive and reductive.[44] As a result, a new method of instruction, the New Rhetoric, began to emerge.[45] The New Rhetoric regarded writing as a process and stressed the elements of discovery and invention which occur as we write.

The New Rhetoric does not regard experience as a "given," that is, as simply *there* to be retrieved by the subject. Following Kant, it conceptualizes experience and reality as "constructed," i.e., as a synthesis of the data of experience and the activity of the subject in perceiving, structuring, relating, and interpreting that data.[46] Experience or reality is therefore not a result of the encounter between subject and object, but is the presupposition of it. And because language is analogous in this regard to experience, the New Rhetoric does not conceive it as a static by-product of the interaction between the person and the world. Rather, language *creates* the meaning of the person and the world. As such, language neither mirrors nor reveals truth; it defines or makes truth possible.[47]

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42 ERIKA LINDEMAN, A RHETORIC FOR WRITING TEACHERS 53 (2d ed. 1987) (summarizing ALEXANDER BAIN, ENGLISH COMPOSITION AND RHETORIC (1866)).

43 *Id.* at 54 (summarizing JAMES L. KINNEAVY, A THEORY OF DISCOURSE (1971)).

44 *See* Berlin, *supra* note 37, at 53.

45 Maxine Hairston outlined the need for a "paradigm shift" in *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, *supra* note 36, at 76.

46 For a fuller discussion of the theoretical foundations of the New Rhetoric, see Berlin, *supra* note 37, at 55-58.

47 "In the New Rhetoric the message arises out of the interaction of the writer, language, reality, and the audience. Truths are operative only within a given universe of discourse, and this universe is shaped by all of these elements . . . ." *Id.* at 57.

When writing is about inventing ideas rather than just retrieving them, instruction must focus on the process of formulating and solving problems. Yet until recently little was known about what actually occurs when writers write. With the advent of the New Rhetoric, however, professionals began collecting evidence about the writing process using "thinking-aloud" protocols.[48] Initially used as a process-tracing tool in cognitive psychology, thinking-aloud protocols require subjects to "verbalize the content of their conscious thought as they work,"[49] without reflecting upon or evaluating those comments. The idea is to observe the process in its least mediated form. Summarizing the results of this extensive research on the writing process is beyond the scope of this article. Yet a few of the discoveries that resulted from these studies should be noted.

First, the process of writing is recursive rather than linear. A writer in the act of creation engages in two alternating mental postures, which Sondra Perl calls "retrospective" and "projective" structuring.[50] Retrospective structuring begins with the writer attending to her own inchoate experience. The writer then proceeds to create in language a rendition of that experience. Then the writer looks at what she has written to see if those words fully capture her meaning or even enable her to discover something new about the topic. Flower and Hayes describe the writer at this stage

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48 Leading researchers include Carl Bereiter, Anne Berthoff, Janet Emig, Linda Flower, John R. Hayes, Elaine P. Maimon, Marlene Scardamalia, Mina P. Shaughnessy, and Nancy Sommers.

JANET EMIG, THE COMPOSING PROCESS OF TWELFTH GRADERS (1971) was a seminal introduction to protocol analysis. Her work reached fruition in a series of studies conducted by Flower and Hayes in the 1970s (some of which are discussed in this article). More recently, these studies have been criticized for regarding the composing process as a decontextualized activity, that is, for failing to account for the socio-cognitive environments in which people write. As Patricia Bizzell writes, "If process analysis tends to strip away social circumstances in favor of cognitive universals, discourse analysis keeps awareness of the social situation alive." Patricia Bizzell, *College Composition: Initiation into Academic Discourse Community*, 12 CURRICULUM INQUIRY 196 (1982). Theorists are increasingly interested in how novices assimilate the language of a particular community and how that language shapes their thinking. They examine "the underlying assumptions, knowledge, values, and interests that its members hold in common and . . . the use of certain language conventions—types of arguments, genres, vocabulary." MARILYN M. COOPER & MICHAEL HOLZMAN, WRITING AS A SOCIAL ACTION 204 (1989); *see also infra* notes 95-107, 115-125 and accompanying text.

49 Linda Flower, *Taking Thought: The Role of Conscious Processing in the Making of Meaning*, *in* THINKING, REASONING, AND WRITING 185, 191 (Elaine P. Maimon et al. eds., 1989).

50 Sondra Perl, *The Composing Process*, *in* THE WRITING TEACHER'S SOURCEBOOK, *supra* note 37, at 113, 117.

as "retrieving information from memory, drawing inferences, and relating her various ideas."[51]

At the same time the writer is also juggling rhetorical constraints, primarily the purpose and audience of the piece.[52] Perl calls this "projective structuring," a mental posture in which the writer imagines what a reader other than herself will need before a piece becomes intelligible and compelling.[53] The retrospective and the projective postures alternate, the writer moving from "sense to words and from words to sense, from inner experience to outer judgment and from judgment back to experience. As [writers] move through this cycle, [they] are continually composing and recomposing [their] meanings and what [they] mean. And in doing so, [writers] display . . . basic recursive patterns . . . ."[54] Far from moving sequentially through planning, writing, and rewriting, writers shuttle back and forth among these activities.[55]

Second, in moving between these alternating mental postures, a writer "makes" meaning and generates a text. As Scardamalia and Bereiter note, "a developing text . . . tak[es] on a life of its own . . . . Text organicity implies that certain unexpected turns in the writer's thought are caused, not by wandering off the point, but rather by the need to preserve the unity of the emerging text . . . ."[56] Indeed, when the writer tries to resolve the conflict between the requirements of text and the requirements of belief (the lessons of inchoate experience), "both the text and the writer's beliefs are subject to

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51 Linda S. Flower & John R. Hayes, *The Dynamics of Composing: Making Plans and Juggling Constraints*, *in* COGNITIVE PROCESSES IN WRITING 31, 34-35 (Lee W. Gregg & Erwin R. Steinberg eds., 1980).

Flower and Hayes also describe a writer as a "busy switch-board operator" juggling demands on her attention:

> She has two important calls on hold. (Don't forget that idea.)
> Four lights just started flashing. (They demand immediate attention or they'll be lost.)
> A party of five wants to be hooked up together. (They need to be connected somehow.)
> A party of two thinks they've been incorrectly connected. (Where do they go?)
> And throughout this complicated process of remembering, retrieving, and connecting, the operator's voice must project calmness, confidence, and complete control.

Id. at 33.

52 Linda Flower & John R. Hayes, *The Cognition of Discovery: Defining a Rhetorical Problem*, *in* THE WRITING TEACHER'S SOURCEBOOK, *supra* note 37, at 92.

53 Perl, *supra* note 50, at 117-18.

54 *Id.* at 118.

55 *Id.*

56 Marlene Scardamalia & Carl Bereiter, *Development of Dialectical Processes in Composition*, *in* LITERACY, LANGUAGE, AND LEARNING 307-08 (David Olson et al. eds., 1985).

change. In the fortunate case, the change is in the nature of a synthesis, the hallmark of dialectic."[57]

Third, thinking-aloud protocols indicate that this recursive process involves various levels of awareness: tacit processes, automated processes, and active awareness.[58] Tacit processes are unavailable to introspection, and include activities like memory search, perception, complex motor processes, and even some value judgments. Automated processes are the rewards of learning. Production that once required consciousness (writing parallel sentences, for example, or automatically using the correct form of address in a business letter) now demands only minimal conscious attention. When writers work at this level of awareness, they concentrate on generating content rather than on maintaining flow and topical coherence.

Cognitive psychologists attribute many of these automated processes to the acquisition of "schemata." Put simply, " 'schemata' are interpretive frameworks, built out of past knowledge and experience, that allow us to make sense out of bits and pieces of information presented to us in a given situation."[59] A schema "is an integrated, organized representation of past behavior and experience that gnides an individual in reconstructing previously encountered material."[60] If a person does not have a schema for a particular experience, however, or if a situation provides insufficient clues to trigger a schema, or if the data require the schema to be altered, then the person must shift into active awareness.[61]

Studies show that expert writers stand out by their "fluency and automaticity—they can draw on stored plans and schemas to make the task easy."[62] When confronted with new or difficult tasks, how-

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57 *Id.* at 310.

58 Flower, *supra* note 49, at 189-90.

59 John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. OF LEGAL EDUC. 275, 277 (1989).

60 Sternglass, *supra* note 32, at 158. For example, the schema for "buy" has a purchaser, a seller, a medium of exchange, merchandise, and a bargaining interaction. When a person is in a "buying" situation, she uses her "buying" schema to process and respond to her situation. *See generally* David E. Rumelhart, *Schemata: The Building Blocks of Cognition*, *in* THEORETICAL ISSUES IN READING COMPREHENSION 35-37 (Rand J. Spiro et al. eds., 1980).

61 Ann L. Brown, *Metacognitive Development and Reading*, *in* THEORETICAL ISSUES IN READING COMPREHENSION, *supra* note 60, at 455.

62 Flower, *supra* note 49, at 205. In addition, Richard Beach and JoAnne Liebman-Kleine point out that "writers have schemata about readers and about how they respond to texts. They also have schemata about writers and about how they use certain rhetorical strategies." Richard Beach & JoAnne Liebman-Kleine, *The Writing/Reading Relationship: Becoming One's Own Best Reader*, *in* CONVERGENCES: TRANSACTIONS IN READING AND WRITING, *supra* note 32, at 64, 65. There are "schemata for audience attributes, intended effects, assessment criteria, and rhetorical strategies." *Id.* at 65.

ever, skilled writers immediately shift into active awareness to diagnose and resolve the problem they are confronting in the text.[63] In contrast, novice writers are marked by their reluctance to shift into active awareness to resolve rhetorical problems.[64] Despite the formidable number of tactics students use to avoid confronting problems,[65] this reluctance is not necessarily willful. Thinking-aloud protocols show that some of the dominant traits of sophisticated learners are their learned abilities to recognize: 1) what they know and do not yet know; 2) what is important to know and what can be disregarded; and 3) when it is important to seek information previously overlooked.[66] Novices simply lack these skills.

Thus, composition theorists associated with the New Rhetoric have developed a variety of heuristics[67] for managing the inventing, planning, and problem-solving situations that arise in the writing process. Some stress free writing, followed by reflection and rewriting.[68] Some emphasize writing plans (a sketch or blueprint of the relationships of ideas without specific content) or schemata (various ways of structuring topics).[69] But perhaps the most common approach is to offer students heuristics for analyzing the rhetorical situation. Students are asked to consider the occasion for and purpose of the assignment ("the rhetorical exigence") on the assumption that people write only when there is a need. Students are also asked

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63 Among the problems writers most frequently encounter are: 1) "knowledge problems," which force the writer to move from an unorganized profusion of perceptions and propositions to an integrated notion; 2) "language problems," which arise when the writer cannot make the words work; and 3) "rhetorical problems," which occur when the writer is uncertain of purpose, audience, or projected self. Flower & Hayes, *supra* note 51, at 34-44.

64 Brown, *supra* note 61, at 475.

65 These include 1) "a take-it-or-leave-it attitude toward audience," 2) "willingness to put up with recoguized weaknesses in structure or content," 3) "poor and vague diagnoses," 4) "satisfaction with superficial connections," 5) "use of conversational ploys for sidestepping difficulties" such as treating a counter-example as an exception, and 6) "use of the knowledge telling strategy," that is, "a reporting of thoughts." Scardamalia & Bereiter, *supra* note 56, at 312-13.

66 Brown, *supra* note 61, at 468.

67 Questions, techniques, or procedures.

68 Free writing, an expressive, stream-of-consciousness mode in which students record impressions, reactions, and information, often provides students a way to get started. Upon reflection, they may be able to see what they know and what they need to discover. *See* PETER ELBOW, WRITING WITHOUT TEACHERS 3-11 (1973); Jill N. Burkland & Bruce T. Petersen, *An Integrative Approach to Research: Theory and Practice*, *in* CONVERGENCES: TRANSACTIONS IN READING AND WRITING, *supra* note 32, at 189; Joseph J. Comprone, *Integrating the Acts of Reading and Writing about Literature*, *in id.* at 233; Katherine Ronald, *The Self and the Other in Process of Composing: Implications for Integrating the Acts of Reading and Writing*, *in id.* at 231.

69 *See* Beach & Liebman-Kleine, *supra* note 62, at 64-81; Barbey Doughtery, *Writing Plans as Strategies for Reading, Writing, and Revising*, *in* CONVERGENCES: TRANSACTIONS IN READING AND WRITING, *supra* note 32, at 82; Maxine Hairston, *Using Nonfiction Literature in the Composition Classroom*, *in id.* at 179-88.

to analyze their audience and their own writing constraints, which might include their knowledge and intentions as well as limitations like time, form, and length.[70]

The New Rhetoric has already penetrated legal writing curricula in some measure. Many teachers now explore the purpose of various legal documents, focus students on questions presented as a way of crystallizing the problem that needs solving, and assign writing projects that are aimed at different audiences and that require different treatment of the subject matter (such as briefs, memos, and client letters). In addition, many programs use collaborative in-class writing exercises and peer review as a way of exposing students to one another's writing processes and reading expectations.[71]

These techniques go some way in making students better and more versatile communicators. Analysis of the rhetorical situation helps student writers to control their tone and approach to the subject matter. Group work initiates students into an interpretive community and helps them assess their audience. Techniques like free writing help them get started; writing plans help them to continue—to confront and resolve problems in the text. Yet the shift in focus from the written product to the writing process does not completely address the problem of invention—of creative and critical thinking, of contributions to an ongoing conversation, of conceptual breakthroughs which are not simply a matter of finding a "better technical solution to an old problem (e.g., the disease-producing influence of evil spirits), but of seeing a new problem (e.g., the existence of germs)."[72] Work in this area—exploration into inspiration, into "having something to say"—has, however, been a focus of reading and "critical thinking" theorists.

B. Reading to Write: Uniting the Skills

Paralleling the rise of the New Rhetoric is an increased interest in the reading process and a growing conviction that reading is a creative activity connected to "meaning" making.

Reading is central to a writing course in part because writers are constant readers and editors of their own works. The recursive nature of the writing process, the retrospective and projective pos-

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70 *See* Lloyd F. Bitzer, *The Rhetorical Situation*, *in* PHILOSOPHY AND RHETORIC, Jan. 1968, at 1; Flower, *supra* note 49, at 206; Hairston, *supra* note 69, at 181; Phelps, *supra* note 29, at 1089-1102.

71 *See* Phelps, *supra* note 29, at 1099-1101. For a general discussion of the value of advanced legal writing courses and of introducing students to new writing techniques and audiences, see Barbara J. Cox & Mary Barnard Ray, *Getting Dorothy Out of Kansas: The Importance of an Advanced Component to Legal Writing Programs*, 40 J. OF LEGAL EDUC. 351 (1990).

72 *See* Flower & Hayes, *supra* note 52, at 101.

tures between which a writer alternates, reveals that writers frequently assume the role of readers as they write. Indeed, studies suggest that good writers continually reread their works in progress to mark their place, "to adhere to [their] global text plans,"[73] to refine their thesis and sense of audience, to generate material and to assess structure, style and grammar. In fact, other experiments show that writers freeze when they are prevented from reading their works in progress.[74] Yet reading also enters a composition course because much expository writing is a response to reading. In fact the quality of many compositions is inextricably intertwined with the quality of reading implicit in them.

Prior to the New Rhetoric, much reading theory and instruction was grounded in the common-sense realism that justified the current-traditional rhetoric. Texts meant something. The best texts "cohered," were organic, had unmistakable signification.[75] Student readers had to decode the text, find or retrieve the controlling ideas and supporting ideas, and show the teacher that they "got" it—that they read the text "correctly."[76] Such readers are, however "consumers . . . who read only for information . . . and as denotatively as possible."[77]

Writers who read merely as consumers have writing problems that cannot be adequately attributed to difficulties with "skills" like organizing, paragraphing, vocabulary, or syntax. Their difficulties stem instead from a failure to imagine reading possibilities.[78] Their papers are only "a paraphrase away"[79] from another author's text. They do not recognize the difference between a summary and an analysis, namely, that "analysis is always an account of what is not visible"[80] in the text. Thus, writing teachers who believe that "good writing" includes imagination, invention, and analysis must become reading teachers, must teach students to read between the lines, to

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73 Deborah Brandt, *Social Foundations of Reading and Writing*, *in* CONVERGENCES: TRANSACTIONS IN READING AND WRITING, *supra* note 32, at 116.

74 Ronald, *supra* note 68, at 235. Deborah Brandt also notes that "[i]f denied access to their evolving texts, even good writers experienced some difficulty with text organization and coherence." Brandt, *supra* note 73, at 116 (citing a study conducted by Margaret Atwell, The Evolution of Text: The Interrelationship of Reading and Writing in the Composing Process (1980) (unpublished Ph.D. dissertation, Indiana University)).

75 Kaufer & Waller, *supra* note 5, at 85.

76 *Id.* at 77-78.

77 Comley, *supra* note 4, at 193 (citing ROLAND BARTHES, IMAGE MUSIC TEXT 155-64 (Stephen Heath trans., 1977)).

78 DAVID BARTHOLOMAE & ANTHONY PETROSKY, FACTS, ARTIFACTS, AND COUNTERFACTS: THEORY AND METHOD FOR A WRITING COURSE 13 (1986).

79 Kaufer & Waller, *supra* note 5, at 78.

80 Joseph M. Williams, *Afterword: Two Ways of Thinking about Growth*, *in* THINKING, REASONING, AND WRITING, *supra* note 49, at 253.

read closely, critically, and multiperspectively.[81] In other words, students must see that the texts they produce are not merely paraphrases and summaries of other texts, but also interpretations of the original text as well as new works. Joyce's *Ulysses* is, for example, both a reading of Homer's *Odyssey* and a new writing.[82]

As the relationship between reading and writing became better understood and accepted, colleges began merging reading and writing programs.[83] One result of this merger was that many composition teachers borrowed from reader-response theory to help students become better writers by becoming more self-conscious and critical readers.

Reader-response theory envisions close critical reading as at least a two-step process. The first step is "subjective criticism," in which students attend not to the controlling ideas in the text but to their own responses to it. The real business of critical reading does not begin, however, until the students try to understand what in the text or their experience elicited their reactions. At this point,

> the reader shifts perspective and tries to imagine the writer's intent, to decide why he used this word instead of that, moved in this direction instead of that, or chose to expand upon one point and not another. Using the text as his terrain, he tries, in short, to map the thinking of the writer and finally to see in relation to that map where he, as one reader, traveled.
>
> Reading in this way, the student begins to sense that the meaning of what he reads or writes resides not in the page nor in the reader but in the encounter between the two.[84]

This interaction is frequently referred to as the transactional approach.[85] Transaction is the benchmark of "close" reading because it results in analysis and interpretation.[86]

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81 "In the composition classroom, student responses to an assigned text constitute an intertextual network surrounding and extending the text." *See* Comley, *supra* note 4, at 192.

82 *Id.*

83 The University of Pittsburgh and Carnegie Mellon have created pioneer programs in this area.

84 MINA P. SHAUGHNESSY, ERRORS AND EXPECTATIONS: A GUIDE FOR THE TEACHER OF BASIC WRITING 223 (1977).

85 *See* Louise Rosenblatt, *The Transactional Theory of the Literary Work: Implications for Research*, *in* RESEARCHING RESPONSE TO LITERATURE: POINTS OF DEPARTURE 33-35 (Charles R. Cooper ed., 1985). Other important reader response theorists are Stanley Fish, Jonathan Culler, Norman Holland, David Hirsch, and Wolfgang Iser.

86 Michael L. Johnson sees reading as a three-stage process. In a table he has compiled, "Levels of Reading Experience," he outlines "ways in which the three levels . . . variously predicated, might be considered, and thereby may help articulate a more informed and flexible pedagogy for all of them, especially the third." Johnson, *supra* note 31, at 314. An abridged version of this table is reproduced below, followed by Johnson's glosses on two of the "triplets."

College writing teachers have developed a wealth of techniques and exercises to promote and encourage such transactive critical reading and writing. A sampling of these materials shows that they are notable for trying to make students conscious of the invisible workings of a text and requiring them to write about the implicit as well as the explicit text. Let us look at three representative approaches.

Nancy Comley alerts her students to gaps in the text by having them write "ghost" chapters.[87] In all fiction there are events missing "at the level of discourse" that are presumed to have occurred at the "story level." The writer trusts the reader to fill in the missing events and to assume those events took place. Comley asks her students to create the text, to write the "ghost chapter" for these miss-

FIRST LEVEL	*SECOND LEVEL*	*THIRD LEVEL*
declarative	interrogative	creative
thetic	antithetic	synthetic
receptive	conflictive	integrative
acceptive	skeptical	transvaluative
univocal	equivocal	dialogical
positive logic	either/or logic	both/and logic
meaning just is	meaning is contested	meanings are made
is unaware of blanks	critiques blanks	fills blanks
readerly	"rereaderly"	writerly
textual	"anti-textual"	intertextual
disregards language	grapples with language	re-forms language
unconscious	(self)conscious	(meta) self conscious
text controlled	reader-controlled	inter-actively controlled
denotative	connotative	stereoscopic
reading	interpreting	criticizing

Id. at 315.

> [T]he denotative-connotative-stereoscopic-triplet is indebted to David Bleich's idea of language as a Cassirerian "symbolic form" capable of creating knowledge that is "always a re-cognition because it is a seeing through one perspective superimposed in [sic] another in such a way that the one perspective does not appear to be prior to the other" (a process described by Jean Piaget as "the internal reciprocal assimilation of schemata"), the kind of knowledge occasioned "when we 'get' a joke"; more specifically and pertinently, such "stereoscopic knowledge" involves langnage evoking the "perspectival possibilities" of always interdependent denotation and connotation. . . . [T]he reading-interpreting-criticizing triplet is borrowed from Robert Scholes, who offers a convenient gloss: "In *reading* we produce *text within text*; in *interpreting* we produce *text upon text*; and in *criticizing* we produce *text against text*."

Id. at 314-15 (quoting David Bleich, *Cognitive Stereoscopy and the Study of Language and Literature*, *in* CONVERGENCES: TRANSACTIONS IN READING AND WRITING, *supra* note 32, and ROBERT SCHOLES, TEXTUAL POWER: LITERARY THEORY AND THE TEACHING OF ENGLISH 24 (1985)).

87 Nancy R. Comley, *A Release from Weak Specifications: Liberating the Student Reader*, *in* WRITING AND READING DIFFERENTLY: DECONSTRUCTION AND THE TEACHING OF COMPOSITION AND LITERATURE, *supra* note 5, at 129, 131-33.

ing events.[88] In order to do it, "the students have to know the original from the inside. In class, it is their discussion of their own texts as part of an intertextual network that further opens up the original."[89]

Burkland and Petersen find reading-response theory useful for research assignments.[90] They require their students to record their associations, questions, and thoughts as they do preliminary reading. This done, students must then sift through their records, categorizing their responses as 1) interpretations, 2) questions aiming toward interpretation, 3) factual questions, 4) personal associations, and 5) personal reactions. Out of these categories they must develop a researchable question as the focus of a paper. The students next engage in extended free writings, what Burkland and Petersen call "zero drafts."[91] While working on these drafts, the students may not refer to their notes. The idea is to make students realize the difference between what they have come to *know* and what they have merely *recorded*. Students also examine their zero drafts to locate areas that need more research, reflection, or development.

Other teachers rely on deconstructionist reading heuristics to get their students to see not only what a text says but how it says it and what it means. Kaufer and Waller give their students two fundamentally incompatible, highly persuasive and strongly argued texts taking opposite positions on a topic.[92] The students must explain why one text is nonetheless superior by showing how the reader can overcome the apparently irresolvable conflict by going beyond the text or into its invisible workings. They must do this by classifying the conflict as "a matter of semantics (which forces them to dig into words and expressions), of factual evidence (which forces them to consider the observable facts that bear on resolving the conflict), or of value (which forces them to consider the larger goals of the parties to the dispute)."[93] These two teachers even have stu-

88 Assume, for example, a character boards a train at the end of one chapter and is disembarking when the next chapter opens. A "ghost" chapter would fill in the trip. *Id.* at 131.

89 *Id* at 133.

90 *See* Burkland & Petersen, *supra* note 68, at 194-96.

91 *Id.* at 199-200.

92 Kaufer & Waller, *supra* note 5, at 78-80.

93 *Id.* at 80. Paul Northam also uses deconstructive reading in his composition class to elicite "[t]he sense of the playfulness of language [in order to] stimulate inspiration, the first essential step of invention." Northam, *supra* note 40, at 123. Barbara Johnson lists seven examples of the types of reading challenges that a text might provide: 1) ambiguous words, 2) undecidable syntax, 3) incompatibilities between what a text says and what it does, 4) incompatibilities between the literal and the figurative, 5) incompatibilities between explicitly foregrounded assertions and illustrative examples or less explicitly asserted supporting material, 6) obscurity, and 7) fictional self-interpretation. Barbara Johnson, *Teaching Deconstructively*, *in* WRITING AND READING DIFFERENTLY:

dents deconstruct grammar by asking them to write sentences in which applying a grammatical rule "would not move a writer closer to his or her expressive goals."[94]

Reader response theory can be seen as an offshoot of process theory, of the New Rhetoric, in that it helps students get started, to find something to say. Another offshoot of process theory is a renewed focus on the socio-cognitive environment in which reading and writing occurs. Some theorists believe that authentic critical thinking cannot really develop independent of a rhetorical and socio-contextual environment, a contextual environment that directs and organizes metacognitive skills and strategies.[95] The discussion seems to focus on what one researcher calls the "uniqueness question":[96] Are the composing, reading, and critical thinking processes acquired by undergraduates easily transferrable to new types of discourses—a posture which assumes that these skills are independent of context—or are these cognitive processes dependent on and intertwined with the social-contextual and rhetorical environments in which they arise?

A fairly recent study of the reading behavior of first-year law students suggests that cognitive processes are dependent at least in part on the social context.[97] The study revealed that law students who were good readers in their prior professions experienced a diminution in their ordinary reading and critical thinking skills[98] when they read law. What is less clear, however, is whether this diminution of skills results from the novice's lack of substantive knowledge and lack of knowledge of text type, as Lundeberg suggests, or whether it results from a novice's lack of understanding of the task's purpose and rhetorical situation, as Stratman suggests.[99] The debate appears to have distinct pedagogic implications. To help the novice reader of law, Lundeberg, for example, would give novices gnidelines and blueprints of text types. Stratman, on the

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DECONSTRUCTION AND THE TEACHING OF COMPOSITION AND LITERATURE, *supra* note 5, at 141-45.

94 Kaufer & Waller, *supra* note 5, at 81.

95 *See, e.g.*, COOPER & HOLZMAN, *supra* note 48; Patricia Bizzell, *Cognition Convention, and Certainty: What We Need to Know About Writing*, 3(3) PRE/TEXT 213 (1982); James F. Stratman, *The Emergence of Legal Composition as a Field of Inquiry: Evaluating the Prospects*, 60 REV. OF EDUC. RES. 153-235 (1990); Williams, *supra* note 80.

96 *See* Stratman, *supra* note 95, at 160.

97 Lundeberg, *supra* note 21, at 416.

98 These skills included their ability to use context, overview, and rereading as well as their ability to synthesize and evaluate.

99 Stratman, *supra* note 95, at 174 (commenting on Lundeberg's conclusions); *see also infra* note 125 (discussing Lundeberg's conclusions).

other hand, would create instructional materials that put students into a real-world role that gives them perspective on the text.[100]

In practice, however, educators associated with the New Rhetoric often combine both approaches. For example, colleges like the University of Pittsburgh and Carnegie Mellon have pioneered programs that introduce students to different professional discourses both by devising "real life" socio-cognitive situations and by encouraging reader response.[101] In contrast, most law students encounter "the socio-cognitive environment in which practitioners write" not in their first year, but in an elective clinical program. Nonetheless, a few schools[102] are experimenting with "lawyering" programs that root assignments in "real life" simulations. These simulations, which dramatize the context and purpose of a practical writing task, may in fact provide a student's reading with direction and perspective. Other schools try to sensitize students to the con-

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100 For example,

> [O]pinions lie at the end of a long, complex chain of arguments and discussion. The defendant's and plaintiff's perspectives, with their full argumentative force, are only abstractly present in a conclusory opinion, having been reconstituted and distilled by the judge(s). Given only the opinion, students may find it much harder to get a palpable sense of the differences among the perspectives of plaintiff, defendant, and judge(s) than if the students first encountered the case in the advocates' opposing briefs. It is in this juxtaposition of texts that the controversy first took shape; and thus it is when briefs are first submitted that differences in the perceived relevance of facts would be in sharpest, and perhaps most accessible, contrast. Accordingly, an alternative pedagogical recommendation to abandoning the students to learn by experience, would be to (a) create instructional material that put students into a real-world role as readers (plaintiff, defendant, judge, appellate court staff attorney), as some theorists now recommend . . . , and (b) begin their introduction with opposing briefs, later introducing opinions. In this way, students' legal thinking skills, including their ability to access the relevance of facts, to hypothesize, and to synthesize parts of an opinion, might be more readily improved.

Id. at 214-15.

101 See generally BARTHOLOMAE & PETROSKY, *supra* note 78, who describe the University of Pittsburgh's program for marginal students. Pittsburgh tries to initiate students into a discourse community from the inside. Its teachers try to introduce students to academic discourse not simply through teaching the content in texts but by having students do the work of a professional in that field. Students begin by writing first-person narratives on a theme related to the theme of the course. This work is then subjected to peer review. This peer discussion leads to students' first experience of an interpretive community. Later, these narratives become case studies to be reconsidered in light of the language and methods of the professional studies they are reading. Students first read the work of a sociologist and are asked questions like "what did the professional see that you did not?" "What use can you make of it in reviewing your narratives?" Then the students read the work of an anthropologist on that theme. The students begin to see their material, their narratives, through the frames of different disciplines.

102 For example, New York University School of Law, CUNY Law School, and the University of Montana School of Law have such programs.

cerns, modes of inquiry, and discourse practices specific to a discipline by embedding writing instruction within courses spread across the curriculum.[103]

Nonetheless, instruction focused on discourse practices alone—without any sense of how they are positioned in relation to more general, cross-contextual techniques of legal reading and writing—is not, we think, enough. Skills sufficient for a specific context or purpose can become limiting if they add nothing of substance to other more general skills, skills applicable to a larger set of contexts and purposes. The discourse community for a writing class, Marilyn Cooper argues, ought to be "the community of professional nonfiction writers."[104] This community

> values discourse practices that lead to a certain kind of knowing, a kind of knowing usually referred to as critical thinking. Critical thinking implies the ability and inclination to examine things from different points of view, to develop, test, and apply theories in order to come to understand experience. Critical thinking is clearly not a value solely of this community, but for nonfiction writers it is a kind of knowing that is the result of writing and reading, a kind of knowledge that develops intertextually . . . . Its purpose is the critical examination of social phenomena from the point of view of current theories; the mode of writing is analysis, synthesis, hypothesis, and comment . . . .[105]

It is also a community that values "cognitive dissonance,"[106] that values the ability to think about contradictions, "to see in them not only the established reality but also the alternative possibilities they contain."[107]

C. Reading & Writing: Issues in the Profession

If encouraging students to think for themselves, to escape from paraphrase, is one of our objectives as educators,[108] there is no generally endorsed strategy for its accomplishment. Indeed, those teachers who are in the forefront of the critical thinking movement

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103 For example, Legal Writing III at the University of Montana Law School is connected to a required, second-year Business Organizations course. Students receive a case file that contains information about the goals, objectives, finances, and personalities of their mock clients. They conduct interviews with the client. Finally, they draft a sophisticated partnership agreement. *See* Bari R. Burke, *Legal Writing (Groups) At the University of Montana: Professional Voice Lessons in a Communal Context*, 52 MONT. L. REV. 373 (1991).

104 COOPER & HOLZMAN, *supra* note 48, at 51.

105 *Id.* at 52-53.

106 *Id.* at 55.

107 *Id.* at 57.

108 Certainly, it has become a focus of English and Composition conferences. *See* Johnson, *supra* note 31, at 312.

often come under heavy fire for their deconstructionist teaching methods.[109] Frequently, they are accused of opening the door to rampant subjectivism: all compositions are opinions and all opinions, all readings, equally valid. In addition, there is heated debate within the academy about whether novices in a field need to acquaint themselves with the conventions of the profession before they begin breaking those conventions.

Many teachers, ourselves included, respond to critics of deconstructionism by emphasizing its effectiveness as an intellectual exercise, even while conceding that the text does in some way constrain reading.[110] In fact, even some deconstructionists note that "Derrida Himself . . . speaks of the 'commonsensical' reading of a text as an 'indispensable guardrail' protecting a reading."[111] Acknowledging textual constraints, however, does not prevent us from regarding the text as at best only a guide to the reader, like a musical score or football play, which must be performed to be real. Strong readers must try out various readings, various performances, of the text. To be strong readers, students must be weaned from their belief that reading is about decoding or uncovering the one "real" topic or theme of a text. They must entertain the notion that all reading is misreading; that is, all reading is a recomposition of the text that is not the text itself, and is thus, and inevitably, a "misreading."[112] These misreadings are not simply error, however, but the beginning of interpretation. By selectively stressing some sections of the text rather than others, each misreading uncovers neglected or distorted features of the text, and thereby moves the reader towards an analysis of the invisible text.[113] Students must, therefore, get over the belief that they write to recite.[114] They must be encouraged to become more subversive.

A more difficult question is whether inventive, sophisticated discourse is possible prior to the acquisition of basic knowledge structures like case-briefing. There are good arguments for holding

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109 E.D. Hirsch may be the loudest critic. *See generally* ERIC D. HIRSCH, JR., CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW (1987).

110 On this point we agree with the view expressed by Louise M. Rosenblatt, Barry Chabot, and Alan C. Purves. *See* RESEARCHING RESPONSE TO LITERATURE AND THE TEACHING OF LITERATURE: POINTS OF DEPARTURE, *supra* note 85, at 22-69.

111 Kaufer & Waller, *supra* note 5, at 68. Of course, most deconstructionists would reject the notion that a common sense reading is possible. Signifiers lead only to other signifiers—never to a signified. No interpretation is privileged; any apparent authorial declaration is undermined by other chains of signification which suggest alteruative and contradictory readings. *See* Northam, *supra* note 40, at 119-20.

112 *See generally* David Bartholomae, *Wanderings: Misreadings, Miswritings, Misunderstandings*, *in* ONLY CONNECT: UNITING READING AND WRITING 93 (Thomas Newkirk ed., 1986).

113 BARTHOLOMAE & PETROSKY, *supra* note 78, at 6.

114 Kaufer & Waller, *supra* note 5, at 71.

teachers responsible for helping students to read, at least initially, at the consumer level.[115] Joseph M. Williams convincingly argues that sophisticated reading, writing, and thinking is impossible prior to a novice's thorough "socialization into a community of knowledge."[116] Regardless of classroom practices such as dialectical discussion, deconstructionist heuristics, and peer collaboration and review, a student will sound like a novice, and read and write like one, until she has a basic knowledge structure into which she can incorporate new information in a new field.[117] This basic knowledge structure requires the student:

> 1. to accumulate "correct knowledge that the community defines as its special domain," including "the history of the conversation that has led to the current state," the reasons why "some questions are more important than others," and "why some answers no longer count as good answers,"
> 2. to learn "how to think like those in the community," which includes "how to pose and explore problems," and
> 3. to learn "how to sound like a member of the community," which includes "not just wbat to say and how to say, but also what not to say and especially when not to say it."[118]

Acquiring this knowledge structure, Williams argues, places such an immense coguitive burden on a student that the novice "cannot hold the material internally as he analyzes it, [but] instead instantiates the knowledge, concretiz[ing] it by getting it down on paper in the form of a summary."[119] Williams suggests that this immature "actualization" or paraphrase of the student's struggle with the assignment is an inevitable stage in the student's initiation into a discourse community. Students may be unable to "avoid passing through some period of socialization in which they succumb to that entirely predictable and natural need to sound like an insider . . . [even if they] don't quite get the voice right at first."[120]

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115 This is especially true in the law, where a text has a demonstrable effect on the real world.

116 Williams, *supra* note 80, at 247. A student's ability to think and read critically, as an expert, is related to the debate about the "uniqueness question." *See supra* notes 48, 94-125 and accompanying text.

117 Williams, *supra* note 80, at 253.

118 *Id.* at 252. Indeed, it has been persuasively argued that legal discourse in this century (like the discourse of other modern disciplines) is defined as much by the questions it excludes as by those it asks. *See* BROOK THOMAS, CROSS-EXAMINATION OF LAW AND LITERATURE 15 (1987).

119 Williams, *supra* note 80, at 253.

120 *Id.* at 255. For a discussion of how the expert/novice dichotomy applies to law school curriculum, see John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. OF LEGAL EDUC. 275 (1989). Mitchell argues that we must determine and articulate the schemata of both novices and

Nonetheless, other educators are less sanguine about this initiation period. Kurt Spellmeyer, for instance, cautions that "[s]tudents trained to analyze and imitate the work of [a] practitioner . . . produce . . . something superficially comparable, but only by suppressing dialogue itself."[121] Normative models discourage students from interacting with the text: "the more we attempt to ready beginning writers for activities which are profoundly mechanistic and undialogical, the less prepared they will be to produce knowledge for themselves."[122] Michael L. Johnson agrees that too facile and blanket an acceptance of the discourse they are attempting to master will control the students' "world-view so extensively that the hell they're in remains invisible to them unless they can read in opposition to and then beyond the hypnotic transparency of the language that imprisons them . . . ."[123]

Ideally then, a student's socialization into a discourse community should be liberating, not repressive. Thus, although "academic knowledge, with its institutionalized power, exerts hegemony over other ways of knowing," we must encourage students

> to reexamine the knowledge the academy disestablishes as well as that which it endorses. But in order to approach this hegemony critically, . . . [students] must understand how it works, and for that understanding . . . [they] need to be initiated into the academic discourse community, though . . . [they] may intend eventually to critique the forms of knowledge which that community offers us.[124]

A legitimate part of the first-year legal writing curriculum may be the introduction of certain traditional skills, such as case-briefing strategies, writing plans like IRAC, and issue-spotting tricks.[125]

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experts and then begin with the novices' schemata and work our way towards the experts' schemata.

121 Kurt Spellmeyer, *Letter to the Editor*, 52 C. ENG. 336 (1990).

122 *Id.* This debate is echoed by other educators. For example, Sternglass and Brandt would agree with Williams that readers can infer information from texts to the degree that "they already possess notions of the world and context within which the specific text appears." Sternglass, *supra* note 32, at 157. Deborah Brandt documents this with a simple but convincing illustration. Compare, she says, these two sentences: "The policeman held up his hand and stopped the car" with "The goalie held up his hand and stopped the ball." Understanding these sentences "involves more than syntactic and semantic processing; readers must invoke knowledge of 'scenarios,' that is, knowledge about settings, episodes, social roles . . . ." Brandt, *supra* note 73, at 119.

Yet, like Spellmeyer and Johnson, she warns that scenarios (schemata) are necessary but not sufficient conditions for comprehension. Incoming, new, and unexpected information must modify prior scenarios. "That is how 'the theory in our head' is enriched, enlarged, and altered by encounters with texts." *Id.*

123 Johnson, *supra* note 31, at 313.

124 Bizzell, *supra* note 48, at 205.

125 Normative heuristics seem to be most helpful when introduced at an early stage in the educational process. In a controlled experiment testing law students' reading

These methods should probably extend to basic techniques for analyzing the rhetorical situation. Yet, we have been perhaps too slow in turning our attention to methods which will get students beyond what one might call "stage-one" legal reading, once they have an adequate knowledge base. Until we do so, however, students' briefs, memoranda, law review notes, and seminar papers will not be posited on readings inventive enough for their writings to be insightful or to make real contributions to legal discourse. In the next part of this article, we explore the problems of teaching close reading to law students, and suggest some approaches.

III
FROM CLOSE READING TO STRONG WRITING

A. Teaching Close Reading

Contemporary composition and reading theory teach, then, that writing is a complex and recursive but teachable process, that reading is a creative act, and that all writing is in some sense a response to other texts. If, as research in these disciplines further suggests, authentic, thoughtful response generates authentic, thoughtful writing, our first responsibility to student writers is to help them move beyond the consumer assessment of judicial opinions that is case-briefing. We must develop techniques that help them move past "stage-one" legal reading (reading for what the court says it is saying) through "stage-two" reading, that is, beyond unquestioning acceptance of textual authority and "found" meaning to an open-ended process of unselfconscious response and self-aware reflection. Then students can move to "stage-three" where purpose informs a "final" reading, where readers take control over " 'two or more opposite or antithetical ideas, images or concepts simultaneously' activated by the text and thereby synthesize its proliferant meanings as fully as they can."[126]

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comprehension, for example, students with zero to a few months of experience with case analysis were all shown to profit from having guidelines developed from the reading strategies of practitioners and law professors. These guidelines, intended for novices, were of little benefit to advanced students, who had already internalized these strategies through discovery. *See* Lundeberg, *supra* note 21, at 407-32. Interestingly, one strategy outlined in the guidelines prepared by Lundeberg helped second- and third-year students but not the novices. Presumably, Lundeberg speculates, these advanced students "had developed a knowledge base in law, which the first-year students lacked, and could thus activate this strategy. It appears that certain strategies are dependent on certain knowledge structures; thus, different guidelines for different levels of coguitive development might be more appropriate." *Id.* at 428. *But see supra* notes 94-112 and accompanying text.

126 Johnson, *supra* note 31, at 314 (quoting ALBERT ROTHENBERG, THE EMERGING GODDESS: THE CREATIVE PROCESS IN ART, SCIENCE AND OTHER FIELDS 49, 55 (1979)).

Stage one is the reading style learned in the first months of law school: unwrap the product (legally relevant facts, issue, holding, reasoning, and dicta) and discard the packaging. Stage two is the antithesis of stage one, but otherwise frustrates all but impressionistic description. It is a free-wheeling, even playful state in which the mind, at once "relaxed and alert,"[127] makes connections both inside the text and with other texts, and confronts the ambiguities and uncertainties latent in the most powerful persuasion and the most self-evident assertion. It is a process of putting texts to the question, a far-ranging but cogent cross-examination. It is a "polyphonic" stage in which all of the "voices" in the opinion and all of the reader's "voices" are heard simultaneously.[128] Finally, it is transactional, involving both reaction and reflection upon that reaction. The reader's practical purpose for reading the case should not be closer than the very back of the mind at stage two, which is not just a means to an end, but an independent intellectual project. Stage three involves selection and synthesis, where purpose consciously exploits and structures the inspirations of stage two.[129]

Regardless of their backgrounds,[130] all stage-one readers initially resist close reading.[131] Yet when they begin to see close reading not as apostasy or irrelevant intellectual gibbering, but rather as a useful and agreeable, even virtuous pursuit, the question remains: how to begin? To a limited extent, it is helpful to analyze a short opinion or excerpt in class, demonstrating how one close reader reads the text. Although this hands-on demonstration makes for a good introduction and a lively class, there is a caveat: to the extent that close-reading is consistently led by the teacher, it risks becoming no more than the teacher's reading, a fall back for students into "tell-me-what-you-want-and-I'll-give-it-to-you" learning. If we show students how we react to texts and parse out our reactions, and if they learn to imitate us by rotely asking those questions our own histories lead us to ask, then all we have done is to teach them to produce more sophisticated case briefs.[132]

One way to illuminate the reading process is to use, in the classroom, a technique borrowed from metacognitive research: the

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127 Salvatori, *supra* note 34, at 661.

128 *See* Davies, *supra* note 10, at 411.

129 *See generally supra* note 86 (charting the three stages of reading).

130 For some students, most likely a small minority, learning to read for issue, holding, and reasoning means giving up close reading habits acquired in college or graduate school. For others, it may require closer attention to a text than was ever required of them. For most, it probably means learning by trial and error to be facile users of another brand of intellectual software.

131 *See supra* text accompanying notes 4-9.

132 *See* Spellmeyer, *supra* note 121.

"thinking aloud protocol."[133] In such an exercise, a student verbalizes her uncensored responses to a short opinion *while* reading it. Further response is encouraged by "prompts" or "probes" interjected by the teacher or another student (e.g., "What are you smiling at?" "What did you just underline?"). All of the responses are recorded, perhaps on tape, and then analyzed by the class.[134] The purpose of this exercise is double. First, it reveals how, as expert readers of caselaw, we automatically use acquired "strategies" such as briefing cases in our heads as we read.[135] Second, it amplifies not just the particular notes we have been trained to listen for, but at least some of the rich polyphony of memory and association as well, rendering consciously available whole ranges of meaning we ordinarily try to tune out.[136] Thus, we can try to show how complex reading really is, how we create new texts as we read, and how profoundly interesting and rewarding it is to listen hard and pay attention to what we hear as we read.

But, in addition to helping new legal readers respond to judicial opinions with all of *their* experience of life and of other texts, we must also help law students hear all the *other* "voices" in the text. One way to help students to descend into the chaos of close reading and emerge with a deeper understanding of the text is to add provocative new voices to the conversation, that is, to encourage legal readers to find out how other readers react and how they put texts to the question. Certainly the perspectives of Critical Legal Studies, feminist jurisprudence, law and economics, law and literature, and legal storytelling provide a range of reading theory and practice broad enough to turn the reading of any judicial opinion into an animated symposium. These readings should be assigned with the caveat that no text is ever exempt from critical reading.[137]

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133 *See* Lundeberg, *supra* note 21, at 410-11; *supra* text accompanying note 147. What we propose for classroom use is a vastly simplified and unscientific version of Lundeberg's procedure. Our goal is merely to challenge students' ideas about reading.

134 *See* Lundeberg, *supra* note 21, at 410-11.

135 According to Lundeberg, expert readers seek first the *context* (parties, type of court, date, judge), then take a brief *overview* (length, holding, summary of facts) before *rereading* analytically, and finally, *synthesizing* (merging facts, issue, rule, and rationale) and *evaluating* the decision. Interestingly, only novice readers tend to ask how the result flows from the law. *Id.* at 412-15.

Lundeberg cites the following "expert" evaluation as typical: "I knew Cardozo wouldn't let . . . that schmuck get away with that." *Id.* at 415.

136 *See* Davies, *supra* note 10, at 422. Davies likens using only our case-briefing reading strategies to hearing only the horns in a symphony; just as an educated musician "cannot deny that the musical effect of the horn part is affected by the fact of the other instruments being played," so a sophisticated reader must accept that no one "who understands English can suppress the various meanings of that language by a conscious act of will." *Id.* at 422.

137 Our own list, seeking to provide balance rather than be balanced, includes the following:

In addition to encouraging students to get to know a whole new range of voices and to hear them when reading judicial opinions, we might usefully urge students to ask some of the questions that inform contemporary critical thinking about the law. Five general areas of inquiry suggest themselves: 1) asking how the court itself reads the law (reading for jurisprudential and interpretive posture); 2) asking how the opinion accords with other things we know about the word and about the world (reading for context); 3) asking how and how legitimately the opinion seeks to gain our assent (reading for rhetoric and style); 4) asking how the opinion tells whose story (reading for narrative); and 5) asking the opinion about its silences (or reading for omission).[138] Certainly, these are not the only important inquiries, nor are the boundaries between them entirely fixed.[139] On balance, though, so long as they are used only as points of entry and not as a check-list, these seem to us genuinely telling questions.[140]

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* PETER GOODRICH, READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES (1986) [hereinafter READING THE LAW].

* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988).

* Symposium, *Legal Storytelling*, 87 MICH. L. REV. (1989).

* Davies, *supra* note 10.

* Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990) [hereinafter Ferguson, *The Judicial Opinion as Literary Genre*]; Ferguson, *We Do Ordain*, *supra* note 8.

* Carolyn Heilbrun & Judith Resnick, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913 (1990).

* Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599 (1989).

* David R. Papke, *Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions*, 40 J. OF LEGAL EDUC. 145 (1990).

* Carol Sanger, *Seasoned to the Use*, 87 MICH. L. REV. 1338 (1989).

* Twining, *supra* note 11.

* Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication, in* BILLY BUDD, SAILOR, *With an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982).

138 These five areas of inquiry represent an extension and elaboration of the four ways of reading we proposed in our first close-reading classes: reading for jurisprudence, context, style, and omission. *See supra* text accompanying note 24.

139 For instance, narrative and rhetoric are sometimes inseparable, as are omission and context or rhetoric and jurisprudential posture.

140 What is clear, if paradoxical, is that close and critical reading can best be learned when it is directed by some kind of heuristic. William L. Twining tells what happened when he assigned passages from Dostoevsky's CRIME AND PUNISHMENT without asking students to focus their ideas about the text or providing a focusing structure. Class discussion proceeded as follows:

> "Self [Twining]: 'How do you find the reading this week?'
> Class: (in chorus) 'Great!'
> Self: 'What did you think of the account of the second meeting between Porfiri and Raskolnikov?'
> Student: 'It said it all, man.'
> Self: 'That's it then.'

Each of these five close-reading inquiries can be pursued in the classroom in a variety of ways. Reading for jurisprudential posture is initially the most straight-forward of the five. We have used passages from Justice Brennan's majority and Justice Black's dissenting opinions in *Goldberg v. Kelly*[141] as examples of differences in jurisprudential posture.[142] Yet this apparently simple business of labelling a judge's approach can be taken a step further by asking students to compare one court's or one justice's approach on different issues—for example, comparing Justice Scalia's interpretive take on the Confrontation Clause in *Maryland v. Craig*[143] with his reading of the Free Exercise Clause in *Employment Division v. Smith*.[144]

Twining, *supra* note 11, at 8.

Twining has developed a variety of heuristics for reading a variety of legal texts: transcripts and jurisprudence as well as judicial opinions. He asks his students to approach texts at three levels: historical, analytical, and applied. *Id.* at 20-21. The historical context establishes the background of the text and the author so that the reader can understand the text from two perspectives: the context in which the author wrote it and the context within which the reader reads it. Analytical reading translates the text's concerns into questions. The most basic kind of analytical reading Twining calls "reading for plot." This involves asking "[w]hat questions does this text address? What answers does it propose? What are the alleged justifications for the answers?" *Id.* at 21. This process supplies, he believes, the basis for dialectical reading: "Do I agree with the questions . . . the answers . . . the reasons?" *Id.* The third level, "the applied," explores the implications and applications of the questions, answers, and reasons attributed to the text and to the alternatives developed at the second level. It requires theorizing about particulars in relation to a general idea and tests positions provisionally adopted at level two.

141 397 U.S. 254 (1970).

142 *See supra* note 24. To keep close to home the idea that all language can always be profitably put to the question, the discussion might begin by asking why we use "posture" in this context.

For a contemporary example of opposite approaches, students could contrast Justice O'Connor's super-realist balancing of the right to confront witnesses at trial with the welfare of child witnesses in sexual abuse prosecutions and Justice Scalia's fierce originalist dissent. *See* Maryland v. Craig, 497 U.S. 836 (1990). Justice Scalia, joined by Justices Brennan, Marshall and Stevens, took blistering issue with the way the majority used precedent to justify its conclusion that what it called "face-to-face" confrontation was only one element of confrontation. Justice Scalia pointed out that the majority cited only cases dealing with "unavailable" witnesses to shore up its claim that the right to confront witnesses appearing at trial was not absolute. *Id.* (Scalia, J., dissenting).

143 497 U.S. 836.

144 494 U.S. 872 (1990). Respondents argued that their First Amendment free exercise rights were violated when they were denied unemployment compensation on the ground of work-related "misconduct"—the sacramental use of peyote, possession of which is a criminal offense in Oregon. Justice Scalia's majority opinion held that a generally applicable and otherwise constitutional criminal prohibition that has the effect of prohibiting a religious practice is immune from free-exercise scrutiny, over Justice O'Connor's complaint (on the part of concurrence and dissent) that the Court reached its result by "a strained reading of the First Amendment" and disregard of "our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct." *Id.* at 892.

Asking how a court reads caselaw or a constitution also implicates the ways it chooses *not* to read, that is, the texts it rejects. Another exercise might provide students with an opinion and ask them to decide it from one or more vastly different perspectives, such as strict textualist, Critical Legal Studies, or law and economics.[145]

Reading for context, our second line of inquiry, has two major aspects: context available within the lower-court history of the case itself, and context unavailable within the four corners of legal literature. Judith Resnick and Carolyn Heilbrun make a powerful case for understanding the lower-court context of judging by showing how the "facts" of a battered-wife homicide case were transformed as the case worked its way through the appellate process. They argue that no amount of pure textual analysis will ever allow us to hear the full range of the appellate "voice." Without the broadest possible inquiry into context, we are deaf to the notes of "recreation and distortion."[146]

Seeing a case in context is perhaps one of the best heuristics for introducing close-reading. Not even the most jaded consumer of judicial rhetoric can fail to react to other accounts and other perspectives. Examples of discrepancies between appellate court "facts" and "facts" testified to at trial or otherwise reported are distressingly easy to find; reading the newspaper is often research enough.[147] Although supplying the class with an opinion and a se-

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145 William L. Twining suggests a similar exercise, in which the class updates Lon Fuller's "The Case of the Speluncean Explorers" by deciding this famous hypothetical (cannibalism and the defense of necessity) from jurisprudential approaches that have come into prominence since Fuller's original was published.

> This works well with approaches, such as that of Ronald Dworkin or Economic Analysis of Law or some versions of Critical Legal Studies, that share Fuller's concern with the nature of appellate judging . . . . [I]t does not work so well with approaches that are less court-centered or are concerned with other issues, such as Marxism, Anarchism, feminism or macro-sociological theories.

Twining, *supra* note 11, at 25-26. But, Twining continues, the very fact that the problem will not work well with these approaches is instructive in itself. *Id.*

146 Heilbrun & Resnick, *supra* note 137, at 1940. One of the most shocking examples of distorted historical context is provided by recent investigations into the facts of Buck v. Bell, 274 U.S. 200 (1927). It is clear now that two of Holmes' purported "three generations of imbeciles," Carrie Buck and the child fathered on her by her employer, had perfectly normal intellects; their offense was not so much being "enough" as being *de trop*. STEPHEN J. GOULD, THE MISMEASURES OF MAN 335-37 (1981); *see also* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30 (1985).

147 During the writing of this section, one turned up unbidden. On its "Law Reports" page on July 31, 1991, The Guardian printed the decision in *Regina v. Thornton* (Court of Appeal July 29, 1991), affirming the conviction of a battered wife who had argued that she was "provoked" to kill her husband. A news story about the case appeared on the same page. The opinion of the Court of Appeal recounted the background to the homicide as follows:

lection of readings which establish its legal and historical context makes the point quickly, asking students to research the context provides richer reading practice. The wide accessibility of news and information data banks like NEXIS and WESTLAW makes it possible for students to assemble a context "dossier" on any significant case in the last ten years. One powerful lesson from this exercise is that it is virtually unending. Unlike "consumer" searches in caselaw data banks, every query in a context search leads to another, as the researcher follows the concentric rings outward from a case's point of impact.

Strong reading requires more than asking hard questions about jurisprudence and context, however. It demands that the reader consider the judicial opinion as a literary and rhetorical genre. For most law students, this third line of inquiry is surely a more exotic intellectual project than examining doctrine or context, and students will need help both with unblocking response to the text and analyzing that response. The best help here may well be good, provocative analyses by expert close readers, supplemented by contemporary views of the judicial opinion as rhetoric and as literature.[148]

The bright light that literary exegesis can cast on a judicial opinion is exemplified by Robert A. Fergnson's analysis of the 1940s "flag-salute" cases,[149] by Richard Weisberg's analysis of Chief Jus-

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> The defendant, Sara Elizabeth Thornton, now aged 35, grew up in comfortable circumstances but suffered from a personality disorder and was asked to leave her public school when she was 16. She married the deceased, her second husband, August 1988. The marriage was successful until he resumed his heavy drinking habits and was on occasion violent. In May 1989 after an argument he severely assaulted the defendant and was charged by the police. The defendant then went to stay with her father, but returned home on May 26. For the next fortnight the deceased made a real effort to give up drink, but rows developed again.

The news article, apparently drawing on facts adduced at trial, gave this account:

> Sara Thornton's husband, Malcolm, regularly hit her and threatened to kill her during their turbulent ten-month marriage. He smashed an ashtray down on her hands, punched her after a Christmas party, tried to push her through a shop window, and attempted to throw her out of the house. An alcoholic, he told her to keep her ten-year old daughter out of the way or the girl would be "dead meat." At the time Sara Thornton stabbed him in the stomach with a kitchen knife, he was facing trial for a vicious assault in which he had knocked her unconscious and landed her in the hospital.

148 Our own mini-curriculum would ask students to read PETER GOODRICH, *Rhetoric: Precedent and Argument*, *in* READING THE LAW, *supra* note 137; Ferguson, *The Judicial Opinion as Literary Genre*, *supra* note 137; Weisberg, *supra* note 137; James B. White, *Judicial Criticism*, 20 GA. L. REV. 835 (1986); James B. White, *Law as Rhetoric, Rhetoric as Law*, 52 U. CHI. L. REV. 684 (1985).

149 In *The Judicial Opinion as Literary Genre*, Ferguson sets out to "identify and clarify the appellate judicial opinion as a distinct literary genre within the larger civic literature of the American republic of laws." Ferguson, *The Judicial Opinion as Literary Genre*, *supra*, note 137, at 202. Ferguson discards "[t]raditional notions about deliberative oratory,

tice Rehnquist's "considerate communication" in *Paul v. Davis*,[150] and by James Boyd White's analysis of Justice Taft's majority and Justice Brandeis's dissenting opinions in *Olmstead v. United States*.[151]

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the formula of facts stated and opinions rendered and the binding psychologies of rule and precedent" because the very ease with which such features are identified "block[s] access to deeper structures in the judicial opinion." *Id.* at 204. Instead, he identifies the four "driving impulses" that mark the modern judicial opinion, conveying its "tonal, methodological, and rhetorical life." *Id.* These are "the monologic voice, the interrogative mode, the declarative tone, and the rhetoric of inevitability." *Id.* He concludes:

> Greater concentration on the nature and development of questions asked, sharper scrutiny of uses and abuses of history, some notice of judicial self-fashioning, more concern for the projected assumptions in decision-making, and a deeper awareness of both the hidden perspectives and projected certitudes in the judicial voice are bound to improve our understanding. These elements will never replace the lawyer's traditional distinctions between holdings and dicta; nor should they, but they do inform judicial choice. The driving impulses of the opinion, properly understood, are the grammar of judicial decision-making.

Id. at 216.

150 424 U.S. 693 (1976). The first half of *How Judges Speak* is devoted to an analysis of Melville's BILLY BUDD, SAILOR, and particularly, to Melville's notion of "considerate communication." Weisberg, *supra* note 137. True "considerate communication" allows a communicator to spare the reader's feelings by omitting or even distorting facts when narrating or explaining events or issues of great significance. But such deviations from truth are permissible only when the communicator "faithfully convey[s] the essence of the underlying reality he is discussing . . . despite . . . omissions or mild misrepresentations of detail." *Id.* at 35. The second half of Weisberg's article applies his notion of "considerate communication" to (then) Justice Rehnquist's majority opinion in *Paul v. Davis*. In *Paul*, the Court concluded that Davis—whose photograph and name were printed on a police flyer warning the public to beware of shoplifters, although he had never been convicted of shop-lifting—had no federal civil rights claim against the police under 42 U.S.C. § 1983. Weisberg's focus is on Rehnquist's "considerate communication": "the cleverly persuasive manner in which Justice Rehnquist, ever considerate of his audience's needs, uses language to dispel critical probing into his logic and use of precedent." *Id.* at 43. Weisberg examines in detail Justice Rehnquist's use of language to "deneutralize" the facts (by focusing on the officers' well-meaning Christmas-spirit attempts to protect shoppers), and to "deneutralize" the law (by focusing on the other claims Davis might have made in other courts, and by constructing a slippery slope argument that "conjure[s] the worst possible disruption of [law and] order" if Davis were permitted to prevail). *Id.* at 43-49. According to Weisberg, Justice Rehnquist's deneutralization of the law is advanced in *Paul* and elsewhere by his frequent and clever, if disingenuous, use of the adverb "concededly" in contexts where no concession has been made and where, in fact, no rational litigant would make any concession. (Weisberg's LEXIS search of Supreme Court opinions revealed that as of 1982, Justice Rehnquist was the largest single consumer of "concededly.") *Id.* at 47 n.270.

Weisberg also analyzes Justice Rehnquist's "talented" use of classical rhetorical figures to dispose of Davis' argument, including the use in one short passage of no fewer than five such tropes. *Id.* at 49-50. Finally, Weisberg argues that the structure of Justice Rehnquist's opinion as well as its language "subtly deneutralizes the Court's ostensibly objective reasoning process." *Id.* at 52. He concludes that *Paul v. Davis* illustrates how, in order to achieve the furtherance of a judicial philosophy, "an adjudicator can win over an audience by considerately providing it with a story it needs to hear, thereby assuaging its doubts and dampening its spirit for further rational inquiry." *Id.* at 58.

151 277 U.S. 438 (1928). White proposes a new way of reading judicial opinions, rejecting the traditional "craft" approach, legal realism's focus on result, and literary criticism's obsession with theory. White, *Judicial Criticism*, *supra* note 148 at 839-46.

These writers' approaches are different, but no reader can come away from these articles with an intact belief that the language of judicial opinions is a neutral medium for the expression of disembodied reason. The wealth of insights proffered leads students to question word choice and analyze the rhetorical impulses within a text, in particular the play of rhetorical tropes and the rhetorical uses of precedent. In so doing, they will have gone a long way toward strong reading.

The best way to foster students' belief that reader reaction matters, and to foster intelligent reflection on that reaction, is classroom practice. Varied and contrasting texts will raise the most questions: appellate and trial court opinions; majority, concurrence and dissent; contemporary, 19th Century, 1920s and Warren Court; criminal and civil; East and West; American and British. Consciously separating the response and analysis aspects of the reading transaction could be a useful introductory heuristic, i.e., unmediated response followed by disciplined analysis of stylistic and rhetorical devices. For example, discussion could focus on the "voice" a court fashions for itself, on evidence of explicit and submerged authorial intent, on the use of rhetorical figures to characterize opposing views, on the use of metonymy (for clarity) and metaphor (for vividness) to persuade the reader, on the characterization of the audi-

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Consistent with his vision of law as constitutive rhetoric, White argues that meaningful judicial criticism should focus on: 1) the state of language and culture inherited by the writer; 2) the ways language is reconstituted by the writer; and 3) "the social, ethical, and political relations that the text establishes both with its reader and with others." *Id.* at 846. The balance of the article elaborates this third aspect and examines the *Olmstead* majority and dissent in light of it. White's analysis investigates how a judge "constitutes a social and political world in his writing . . . the way his opinion constitutes him as a mind and as a judge, his colleagues as a court, and his readers, as lawyers, citizens, or other kinds of legal and nonlegal actors." *Id.* Since, in White's terms, each case is "an invitation to lawyers and judges . . . to constitute themselves in language one way rather than another," the critic must ask, "[i]s this an invitation to a conversation in which democracy begins (or flourishes) . . . [o]r to one in which it ends?" *Id.* at 847. White's analysis of (the subsequently overruled) *Olmstead* decision (holding that wiretapping is not a search within the meaning of the Fourth Amendment) contrasts Justice Taft's "authoritarian" voice with Justice Brandeis' voice, "spea[king] as an individual himself and to us as individuals." *Id.* at 868. In Taft's view, the Constitution is the boss, and he is the next in charge, sounding to White a bit like "a crusty old boss from a 1930s movie." *Id.* at 854-55. The Constitution is not about anything valuable in Taft's language; rather, it is "a set of words that tells us what to do." *Id.* at 856. The "conversation" to which this kind of judicial writing invites us—between the voice of authority and a passive listener—is "not the beginning but the end of democracy." *Id.* at 857. In contrast, Brandeis' focus is from the first on "expounding" the Constitution, that is, "translating" it for changed circumstances. *Id.* at 858-61. White sees Brandeis' formulation of " 'the right to be let alone' " (a "translation" of the fourth amendment) as "connect[ing] our own vernacular with the language of the Constitution and our past," an example of how in a "deeply democratic" fashion, "[t]he community makes and remakes itself in a conversation over time." *Id.* at 867.

ence, and on the choice of words and manipulation of syntax within (or against) the larger rhetorical design. This class should proceed with minimum help from the teacher. Indeed, student volunteers might lead the discussion. An out-of-class exercise could then focus narrowly on word-choice. Taking off from Richard Weisberg's computer-assisted analysis of Chief Justice Rehnquist's use of "concededly,"[152] students could analyze the characteristic or idiosyncratic use of another word by another judge.[153]

Although we characterize the search for the story within a judicial opinion as a separate line of textual inquiry, it is, with reading for style and rhetoric, part of the larger "law-and-literature" inquiry. The goal is to learn to sense, then to translate, the prototypical narratives at the heart of a discourse that is explicitly hostile to narrative.[154] Exploration of these hidden or "master" stories—drowned shapes in the depths of our culture—is a crucial, but neglected enterprise.[155] As one writer argnes, "[g]rasping how opinions and the law tell stories points the way to a larger understanding of the importance normative messages have in our lives."[156] Moreover, anyone writing for a court will reap a practical advantage: the stories judges tell may well be the ones they want to hear.

Locating the master narratives in judicial prose involves diving deeper than any other aspect of close reading, however, and it takes practice. But although reading judicial opinions for their hidden stories is foreign to most law students, its unfamiliarity is at least balanced by the pleasure of discovery. An essential first step is understanding that we live surrounded by stories and by story-tellers—not just in novels or movies or on television, but in advertising and in public pronouncements of every sort. A daily newspaper is material enough to make this point. The next step could be an association exercise, with students reading several sharply contrasting opinions and associating their stories with other master stories in

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152 *See supra* note 150.

153 Indeed, simply updating Weisberg's 1982 analysis would be an interesting project in itself.

154 Hostile, that is, to any narrative other than the highly stylized recitation of the facts of the case.

155 *See* Papke, *supra* note 137, at 146.

156 *Id.* As to how we interpret these stories once we discover them, David Papke suggests that we need not choose between formalism and ideology, at least not in the classroom. Having drawn out the "master narrative" of Chapter 7 consumer bankruptcy (redemption of the momentarily strayed but fundamentally virtuous and hard-working bankrupt), he concludes that "[t]eachers and interpreters of the consumer bankruptcy master narrative should engage in a negative hermeneutic function; they should unmask, demystify, and demonstrate the way the master narrative embodies false consciousness and legitimates dominant power structures. Teachers and interpreters should also engage in a positive hermeneutic endeavor; they should show students and friends how legal narratives can speak of liberation, wholeness, and recuperation." *Id.* at 154.

our culture such as a novel, a popular song, an advertising slogan, or a passage from the Bible. One compelling exercise in American legal narratology might be to compare the master story of *Brown v. Board of Education*[157] with that of its "sequel," *Board of Education v. Dowell*.[158]

Finally, the ultimate way to resist the tyranny of paraphrase is to read for omission by borrowing the deconstructionist technique of reading for incoherence and inconsistency. Readers need to learn to ask "[w]hat does the construction of the bottom line leave out? What does it repress? What does it disregard? What does it consider unimportant? What does it put in the margins?"[159] A composition task described by David Kaufer and Gary Waller, in which they ask their students to "find a problem in the text to write about,"[160] could form the basis of a reading-for-omission exercise. Students would be asked to read a judicial opinion chosen for its silences: a decision that fails to address crucial aspects of the issue, is thinly reasoned, or is an example of *ipse dixit* decision-making.[161]

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157 349 U.S. 294 (1955).

158 111 S. Ct. 630 (1991). *Dowell* held that an injunction in a school desegregation case may be dissolved upon a sufficient showing that the school board "complied in good faith with the desegregation decree since it was entered, and whether, in light of every facet of school operations, the vestiges of past *de jure* segregation had been eliminated to the extent practicable." *Id.* at 632. The majority opinion in *Dowell* tells (but with a new spin) that most central of all Christian stories—the repentant sinner raised up, admonished to sin no more, and restored to full participation in the community. The protagonist of *Dowell* is Local Authority, which, in its youthful incarnation as the Oklahoma City Board of Education, offended against the Constitution, intentionally segregating students by race. However, ten years of good faith compliance with the desegregation injunction and twenty-five years of not actively promoting residential segregation may be expiation enough. The Court rejected the Court of Appeals' holding that the Board must show "grievous wrong evoked by new and unforeseen conditions" in order for the injunction to be dissolved. *Id.* at 636. The "grievous wrong" standard would "condemn a school district . . . to judicial tutelage for the indefinite future." *Id.* at 638. "Local control over the education of children allows citizens to participate in decision-making, and allows innovation so that school programs can fit local needs." *Id.* at 637. Thus, not only is the sinner restored to respectability, but paradoxically, takes on the innocence of the sinned-against: the Board becomes the student suffering under the foreign "tutelage" of the district court, just as Afro-American students suffered under the Board's tutelage. The oppressor in *Brown* has become the oppressed in *Dowell*.

159 Barbara Johnson, *Interview*, *in* CRITICISM IN SOCIETY 152, 164 (Imre Salusinsky ed., 1987).

160 Kaufer & Waller, *supra* note 5, at 77.

161 *In re* Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991), provides a suitably perplexing example for classroom use. There, the New York Court of Appeals decided that the lesbian ex-life-partner of the biological mother had no standing to seek visitation with a child jointly raised by the couple. The court decided that petitioner Alison D. was not a "parent" within the meaning of § 70 of New York's Domestic Relations Law. There are at least two obvious problems presented by this text. First, although "parent" is not defined in the statute, and the court declines to define the term, it nonetheless writes "[p]etitioner concedes that she is not the child's 'parent'; that is, she is not the biological mother of the child, nor is she a legal parent by virtue of an adoption." *Id.*

When students are asked to "find a problem in the case to write about," at least some would fall into our trap: as Kaufer and Waller's college students summarize the author's position, law students will often paraphrase the issue. Having gone back and discovered the silences in the text, students might try to fill them in a variation on Nancy Comley's writing-ghost-chapters heuristic.[162] Whether another writer can close the gaps without altering the conclusion, and what it means if she cannot, are the hard questions.

Even if students find their way into the text and into an educated and personal argument with it, there remain the questions of whether there are best or even better readings, and whether all readings are pre-packed by a reader's membership in an interpretive community. And remain they will. For our purposes—teaching law students to write plausible and persuasive legal documents and thoughtful commentary on the law—pragmatic answers will have to do. Although there are no right or wrong readings at stage two, after questioning the text closely and paying close attention to all its "voices," students must finally negotiate a meaning consistent with their purpose. Of course, drafting a contract or pleading imposes more restraints on the final "stage-three" reading than does writing a law review article, although even there, some notions of decorum and publishability surely intervene.

B. The Reading-Writing Nexus: Practical Applications

If close reading can be taught, the next task is to use its insights to produce strong writing, and to organize that attempt in an advanced writing curriculum. Perhaps a student best comes to appreciate the reading-writing nexus when faced with the challenge of a scholarly paper or a law review note. Given the vast numbers of articles that are written by highly experienced, well-educated scholars and practitioners, it is not surprising for newcomers like law students to feel they have little to add. Nonetheless, some of the techniques educators are using to promote critical thinking and writing on the college level may also help law students find something to say about controversies in the law.

"The impulse to write comes from the discovery of a comment worth making."[163] Thus, a writer's first task is to articulate a worthy problem that she can explore and resolve in the course of the paper.

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at 29. Second, although the statute in question is explicitly informed by "the best interests of the child," no mention of the child's interest is ever made. *Id.* at 31 (Kaye, J., dissenting).

162 *See supra* text accompanying notes 87-89.

163 Richard L. Larson, *Discovery Through Questioning: A Plan for Teaching Rhetorical Invention*, *in* CONTEMPORARY RHETORIC: A CONCEPTIONAL BACKGROUND WITH READINGS 150 (W. Ross Winteroud ed., 1975), *cited in* Northam, *supra* note 40, at 121.

Yet many composition teachers frequently begin their supervision after the stages of inspiration and discovery. We ask students in our advanced writing seminar to turn in first, their topic and preliminary thoughts; second, a description of their research; third, an outline; fourth, a first draft; and finally, a finished paper. When commenting on those submissions, we remark on the presence or absence of an emerging thesis and suggest avenues to explore. And yet this very article was prompted by our sense that we are not doing enough to help our students discover a problem to write about. Our failure stems, we now believe, in focusing our students' attention and our supervision too much upon the quality of their writing, rather than upon the quality of their reading. Thus, we propose a new paradigm for a term paper process, one that begins with and encourages creative, self-aware reading.

Borrowing from reader-response theory, we now intend to ask our students to keep a reading journal. Their first assignment will be to create their own "thinking-aloud" protocol while they read. In other words, when reading the case that is to be the focus of their writing, they must record their personal associations, reactions, evaluations, interpretations, and questions.[164] Once they have collected the raw data, their second assignment will be to reflect upon it.

Variations on the introductory close-reading heuristics suggested in the prior section might also promote insightful reflection here. A reading journal that contains many personal associations or reactions to a judicial decision can indicate that the decision coheres or fails to cohere depending on whether the reader shares the value system of the judge. To explore this possibility, the student might be asked to reflect on the cause or causes of her reaction. The student might also be asked to imagine other possible reactions.[165] If the reading journal refers to logical inconsistencies, gaps in the argnment, or ambiguities, the student could be asked to write the "ghost" arguments. If the student can fill the gaps in the argnment or explain away the inconsistencies (as a matter of semantics, perhaps), the student may have found the problem that the paper can explicate. If the gaps cannot be filled or the inconsistencies resolved, then the student has grounds for a critique. If the student has recorded a number of factual questions, the next step might be close examination of, say, the lower court proceedings or relevant

164 *See* Burkland & Petersen, *supra* note 68.

165 For example, a student might summarize and explore the decision from the perspectives of the defendant, plaintiff, and other interested parties to see if there is an important story that the opinion neglects.

secondary source material. This might develop into a sort of "context" approach to the assignment.

We quoted Joseph Williams earlier as saying "analysis is always an account of what is not visible."[166] Reading journals may well be the first step in analysis if they are used not to summarize or paraphrase what is read, but rather to record one's responses to what is said.[167] In focusing on what the text provokes, students may be better able to find an angle on their topic—and indeed, even an angle on the research needed to develop their thesis. The next step would, of course, be research. Here again, recording one's reactions to and assessments of the material collected might, upon perusal, provide clues for how to use it.

Following the research stage, writing teachers typically ask for outlines. Yet before reverting to the traditional outline, first draft, rewrite paradigm, it might be helpful to have students write zero drafts.[168] Performing an extended free writing exercise independent of their reference notes, students must again confront what they have internalized and made their own as opposed to what they have collected and can parrot. If students' outlines can focus upon and organize what emerged as the dominant themes in the zero drafts, and if they are close readers of their own drafts, then the final papers might escape the tyranny of paraphrase.[169]

Close reading also has another practical application—to persuasive writing in general, and particularly to appellate practice, where the connection is that of pure necessity. Consumer reading cannot take the sting out of controlling adverse precedent:[170] real cases

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166 Williams, *supra* note 80 and accompanying text.

167 A double-entry journal might be useful. On one side, the reader can summarize the substance of the piece. On the opposite page, the reader can record responses and reactions.

168 *See* Burkland & Petersen, *supra* note 68, at 199.

169 Perhaps the most stable indication that a writer has escaped paraphrase is the writer's own sense that even a "final" is incomplete. Unlike consumer readers and paraphrase-makers, close readers and strong writers are never finished: they just come to a carefully considered stop.

170 As crucial as close reading is to neutralizing adverse precedent in an argument on the merits, it is even more invaluable at an earlier stage: convincing the appellate court to admit the case through the narrow gate that leads to consideration of the merits. Reading for issue, holding, and reasoning alone can make no sense of the corpus of case law on finality of judgments, issue preservation, plain error, standards of review, and harmless error. The rules are easy to state, but their application can seem totally random and inconsistent. (One student in an Appellate Advocacy seminar compared reading the case-law to scuba-diving at night: "You can't tell up from down.") Here only close analysis of context, rhetoric, omission, and narrative can orient the brief-writer, suggesting ways of using the cases both as predictors and as persuasion. Although this appellate-threshold caselaw is perhaps too specialized to form the basis of a reading or writing exercise in an advanced writing seminar, a course in appellate advocacy is another ideal place to teach close reading.

rarely turn on the kind of straightforward factual distinctions we use in our first-year legal writing problems; significant cases, cases that advance the conversation of the law, never do. A good advanced reading and writing exercise might have the students write an argument attempting to convince a state court to reject a ruling of the United States Supreme Court.[171] But the exercise should attempt to forestall paraphrase by forbidding the students to use, or even read, the dissent. The students would have to base their arguments on their critical analysis of the text itself and on their own extra-textual inquiries into context and omission. Caselaw research would similarly be forbidden (more paraphrase-prevention) except where necessary to an analysis of the Court's use of precedent as persuasion. Double-entry note-taking would be useful here, too: one side or column of the page for traditional "expert-legal-reader" notes, the other for uncensored personal reactions and questions.

Finally, close-reading of precedent can help a practitioner predict the outcome of litigation and thus has a direct application to office memoranda and client opinion letters, and to teaching students to write effectively in these genres. Can close-reading practice help lawyers draft better wills, contracts, and statutes? Here, the nexus is less clear, but close-readers tend, at least, to feel more assured, more in control of their writing.

CONCLUSION

We began this article with one idea, and we end with it: in order to be effective practitioners and to make a contribution to the ongoing discourse of the legal community, students of our text-dominated discipline must learn to read—and thus to think and write—*for themselves*. We have attempted to situate this idea in a wider intellectual context, and to suggest ways of putting it into practice in an advanced writing seminar.

But as we reread and rewrite, we wonder whether we are proposing too much too late: too much because integrating even half of the close-reading practice we describe would radically transform the traditional two-credit advanced writing syllabus. (Might it find a place in a three-credit advanced writing course or a whole new course in Reading and Writing the Law?) And do our suggestions

171 For instance, students might argue against the adoption of the rule of Arizona v. Youngblood, 488 U.S. 51 (1988). There, in an opinion by Chief Justice Rehnquist, the Court held that unless a criminal defendant can show bad faith on the part of the police, failure to preserve evidence potentially useful to the defense does not constitute a denial of due process of law. The majority opinion lends itself particularly well to the exercise suggested: questioned along the lines suggested in part III, it easily yields its own "shadow" opinion.

come too late in that we have accepted too readily an unexamined, perhaps ungrounded, assumption that critical reading can effectively be taught only after the first-year student's initiation into the discourse community?[172] (Should the teaching of close reading be integrated into Legal Writing? Into Legal Process?) As we continue to teach and to read, the need for ever earlier training in critical thinking seems ever more apparent and urgent. So, in effect, we stop this article at a new beginning.[173]

172 *See supra* part II.C.
173 *See supra* note 169.