

# TEACHING WRITING IN CLINICAL, LAWYERING, AND LEGAL WRITING COURSES: NEGOTIATING PROFESSIONAL AND PERSONAL VOICE

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*This article addresses the challenge facing law students to preserve some sense of individual voice and ownership of their writing as they enter a professional discourse community and negotiate its formal structures and idioms. It conceives of this challenge as equally a project for clinical, lawyering, and legal writing teachers. Each of these teaching communities plays a role in acculturating law students to the conventions of practice-based writing and identifies strategies to help them develop confidence in their capacity as communicators. The question of student voice is particularly a consideration for clinical teachers who supervise student work in live-client settings and continually must balance the need to ensure that a student's work product meets the standard of competent representation against the educational imperative of preserving the student's individual voice and sense of personal efficacy. Informed by these considerations, the article proposes pedagogic approaches that can help emergent lawyers undertake the delicate negotiation between professional and personal voice, and argues that there is good reason for clinical, simulation-based, and legal writing pedagogies to be in conversation on the question of cultivating individuality and bolstering confidence in student writers.*

## INTRODUCTION

The legal profession has been described as a discourse community,<sup>1</sup> or perhaps several communities, that use writing to cultivate a

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<sup>1</sup> Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and*

sense of professional identity and professional role. If that is true, a challenge for law students and novice lawyers is to become acculturated to this professional discourse. A further challenge for all inexperienced legal writers, related to that acculturation process, is acquiring a writing voice that is appropriately professional, without losing a sense of individuality. In my legal writing teaching, I have encountered these questions in relation to law students' efforts to gain fluency in a professional voice as they begin to work within the formal structures of legal analysis, while they struggle to hold on to the capacity for creativity in their writing.<sup>2</sup>

As emergent professionals, law students must become well-versed in the written forms in which legal practitioners communicate information and analysis. They need to learn that a lawyer's professional writing observes formal conventions and that it must be accurate in a substantive analytic sense. For most law students, as well as less experienced lawyers, the cognitive challenge of becoming articulate in professional, practice-based writing such as law office memoranda, briefs to a court, and pleadings can be substantial.<sup>3</sup> Often, novice legal writers conclude that their prior knowledge and experience of writing are irrelevant to the specialized modes and structured formats of legal documents, which they tend to regard as redundant and off-putting. Their discouragement, and the anxiety that often ac-

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*Development*, 1 J. LEGAL WRITING 1, 9, 13-15, 18 (1991). Relatedly, J. Christopher Rideout and Jill Ramsfield discuss the "situated legal writer" who must operate with a recognition of institutional contexts and practices that make law a highly complex professional discourse community. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 98-99 (1994).

<sup>2</sup> Given the focus of this article on maintaining individuality while working within the recognized forms of legal writing, it seems appropriate for me to broach whether, and how, my own voice comes across in this writing. A reader using Richard Posner's descriptors of "pure" and "impure" style, see Richard A. Posner, *Judges' Writing Styles (and Do They Matter)?*, 62 U. CHI. L. REV. 1421, 1429-32 (1995), might conclude that this article is a stylistic hybrid. It is "pure" when it invokes authoritative sources, in its use of quotation and citation, and in its effort to follow the conventions of law review writing. *Id.* But it is perhaps "impure" in its more exploratory approach to its subject, and in its reference to personal experience and observation. *Id.* at 1430-31, 1437. Writing on the presence of individuality in judicial opinions, Laura Krugman Ray distinguishes writing that is "impersonal" and "generic" from writing that reflects individual perspective and style. Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 222-23 (2002) (hereinafter "Judicial Personality"). I can only hope—and leave to the reader to assess—that the voice in which I have written this article does not seem generic, and instead conveys some of the individuality that I tried to communicate.

<sup>3</sup> Williams, *supra* note 1, at 14-15, 18-23 (describing the "cognitive overload" confronting the novice legal writer and the resulting degradation of skill in expressing ideas that occurs when the writer is trying to incorporate new knowledge into existing frameworks).

companies it, can produce profound self-doubt,<sup>4</sup> and, for more than a few, a kind of writing paralysis.<sup>5</sup>

The challenges of becoming fluent in the written forms of law have engaged scholars of legal rhetoric and discourse in a growing body of literature on “voice” in legal writing, a term that I will use here to mean the combinations of word choice, tone, structure, and syntax, and the unconscious influences contributing to them, that inform and help to distinguish individual writing.<sup>6</sup> This scholarship on voice includes thought-provoking analyses of judicial<sup>7</sup> and scholarly writing<sup>8</sup> as well as the impact of legal education, and especially legal writing pedagogy, on the attributes of professional voice—what one commentator has described as “a discipline-specific rhetoric of law.”<sup>9</sup> Professor Julius Getman’s call for greater valuing of “human voice” in legal education—a voice that is rooted in “ordinary concepts and familiar situations”<sup>10</sup>—has generated thoughtful considerations of how teaching law students about literary and critical theory can offer a more nuanced understanding of lawyerly voice. Professor Kathryn Stanchi has addressed the risks and limitations of a legal writing pedagogy that teaches students to assume a professional voice without at the same time problematizing it—given the identification of professional voice with dominant cultural and ideological values, its distance from the lived experience of many persons served by the legal profession, and its profoundly alienating character for practitioners who identify as outsiders.<sup>11</sup>

Building on and responding to Professor Stanchi’s thesis, this article argues that all entering law students (and most novice lawyers) are

<sup>4</sup> *Id.* at 14-15.

<sup>5</sup> Robin S. Wellford-Slocum, *The Law School Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 255, 264, 269, 285-289 (2004) (discussing the findings of cognitive science on the effect of anxiety and lowered confidence on perception and performance, especially in relation to more complex intellectual work).

<sup>6</sup> Ben Yagoda’s thoughtful exploration of voice and style acknowledges the role of the unconscious in writing. BEN YAGODA, *THE SOUND ON THE PAGE: STYLE AND VOICE IN WRITING* xxxii (2004). Yagoda also refers to voice as a “metaphor” for style. *Id.* at xxxi-xxxii. Given the close conceptual relationship between the two terms, “style” and “voice” tend to be used interchangeably. I will follow that practice here.

<sup>7</sup> See, e.g., Robert A. Ferguson, *The Rhetorics of the Judicial Opinion: The Judicial Opinion as Literary Genre*, 2 YALE J. L. & HUMAN. 201 (1990); Posner, *supra* note 2; Krugman Ray, *supra* note 2; Robert Rubinson, *The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse*, 101 DICK. L. REV. 1 (1996); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995).

<sup>8</sup> See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

<sup>9</sup> Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1550 (1990).

<sup>10</sup> Julius G. Getman, *Voices*, 66 TEX. L. REV. 577, 582 (1988).

<sup>11</sup> See generally Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 DICK. L. REV. 7 (1998).

outsiders to professional legal culture and its discourse. In my own teaching, I have been struck by the disjunction between first-year law students' struggles to write in a professional voice and the vibrancy of their reflective writing about professional tasks, particularly reflections on their own efforts to complete a law-practiced-based writing assignment. These students frequently express their frustration and lack of confidence, and they worry that they have lost touch with the sources of originality and creativity that once animated their writing.

In this respect, most novice legal writers might recognize as familiar the condition described by the renowned writer, and strong stylist, Cynthia Ozick, as she traced her descent from the highs of literary ambition after her first novel was published to the point where "doubt and diffidence set in, and the erosion of confidence, and the diminution of nerve."<sup>12</sup> Drawing on these observations, I address how those of us who teach legal writing or who mentor and supervise lawyers' writing can help our mentees acquire a professional voice in a way that is not discouraging, or worse, paralyzing. I will also consider how legal writing teachers and mentors can help law students and novice lawyers cultivate individual voice and creativity as they write their way into professional discourse.

This article addresses the challenge facing law students to preserve some sense of individual voice and ownership of their writing as they enter a professional discourse community and negotiate its formal structures and idioms. It conceives of this challenge as equally a project for clinical, lawyering, and legal writing teachers. Each of these teaching communities plays a role in acculturating law students to the conventions of practice-based writing and identifies strategies to help them develop confidence in their capacity as communicators. The question of student voice is particularly a consideration for clinical teachers who supervise student work in live-client settings. Clinical teachers facing practice-based deadlines continually must balance the need to ensure that a student's work product meets the standard of competent representation against the educational imperative of preserving the student's individual voice and sense of personal efficacy. For clinical teachers, maintaining this balance entails monitoring the extent to which they become implicated in a student's written work—and guarding against the risk that the writing may become almost unrecognizable to the student as it progresses through multiple revisions.

Informed by these considerations, the article proposes pedagogic approaches that can help emergent lawyers undertake the delicate ne-

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<sup>12</sup> Cynthia Ozick, *Henry James, Tolstoy, and My First Novel*, 73 *AMERICAN SCHOLAR* 15, 24 (2004).

gotiation between professional and personal voice. These approaches, which I have used in lawyering and legal writing teaching contexts, draw heavily on core aspects of clinical teaching methods, and respond to multiple learning styles.<sup>13</sup> Part I addresses the benefits of a close and rhetorical reading of judicial opinions. It argues that judicial prose, at its best, models a kind of writing that is probative, formal—in the sense of being attentive to discursive conventions—and is pitched to (at minimum) a professional audience. Thus, judicial opinions often are held out as exemplars of individuality in legal writing.<sup>14</sup> Part II proposes a similarly close and rhetorical reading of lawyers' writing, especially published briefs, as a tool for examining variable approaches to crafting a legal document while preserving individuality, even within the constraints of professional form. Part III considers how law students and lawyers can use reflective and other imaginative writing opportunities to step back from a professional writing task and consider factors that enable or constrain them as writers. Relatedly, Part IV addresses the benefits of drawing novice legal writers into a facilitative dialogue about professional writing, voice, and creativity while they are engaged in professional writing tasks. Part V explores the use of readings for classroom discussion that problematize the formalities of legal language as a basis for discussion and reflection about professional voice, client-centered communication, and humanistic practice.

Guiding law students' efforts to gain a sense of legitimacy in a professional voice while they strive to hold on to the capacity for individuality is a pedagogic issue facing the spectrum of clinical, lawyering, and legal writing teachers; all are implicated in students' development as professional writers and communicators. As I sketch out strategies to help students in this endeavor, I will argue that there is good reason for clinical, simulation-based, and legal writing pedagogies to be in conversation on the question of cultivating individuality and bolstering confidence in student writers.

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<sup>13</sup> See, e.g., Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213 (1998); M. H. Sam Jacobson, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, 2 J. ASSOC. LEG. WRITING DIR. 27 (2004). See generally Rita Dunn, Jeffrey S. Beadry & Angela Klavas, *Survey of Research on Learning Styles*, EDUCATIONAL LEADERSHIP, March 1989, at 50.

<sup>14</sup> Although at first blush the study of judicial discourse seems less associated with the experiential and lawyering-process-based emphasis in clinical and lawyering teaching methods, it is nonetheless a focused method of reading that can enhance students' rhetorical abilities. In its contribution to lawyering skills development, it falls squarely within the realm of clinical legal education.

## I. READING JUDICIAL WRITING

Robert Ferguson's classic work on legal and literary genres<sup>15</sup> has given nuanced consideration to voice and judicial self-characterization in opinion writing. In this work, an inspired application of the tools of literary criticism to World War II-era Jehovah's Witnesses' flag-saluting cases—*Gobitis v. Minersville Board of Education*<sup>16</sup> and *West Virginia State Board of Education v. Barnette*<sup>17</sup>—Ferguson examines how judicial opinions have rhetorical features that constitute a discipline-specific genre.<sup>18</sup> The monologic voice establishes an identity between speaker and text, and assumes a stance of “compelled performance.”<sup>19</sup> The interrogative mode discovers the question that will dispose of the contested case and elaborates a line of argument as it progressively redefines the question for decision.<sup>20</sup> The declarative tone secures public acceptance of the opinion by using the language of certainty, assertion, reduction, and abstraction.<sup>21</sup> And a “rhetoric of inevitability” invokes a presumed shared understanding of history between author and audience to remove all hint of controversy or dissensus from a decision.<sup>22</sup>

It seems fair to say that United States Supreme Court opinions are in a category of their own and garner more attention within and outside the cohort of legally-trained readers than other judicial writings. Even then, not all members of the Supreme Court are identified as memorable or distinctive opinion writers. And the very idea of authorship is complicated in judicial opinion writing by the variable role that law clerks play in the composition process. Some commentators have suggested that the trend toward reliance on law clerks to pen first drafts of Supreme Court opinions has led to judicial writing that is more “generic” and less individually identifiable,<sup>23</sup> in marked contrast to an earlier “golden” era of Justices who wrote virtually all of

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<sup>15</sup> Ferguson, *supra* note 7.

<sup>16</sup> 310 U.S. 586 (1940).

<sup>17</sup> 319 U.S. 624 (1943).

<sup>18</sup> Ferguson, *supra* note 7, at 201.

<sup>19</sup> *Id.* at 206.

<sup>20</sup> *Id.* at 208-209.

<sup>21</sup> *Id.* at 210-211, 213.

<sup>22</sup> *Id.* at 213-216.

<sup>23</sup> See, e.g., Krugman Ray, *Judicial Personality*, *supra* note 2, at 194, 221-23. See also Posner, *supra* note 2, at 1429-32 (opining that law clerks tend to write in the “pure” style, marked by the use of technical legal terminology, extensive quoting of authority, extensive detail, and the absence of linguistic “novelties” or other indicia of personality); Laura Krugman Ray, *Judging the Justices: A Supreme Court Performance Review*, 76 *TEMP. L. REV.* 209, 215-17 (2003) (hereinafter “*Judging the Justices*”) (observing that law clerks bring to opinion drafting a “law review style of writing, which is formal, dry, and impersonal,” as well as a penchant for extensive footnoting).

their own opinions and contributed a range of expressive approaches to Supreme Court prose.<sup>24</sup>

Nor is the character of judicial writing limited to matters of style or voice. Richard Posner's typology of judicial opinion writing style as "pure" and "impure" connects writing style to distinctive decision making approaches. He links the "pure" style with its "jargon. . . solemnity, the high sheen, the impersonality" to legal formalism, which he characterizes as a "logical, impersonal, objective, constrained character of legal reasoning."<sup>25</sup> Posner couples the "impure" style, concerned with bridging distances between writer and reader, and thus more likely to be "conversational," less detailed, and more "concrete," with pragmatism, an approach to the "nonroutine case" that strives to achieve the "most reasonable result," while taking into account the effect of previous decisions and other authoritative texts.<sup>26</sup> In Posner's formulation, the impure style is more exploratory, and somewhat more engaging, in the sense that it "invites. . . the writer to dig below the verbal surface of the doctrines that he is interpreting and applying."<sup>27</sup>

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<sup>24</sup> Krugman Ray, *Judicial Personality*, *supra* note 2, at 221-222. The implications of this shift toward heavier law clerk involvement in opinion drafting are not only stylistic. As Laura Krugman Ray has argued, it is significant that clerks who write drafts of opinions are in a position as inexperienced lawyers to "frame" the presentation of legal doctrine, particularly when matters of constitutional law are at issue. Krugman Ray, *Judging the Justices*, *supra* note 23, at 216. Richard Posner discerns another problem: because the act of writing forces the writer to examine the sufficiency of reasoning needed to support a conclusion, assigning that task to the judge's law clerk removes the judge from that process and that responsibility. Posner, *supra* note 2, at 1447-48. Penelope Pether emphasizes that this delegation of opinion writing responsibility to law clerks, coupled with the increasing tendency of judges not to publish such opinions, privatizes the decisionmaking process, denies equal access to the rationale (and the results) of decided cases, and often distorts the actual state of the law in ways that disadvantage litigants from already disempowered groups. Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 *STAN. L. REV.* 1435, 1492, 1496-1504, 1504-1514 (2004).

<sup>25</sup> Posner, *supra* note 2, at 1429-33.

<sup>26</sup> *Id.* at 1430-33, 1437.

<sup>27</sup> *Id.* at 1437, 1447. Posner's own prolific output as a judicial writer (and it appears that he writes all of his opinions, without assistance from law clerks), see Stephen J. Choi & G. Mitu Gulati, *Mr. Justice Posner? Unpacking the Statistics*, 61 *N.Y.U. ANN. SURV. AM. L.* 19, 24-25 (2005), is the subject of scholarly commentary concluding that his writing has been uneven in matters of style. See, e.g., Robert F. Blomquist, *Playing on Words: Judge Richard A. Posner's Appellate Opinions, 1981-82—Ruminations on Sexy Judicial Opinion Style During an Extraordinary Rookie Season*, 68 *U. CIN. L. REV.* 651, 733-735 (2000) (hereinafter "Playing on Words"); Robert F. Blomquist, *Dissent, Posner-Style: Judge Richard A. Posner's First Decade of Dissenting Opinions, 1981-1991—Toward an Aesthetics of Judicial Dissenting Style*, 69 *MO. L. REV.* 73, 155-157, 160 (2004) (hereinafter "Dissent, Posner-Style"). At their best, Blomquist notes, Posner's opinions are marked by acute but succinct doctrinal and policy-based analysis, adroit use of narrative and other rhetorical techniques, and illuminating law-and-economics assessments. Blomquist, *Playing on Words*, *supra* at 689-705. At other times, his opinions seem to belie his professed preference for the seem-

Laura Krugman Ray's revealing analysis of judicial voice in the New Deal-era and Rehnquist Courts also discerns a connection between writing voice and jurisprudence. The Roosevelt-era Court, more fractionated, less consensus-oriented than earlier Supreme Courts, featured a range of rhetorical approaches to accompany the Justices' identifiable approaches to reasoning and doctrinal analysis, including a greater tendency among the Justices to write separate, individually nuanced opinions.<sup>28</sup> Hugo Black's text-based approach to constitutional analysis was matched by his straightforward, conversational language that was designed to be accessible to the general public, not just an audience of legal insiders.<sup>29</sup> Felix Frankfurter's prose, by contrast, was elaborate, frequently complex, embellished with footnotes, quotations, charts, and appendices, and professorial in tone, reflecting his intellectualism, his commitment to "elite leadership," and his conception of the judicial role as that of "educator."<sup>30</sup> William Douglas's iconoclasm, creativity, willingness to be guided by personal values rather than mere adherence to precedent, and his strong identification in constitutional cases with disfavored or outsider groups were manifest in the strong imprint of Romantic influences in his writing, and in the directness and clarity of his language.<sup>31</sup> The literary elegance of Robert Jackson, with his penchant for ironic inversions and aptly chosen language, served a skeptical and "dialectical" cast of mind that appreciated nuance and multiple perspectives.<sup>32</sup>

These distinctive judicial voices, even those, such as Frankfurter's, that bear some of the earmarks of Posner's "pure" style, are, in Krugman Ray's assessment, no longer in evidence. Instead, the writing of the Rehnquist Court Justices seems more marked by the "law review style" of law clerks<sup>33</sup> (with the exception, Krugman Ray notes, of Justice Scalia, who generally drafts his own opinions).<sup>34</sup> Replacing the nuance of judicial writing in the Roosevelt Court era, she

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ingly more unassuming "impure" style. *Id.* at 705-06, 707 n. 263, 723-25. In Blomquist's appraisal, Posner's stylistic transgressions include "overtly vitriolic rhetoric, failure to exercise a sense of proportionality and equitable sensitivity, confusing, rambling, and unstructured digressions on the role of federal courts vis-à-vis federal administrative boards, argumentative overkill and whining, and political pandering." *Id.* at 734. And Judge Patricia Wald, then U.S. Circuit Court Judge for the D.C. Circuit, has referred to Posner's "kamikaze style of discourse," in response to a rather unexpected Posner critique of one of her own opinions in his article on judges' writing style. Patricia M. Wald, *A Reply to Judge Posner*, 62 U. CHI. L. REV. 1451, 1454 (1995).

<sup>28</sup> Krugman Ray, *Judicial Personality*, *supra* note 2, at 194.

<sup>29</sup> *Id.* at 198-99, 201.

<sup>30</sup> *Id.* at 201-04.

<sup>31</sup> *Id.* at 205-08.

<sup>32</sup> *Id.* at 208-11.

<sup>33</sup> See Krugman Ray, *Judging the Justices*, *supra* note 23, at 217.

<sup>34</sup> Krugman Ray, *Judicial Personality*, *supra* note 2, at 222-23, 226.



suggests, are the sporadic displays of emotional tone among Rehnquist Court Justices that, in turn, seem related to a jurisprudence willing to rely on the emotive force of an argument rather than on reason or recognized authority to persuade.<sup>35</sup>

At this point a reader might wonder why I have lingered on judicial opinion writing when most lawyers will never write an opinion. In addition to the insights that judicial writing can offer into a writer's jurisprudential approach, Robert Ferguson proffers a persuasive reason, one that is entirely "practical": attention to the aspects of literary genre in judicial opinions helps readers understand the artfulness of such writing, and, in a word, its "creativity."<sup>36</sup> Ferguson also suggests a second, more "speculative" explanation for the ways in which judicial opinions deploy language: "[j]udges use words to secure shared explanations and identifications; they also use them as weapons of control."<sup>37</sup> I would add that the close reading of judicial opinions can reveal the guiding ideas—beyond holding and dictum—that a judicial author uses to shape the text. It can make visible how individual judicial writers signal the terms and parameters of an opinion—in the way a writer limits its scope, disclaims intention, or declares what the opinion is *not* deciding. A habit of rhetorical reading<sup>38</sup> thus offers a window onto an opinion writer's own sense of audience, argument, and writerly perspective, and can suggest strategies for the brief writer who must argue to that judge in a rhetorically resonant way. Examining some contemporary examples of judicial voice can illuminate these aspects of voice and rhetoric in judicial opinion writing.

Ben Yagoda's engaging study on style and voice in writing<sup>39</sup> offers as an example of "persuasive writing" an excerpt of Justice Stephen Breyer's dissenting opinion in *Bush v. Gore*.<sup>40</sup> Yagoda's choice of Breyer is especially interesting in the context of a work on individual voice because Breyer's quoted remarks following the excerpt indicate that Breyer favors "understatement."<sup>41</sup> By contrast, he considers

<sup>35</sup> *Id.* at 223, 226, 229, 230-34.

<sup>36</sup> Ferguson, *supra* note 7, at 216.

<sup>37</sup> *Id.* at 217, 219.

<sup>38</sup> For a thoughtful exploration of the connections between close reading and effective writing using the lens of cognitive psychology, composition and reader theories, and critical theory, see Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993). See also ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000) (using close reading techniques to examine the operations of categorizing, narrative, and persuasion, and the influence of culture on these processes, in legal texts).

<sup>39</sup> YAGODA, *supra* note 6.

<sup>40</sup> 531 U.S. 98 (2000) (per curiam) (reversing judgment of the Florida Supreme Court ordering recount of votes in the 2000 Presidential election to go forward on the ground that there was no procedure in place comporting with minimum constitutional standards).

<sup>41</sup> YAGODA, *supra* note 6, at 170.

“exaggerating for rhetorical effect” as appropriate in conversation or in the classroom, where it can underline an important idea or point of information.<sup>42</sup> Breyer also lists features that mark his own approach to opinion writing: he begins by stating the legal issues; follows with a succinct narrative of the facts; states his conclusions and supporting reasons; and follows with a fair, unembellished statement of the strongest counterarguments against his conclusion, as well as his reasons for rejecting them. Breyer thus offers us a textbook version of the basic paradigm of legal analysis—IRAC<sup>43</sup> or any of its iterations.

Breyer opts for simplicity and general readability, recognizing that the Court’s audience encompasses the “lay members of the general public.”<sup>44</sup> He avoids detailed exceptions or qualifiers to his reasoning; he chooses to write succinctly, avoids footnotes, and aspires to a conversational quality.<sup>45</sup> Aware of the widespread practice of reading beginnings and endings of opinions more closely than the rest of the text, Breyer places his most important statements in these sections, reserving statements with the most force for the end, where he believes they will have maximum effect.<sup>46</sup> He contrasts his own style with those of other justices whom he admires, including Antonin Scalia, whose writing Breyer describes as “dramatic” and “colorful,” with never a misplaced metaphor.<sup>47</sup> Brief selections from the Justices’ writings will, I think, highlight differences in their voice.

Justice Breyer’s concurrence in *Chicago v. Morales*,<sup>48</sup> a case decided in 1999, is marked by its brevity and directness. In that case, the Supreme Court invalidated a Chicago ordinance that gave local police discretion to arrest suspected street gang members standing with one or more persons in a public place when they refused to obey an order

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<sup>42</sup> *Id.*

<sup>43</sup> IRAC (Issue, Rule, Application, Conclusion) is a paradigm of deductive analysis. Many legal writing textbook writers have refined it to include additional elements, and have replaced “issue” with “conclusion” as the first element. *See, e.g.*, MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 47-48 (2002) (using same elements under the acronym CREXAC—Conclusion, Rule, Explanation of Rule, Application, Conclusion); LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 89-90 (2003) (adopting the variation of Conclusion, Rule, Rule Explanation, Rule Application, Conclusion); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING 96-97 (4th ed. 2001) (recommending CRuPAC as a paradigm for structuring a proof of law: Conclusion, Rule, Proof of Rule, Application, Conclusion).

<sup>44</sup> YAGODA, *supra* note 6, at 169.

<sup>45</sup> *Id.* at 171.

<sup>46</sup> *Id.* at 172.

<sup>47</sup> *Id.* at 171. One of my students recently described Scalia’s style as “pugilistic,” which I think is apt. His assessment is in line with that of commentators who have noted the somewhat stinging quality of Scalia’s opinions, with their vigorous idioms, their brusque, sardonic quality, *see, e.g.*, Blomquist, Playing on Words, *supra* note 27, at 718, and the confidence of their assertions.

<sup>48</sup> 527 U.S. 41 (1999).

to disperse. Concurring in the judgment and concurring in the opinion in part, Justice Breyer wrote:

The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications.<sup>49</sup>

The quoted language is straightforward and succinct. Its balanced, parallel structure (not because /but rather because, in a particular case/in every case) and the repetition of language (discretion, application) give it its cadence. Note also the use of an if/then rule structure, which suggests the writer's lawyerly vocation: if every application . . . then the ordinance is invalid . . . . Examined in isolation, this passage may not have the stamp of the writer's individual, idiosyncratic personality, but it has a notable clarity and assertiveness—recalling here Ferguson's discussion of declarative tone—and it exudes confidence. If we compare this excerpt with the opening and concluding sections of Breyer's dissent in *Bush v. Gore*, the salient qualities are, again, the clarity and confidence of his point, which in that case is that the Court should exercise restraint rather than intervene in the Florida vote recount after the Presidential election of 2000. He achieves this effect by again resorting to a kind of rhythmic repetition.

In the opening he repeats the straightforward declarative statement that the Court was "wrong": "The Court was wrong to take this case. It was wrong to grant a stay. It should now vacate that stay and permit the Florida Supreme Court to decide whether the recount should resume."<sup>50</sup> In the concluding passage, he uses variations of the verb form "to do" (do/doing/does/done) and the adjective formed from the verb (undone) to underline the fact that refraining from acting in response to limits on the judicial role is itself judicial action:

I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary "check upon our own exercise of power," "our own sense of self-restraint." (citation omitted.) Justice Brandeis once said of the Court, "The most important thing we do is not doing." (citation omitted.) What it does today, the Court should have left undone. I would repair the damage done as best we now can, by permitting the Florida recount to continue under uniform standards. I respectfully dissent.<sup>51</sup>

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<sup>49</sup> *Id.* at 71 (Breyer, J., concurring in part and concurring in judgment). (emphasis in original).

<sup>50</sup> *Bush v. Gore*, 531 U.S. at 144 (Breyer, J., dissenting).

<sup>51</sup> *Id.* at 158 (Breyer J., dissenting), quoted in YAGODA, *supra* note 6, at 169.

This passage does bear some family resemblances to Posner's "pure" style—the quotations, the invoking of another authoritative judicial voice, the use of the collective "we" and "our" of the Court. And the language at times has a professional formality to it (definitive conclusion/adequately attended/uniform standards). But Breyer inserts his own personality by juxtaposing the institutional "we" with the use of the first person, and by communicating that he shares with the larger American public the experience of enduring the "agonizingly long" process of verifying how the Florida electorate actually voted. That confession of a personal response, and the candid acknowledgment that the Court itself is subject to limits, and bears institutional responsibility for failing to observe them, speaks to a range of readers, professional and non-legally-trained.

Contrast these selections with Antonin Scalia's dissent in *Troxel v. Granville*.<sup>52</sup> There, a plurality of the Court invalidated as applied a state statute permitting grandparents and other third parties to petition for child visitation even over a parent's objection, on a showing of "best interests" of the child. The fractionated court produced six opinions, including this excerpt from Scalia's dissent:

In my view, a right of parents to direct the upbringing of their children is among the "unalienable rights" with which the Declaration of Independence proclaims "all men . . . are endowed by their Creator." And in my view that right is also among "other rights retained by the people" which the Ninth Amendment says the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' lists against laws duly enacted by the people. . . . If we embrace this unenumerated right, I think it. . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantage of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.<sup>53</sup>

Note here how the writer announces his authorial presence in the text by the extent of the self-referencing, starting with the repetition of the somewhat formal phrase "in my view" in the first two sentences. The placement of this phrase at the beginning of the sentences fore-

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<sup>52</sup> 530 U.S. 57 (2000) (plurality opinion).

<sup>53</sup> *Id.* at 91-93 (Scalia, J., dissenting).

grounds it, communicating to readers that the writer's view is indeed noteworthy. The repetition of the phrase reinforces it, conveying that it is the writer's view (and, presumably, not the views of the other Justices) that, in the end, matters.

The passage bears the earmarks of professional writing in its textual quotations and use of lawyerly language (duly enacted/unenumerated right/judicially prescribed/removable), and by including an if/then rule-like sentence: if we embrace/we will be ushering in. It has an assertive quality, again reinforced by repetition of phrasing (is far removed from affirming/and even further removed from authorizing). The quotation from the Declaration of Independence, suggesting that parental rights are God-given ("endowed by their Creator"), is a smart rhetorical ploy; although the Justice finds no affirmative legal authority to override the state law granting third parties visitation rights, by associating his views with the originary status and sanctity of the Declaration and the Founding Fathers, he projects onto his own language some of that same patriarchal authority.<sup>54</sup> The effect of the passage is unrelenting, and to some stalwart readers, haranguing. But it is nothing if not confident. At the same time, Scalia smuggles in an informal phrase ("in a flash"), hinting that he has a more accessible side. If the overall impression is hardly the "down-to-earth figure" that Laura Krugman Ray somewhat puzzlingly discerns in other Scalia opinions,<sup>55</sup> the combination of "emotional response and legal argument" seems calculated, as Krugman Ray suggests, to align the writer with the reader against the majority's view.<sup>56</sup>

Should legal writers emulate these judicial writing voices? The extensive self-referencing and the assertive-bordering-on-combative tone in the selection from Justice Scalia would be out of place in most of the contexts in which lawyers typically write. Yet the vigor of Scalia's language, and the momentum of the passage, demand the

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<sup>54</sup> Anthony Amsterdam and Jerome Bruner examine how *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), another Scalia opinion implicating parental rights, operates in a similar fashion. Justice Scalia's description of a state law governing multiple paternity claims—"California law, like nature itself, makes no provision for dual fatherhood," *id.* at 118—associates the law with a force deemed more enduring and encompassing than human prescription to justify his ruling that a non-marital father has no liberty interest in pursuing visitation with his biological daughter born while the child's mother was legally married to another man. AMSTERDAM & BRUNER, *supra* note 38, at 30, 44, 81-82. The authors' persuasive deconstruction of Scalia's narrative and rhetorical techniques in *Michael H.* shows how Scalia uses the linkage to nature to set up an unimpeachable train of reasoning—unimpeachable if the reader accepts Scalia's normative assumptions: "This approach perpetuates a basic symbol of established hegemonies—political and religious, as well as social and sexual—by consecrating a patriarchal notion of the family that simultaneously excludes outsiders and rank-orders insiders in proper top-down fashion." *Id.* at 82-83.

<sup>55</sup> Krugman Ray, *Judicial Personality*, *supra* note 2, at 228.

<sup>56</sup> *Id.* at 227, 229.

reader's engagement. Surely these are crucial qualities in any lawyer's brief to a court. Turning again to the language quoted from Stephen Breyer, its cadence, clarity, and directness all contribute to the intellectual force of his conclusions, while underlining a desire to be *read*—to reach, and to persuade, a wide audience. It would be difficult to imagine that legal writers would not aspire to these attributes in their writing.

## II. READING LAWYERS' WORDS

Another strategy for cultivating individual voice is the practice of close, rhetorical reading of specimens of writing produced for professional legal contexts. In my early years of teaching legal writing, I rarely offered my students examples of other practitioners' writing. Perhaps I felt the challenge of identifying specimens that I thought would model consistently good writing practices. At the heart of my concern, though, was the worry that students might too readily accept and imitate what was written in a particular work—even if it was a perfectly crafted specimen for the issue at hand. Thus, my reluctance to use models extended to artifacts created for the course itself, such as mock briefs or memoranda in a simulated case. The risk that students would imitate a writing slavishly, without considering variations in purpose, strategy, and audience that might make a good writing specimen in one rhetorical context a poor model to emulate in another, gave me and other colleagues some hesitation about using models of lawyers' writing in this way.

At the same time, learning-theory literature documents the existence of individual learning styles, informed by factors such as variations in learners' perceptual strengths or attributes, that make use of models an effective instructional tool for some learners, both generally and in the context of teaching legal writing.<sup>57</sup> The differentiation and specificity among researchers' taxonomies of learning modes vary, but learning theory recognizes that visually-oriented learners learn most effectively with the use of hand-outs that contain text, diagrams, or other visually-accessed material.<sup>58</sup> Other learning-modality classification schemes differentiate between the textual content of a writing and visual material such as graphs or charts, because written texts require processing that includes, but extends beyond, visual inspection and mapping. Such a classification scheme would consider a court brief or memorandum offered as a model to serve primarily a verbal

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<sup>57</sup> See, e.g., Boyle & Dunn, *supra* note 13; Jacobson, *supra* note 13. See generally Dunn, Beadry & Klavas, *supra* note 13.

<sup>58</sup> See Boyle & Dunn, *supra* note 13, at 228-29.

perceptual modality.<sup>59</sup>

These insights from learning theory have led me to think differently about the value of asking students to read and draw lessons from other lawyers' words. In my Lawyering Seminar classes at City University of New York School of Law (CUNY),<sup>60</sup> I have selected briefs filed in cases that my students are familiar with—because they have studied the case in my class or in another law school course. The advantage of using materials from known cases is that usually students will have enough understanding of the underlying legal doctrine and policy issues to be able to appreciate at least some of the strategic considerations and rhetorical judgments that the brief writers confronted as they wrote. As a group we can speculate about why the writer might have chosen to frame the law or structure the argument as the writer did. Then we can focus attention on specific rhetorical techniques that the writer applied.

For example, I have asked students in my first-year, second-semester Lawyering Seminar course on written and oral advocacy to read portions of Supreme Court briefs from cases many of them had studied in a course on the Fourteenth Amendment (Liberty, Equality, and Due Process) the previous semester and in a course they were then taking (the Law of Family Relations). In the Lawyering Seminar,

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<sup>59</sup> See Jacobson, *supra* note 13, at 34.

<sup>60</sup> The Lawyering Seminar in the first-year curriculum at CUNY is a required simulation-based course offered in four-credit components in the Fall and Spring semesters. An integral part of CUNY's public-interest and professionalization curriculum, these writing-intensive seminars are linked with doctrinal courses covered in the first year, typically the first course on Constitutional Law (Liberty, Equality, and Due Process), the Law of Family Relations, Civil Procedure, and Torts. The simulations are designed to integrate learning about a range of lawyering skills (in addition to writing, fact development and analysis, interviewing, counseling, negotiation, and oral advocacy), with doctrinal analysis, theoretical perspective, legal process, and an introduction to professional ethics and professionalism issues, including management of effort and clinical judgment. For an insightful discussion of the premises that underlay the pedagogy of the first-year Lawyering Seminars at CUNY (formerly referred to as the House system), see Joyce E. McConnell, *A Feminist's Perspective on Liberal Reform of Legal Education*, 14 HARV. WOMEN'S L. J. 77, 88-94 (1991). Although there have been some modifications to the curriculum and educational milieu at CUNY since the publication of this article by Professor McConnell, then a faculty member at CUNY, the premises she discusses—(1) the societal benefits of achieving diversity, in many dimensions, among the law student population, and, ultimately, within the legal profession, (2) a commitment to in-role, experiential learning, (3) students' participation in and co-responsibility for the day-to-day workings of the law school, and (4) the importance of fostering a sense of a community as a way of developing individual and social responsibility as lawyers, *id.*—continue to drive CUNY's mission and shape its pedagogy. In the Lawyering Seminars, these premises are manifested in the use of simulated problems of professional practice that require students to work in role; in the reliance on small-group learning interactions, smaller student-teacher ratios, and a faculty role approximating that of a guide or mentor, to build a sense of familiarity and trust, and encourage exploration and creativity in approaches to lawyering tasks; and in the explicit attention to the "human dynamics of lawyering." See *id.* at 85, 88-90, 92.

students were cast in the role of either parents' or grandparents' attorneys for a semester-long simulation involving a custody dispute over an eight-year-old boy who showed symptoms of gender identity disorder. During the semester, they were assigned to write a pretrial brief challenging or defending the constitutionality of New York State's recently adopted grandparent custody statute as against a claim of parental rights under the substantive component of the Due Process Clause. To help students prepare for that assignment, I asked them to read the Summary of the Argument and sections of the Argument in Respondent's brief and a supporting amicus brief filed on behalf of 13,933 law students in *Grutter v. Bollinger*,<sup>61</sup> the 2003 Supreme Court decision affirming that diversity in higher education is a compelling state interest.<sup>62</sup>

Specifically, I asked students to read these excerpts as a vehicle for identifying features of advocacy writing that we were then examining in the seminar—paragraph organization, thesis sentences, sentence structure, word choice and repetition of language, and use of positions of emphasis,<sup>63</sup> among others—and to trace how the brief writers used these features to communicate a theory of compelling state interest, one of the elements of strict scrutiny. The Summary of the Arguments in these briefs proved to be useful teaching tools because they were succinct and focused, designed to highlight core ideas and themes in one or more tightly structured paragraphs. Students were able to absorb the material relatively quickly during the class, and to identify features, such as use of strong assertions of a thesis, and repetition of terms that helped to announce, and reinforce, the theory of diversity in higher education as a compelling state interest.

Later in the semester, students were preparing to draft an appellate brief addressing both the constitutional issue and the question whether the grandparents had met a threshold showing of "extraordinary circumstances" under the statute to permit them to pursue custody at a "best-interest-of-the-child" hearing. I asked students to read the Statements of the Case in the opposing briefs filed in *Troxel v. Granville*,<sup>64</sup> a case in which a mother contested the extent of visitation

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<sup>61</sup> 539 U.S. 306 (2003).

<sup>62</sup> At least half of the students in the class had studied the case the previous semester, and all seemed at least generally familiar with the issue and ruling.

<sup>63</sup> Mary Beth Beazley's engaging text on appellate advocacy has emphasized that because a reader's eye tends to gravitate toward physical locations within a document, such as the beginning or ending of a paragraph, where there is a larger massing of "white" space, writers should be strategic by placing important points in these physical positions of emphasis. BEAZLEY, *supra* note 43 at 153-54. As noted, that insight was not lost on Justice Breyer when he wrote his dissent in *Bush v. Gore*. See *supra* note 46.

<sup>64</sup> See *supra* note 52.



sought by her daughters' paternal grandparents, to consider whether, and how, these briefs used such techniques as characterization, word choice, level of detail, and perspective to communicate a narrative theme.<sup>65</sup>

This in-class exercise was effective in focusing students on how selection of details could color, however subtly, a reader's perception of the worthiness of a litigant, even in ways that were completely irrelevant to the issue and, arguably, inappropriate as an advocacy technique. For example, one student perceptively observed that the reference in the grandparents' Statement of the Case to the mother's successive relationships with three men, all of whom had fathered one or more of her children, conveyed the impression of promiscuity and moral laxity in the mother.<sup>66</sup> Another student was struck by the brief writer's use of "desire" in the first sentence of the Statement ("This case arises out of the desire of petitioners Jenifer and Gary Troxel to remain in contact with their granddaughters. . .") to convey emotional tone. In short, this type of exercise invites students to become careful readers of texts as they search the material for evidence of persuasion-in-practice, motivated as they are by the need to add to their own rhetorical toolkit.

In a similar vein, I developed a classroom exercise based on my students' prior reading of two versions of an annotated pretrial brief published on the Law School's Writing Center web site. The briefs had been written by a second-year law student for a course in Pretrial Advocacy, a fourth-semester Lawyering Seminar developed by my CUNY colleague Professor Janet Calvo. The course focused on pre-trial motion practice and oral advocacy and had as one of its objectives to strengthen students' abilities as advocates. Professor Calvo described her feedback on briefs as covering many suggestions to improve overall persuasiveness.<sup>67</sup> Responding to this feedback, this stu-

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<sup>65</sup> We had read and discussed *Troxel* at length in the course because it was closely related to the issues involved in the simulation.

<sup>66</sup> Although there is a range of views and tolerance levels among advocates for the resort to techniques that by indirection seek to impeach a litigant's character, such practices do raise questions of professionalism and, arguably, ethical concerns, that merit discussion in their own right. See, e.g., NEW YORK STATE BAR ASSOCIATION LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-10 (2002) (lawyer's duty to "treat with consideration all parties involved in the legal process and to avoid the infliction of needless harm"). For ethical prescriptions that raise these concerns in related advocacy contexts, see EC 7-25 (lawyer's duty of candor before a tribunal, duty to avoid "harassment or embarrassment" of witnesses, and to avoid "by subterfuge put[ting] before a jury matters which it cannot properly consider) and EC 7-36 (lawyer's duty to maintain "dignity and decorum" in judicial proceedings).

<sup>67</sup> These include framing a rule favorably, thorough mining of precedent, effective use of facts, strong thesis sentences, appropriate word choice, and assertive, specific point headings. Conversation with Professor Janet Calvo, Spring 2004.

dent (whose original submission Professor Calvo considered to be analytically strong and articulate) produced a revised version of the brief that successfully incorporated the suggestions to enhance its persuasive impact. With the permission of this student, the Writing Center posted the original and revised versions of the briefs on the Writing Center web site,<sup>68</sup> and we added annotations (accessible as links on the web page) highlighting the writer's revisions.

To focus my seminar students' reading and analysis of these briefs, which involved an underlying claim that a city, its department of children's services, and various caseworkers violated foster children's substantive due process rights, I assigned a set of notes and questions for them to consider before class. Although the briefs were connected to a simulated case rather than an actual case that the students had studied, the students were familiar with the substantive due process analysis from their course in the Law of Family Relations and from the Lawyering Seminar itself. In addition, they had covered *DeShaney v. Winnebago Department of Social Services*<sup>69</sup> (a case discussed at length in the student's briefs) in their Torts class at that point in the semester.

The questions drew attention to a variety of rhetorical features bearing on persuasiveness. They included asking students to note in what ways the Introduction in the revised draft of the brief improved communication and emphasis of the defendants' theory of the case; to compare how the Question Presented in the revised draft set up the answer that the writer wanted the court to reach, *i.e.*, listing all the reasons that summary judgment should be granted, with the original version, which had asked whether defendants' actions violated the children's rights; to note how the writer's revised version de-emphasized or rephrased information and details in the original Statement of the Case that were generally unhelpful to the defendants' legal interests, and how those changes reinforced the defendants' theory of the case; to compare how the Summary of the Argument in the original and revised drafts communicated the major and supporting points of the Argument; and to identify what insight into the defendants' argument and theory of the case they gained from reading the headings of the major/minor point structures of the Argument in the final draft of the brief.

During the classroom discussion, I displayed the briefs (accessible on the web via a "smartboard") as we compared the two texts and assessed the writer's revisions. The exercise generated some insightful contributions and inquiries from students about a brief writer's lati-

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<sup>68</sup> <http://www.law.cuny.edu/wc/usage/AnnotBriefs.html>

<sup>69</sup> 489 U.S. 189 (1989).

tude in excluding unfavorable information from the Statement of Facts, ways of formulating Questions Presented to mirror language and structure in point headings, and organization of information within paragraphs to achieve a desired emphasis. The students were engaged in the exercise, and, as my notes and questions had encouraged them to do, they were thinking about how to apply these insights to their appellate brief assignment, then in progress.

The success of this exercise in reading another's words, here the words of a slightly more experienced law student who was still developing as an advocate, spoke to my concerns that students might simply imitate or adopt a technique they had seen, without appropriately integrating it into the context of their own assignment. In fact, they read the texts closely, commented on why, or whether, they thought the student's revisions were effective, and then began to turn to the context presented by their own brief-writing assignment—indicating that they recognized that this separate context called for adaptation and revision, rather than wholesale adoption of the approaches we had discussed. It is possible that working with another student's brief may have presented less of a risk that the students would be imitative,<sup>70</sup> but I had noted that my students were also willing to question rhetorical features in the Supreme Court briefs we read. From these experiences in the classroom, I have come to think that the more specimens legal writers see, the less risk there is that they will perceive legal writing to be entirely formulaic, or that they will become wedded to one way of writing.<sup>71</sup> Just as wide reading of general literature tends to improve overall literacy, reading a range of legal briefs and memoranda can illuminate the discursive possibilities—rather than the supposed limitations—of legal writing.

More extensive reading of practice-based writing also brings to light the unevenness in even the best work, and this revelation itself can save a discouraged novice writer from giving up altogether.<sup>72</sup> Achieving persuasiveness is never a given; it is not an attribute or a developmental milestone that writers simply attain. Lawyers at all stages of their professional lives continue to work toward being per-

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<sup>70</sup> It also can be a source of encouragement to slightly junior students to see the extent of a peer's progress after only another year in law school.

<sup>71</sup> See Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 *NEB. L. REV.* 561, 583 (1997) (discussing the need to use more than one exemplar of "good writing" in any format, to highlight why the exemplars are successful, and to identify effective features of writings in various legal genres against which to assess examples to mitigate the risk that students will see a sample as a "template").

<sup>72</sup> For a discussion of the psychology of hope as an aspect of cognition, and the relationship between goal-oriented thinking and performance, see Wellford-Slocum, *supra* note 5, at 269-70, 324.

suasive, and then persuasiveness can only be judged contextually, in relation to a writer's purpose, audience, and perspective in a particular writing. A close, rhetorical reading of other lawyers' words will help drive home these points for writers who may be tentative or inclined to take a narrow view of what is permissible, or possible, in writing persuasively.

A reader might at this point ask how exposure to another lawyer's writing enhances a writer's individuality rather than promote conformity and imitation. I would argue that the opportunity to examine a range of writing gives writers ideas, and choices, that increase fluency—even if it is fluency in the service of someone else's metaphor.<sup>73</sup> The awareness that metaphor is possible can be an important opening, a point of entry, for some writers. When they write with a consciousness of what has come before, they can and often do eventually find a way to make it over, to make it their own.

### III. WRITING OUTSIDE OF PROFESSIONAL FORMS: IMAGINATIVE AND REFLECTIVE WRITING

A promising approach to cultivating individuality within a professional voice is to write reflectively or imaginatively about legal subjects outside of a practice-based context (for example, in an essay or a short story). Because professional legal writings are generated in the context of a human interaction, lawyers' professional texts will have consequences for the legal clients whose life situations are implicated. Experienced legal writers recognize that, in addition to technical accuracy, these writings should reflect an accurate sensibility about a client's circumstances—her concerns, goals, and expectations. To achieve that additional writing focus, an experienced legal writer will step back from a professional writing task and consider the personal subject behind the professional's problem. As lawyers work within the formal structures and, at times, tortured paradigms of a new discourse, they do need to be reminded of the human dimensions and consequences of professional writing. One way to keep that sense alive is to offer them opportunities to write about law in a variety of complementary forms—narratively, introspectively, reflectively.

To gain perspective on the uses of such writing, I take inspiration

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<sup>73</sup> For a discussion of the phenomenon of influence of writer—positive and sometimes negative—on writers, see YAGODA, *supra* note 6, at 105-115. Yagoda concludes from his interviews of many strong stylists that even when writers consciously imitate the styles and techniques of other admired writers, at some point "influence will be mitigated and eventually trumped by personality." *Id.* at 107. If that assessment seems overly sanguine, it does remind us that writers do not compose in a literary vacuum. Models can instruct and sometimes inspire, and for these reasons are worth examining in any effort to develop an individual writing voice.

from the efforts of those who have designed law school courses that encourage students to write outside of specialized, structured professional genres.<sup>74</sup> Mark Weisberg of the law faculty of Queens University in Ontario has described how his Legal Imagination course uses this approach, requiring students to write a series of essays that address various social experiences and exclusions implicating the legal system.<sup>75</sup> As Weisberg points out, these writings about students' personal experiences of the law, such as the story of a Samoan law student's encounter with police, or observations of how other people negotiate the legal system when called before a court, amplify voices and perspectives that formal legal discourse rarely includes.<sup>76</sup>

Noting how law students seem to gravitate toward "jargon and abstractions," Weisberg concludes that what discourages law students from "using their own voices"<sup>77</sup> is fear of exposing themselves as outsiders to this professional discourse community, untutored as they feel in its modes and conventions.<sup>78</sup> Weisberg advocates a variety of approaches to encourage students to be true to their own voices in these writing assignments: assigning readings from less formally structured, non-legal genres; posing questions to generate ideas; using examples of peer writing; harnessing the advantages of group work in the classroom; and use of descriptive (rather than evaluative) feedback.<sup>79</sup> In Weisberg's experience, asking students to write imaginatively on legal subjects has a disinhibiting effect; they produce writing that is nuanced, lively, and affecting.

Critical race scholar Derrick Bell has taken a similar approach.<sup>80</sup> Students in his Constitutional Conflicts course write, among other things, "op-ed" pieces about the constitutional doctrine they are

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<sup>74</sup> See, e.g., Derrick Bell, *Constitutional Conflicts: The Perils and Rewards of Pioneering in the Law School Classroom*, 21 SEATTLE U.L. REV. 1039, 1047 (1998); James R. Elkins, *Writing Our Lives: Making Introspective Writing a Part of Legal Education*, 29 WILLAMETTE L. REV. 45 (1993); Mark Weisberg, *Epilogue: When (Law) Students Write*, 27 LEGAL STUD. F. 421 (2003).

<sup>75</sup> Weisberg, *supra* note 74, at 421 n.2.

<sup>76</sup> *Id.* at 422.

<sup>77</sup> *Id.* at 424.

<sup>78</sup> Weisberg's assessment resonates with Joseph Williams's observations about the process of becoming fully incorporated into a discourse community, which involves freeing oneself from the tyranny of formal jargon: a writer must be prepared to let go of the "mystery" of legal discourse.

But give up the mystery of the discourse, and one risks losing the authority of one who understands the mystery of the profession. . . . It is the risk that every writer/communicator takes when he or she gives up the jargon, the freedom to take for granted what the 'in-group' shares, the seeming authority of professional language.

Williams, *supra* note 1, at 28-29.

<sup>79</sup> Weisberg, *supra* note 74, at 425-426.

<sup>80</sup> Bell, *supra* note 74, at 1042.

learning. Bell describes how, to encourage active learning, he assigns students to argue or judge a hypothetical case and, over the course of the semester, to write at least fifteen “op-ed reflections” based on course hypotheticals. These op-ed pieces are expected to be brief (one to two pages, single-spaced), to develop and support a perspective on constitutional law and policy, and to address counterarguments.<sup>81</sup> Although not required to do so, students are instructed that they can explore a personal experience or vantage point.<sup>82</sup> In a related vein, James Elkins incorporated a semester-long journal-writing option in a course exploring the role of the lawyer and professional legal culture. He has noted the function of such “introspective” writing to “connect our knowledge and our work with our subjectivity.”<sup>83</sup> Students used the journal to navigate the boundaries of the professional and the personal,<sup>84</sup> and sometimes reflected explicitly on their struggles with legal writing, which some perceived as more “authoritative,” less conversational, less personally revealing, more “precise,” and more “sterile” than writing outside of the law.<sup>85</sup>

In the Weisberg, Bell, and Elkins examples, the permission given to students to use more familiar language and forms to analyze a legal topic, including their own acculturation into the profession, in effect disaggregates legal content and context from form. This practice allows novice legal writers to explore and write about legal ideas without the constraints of the alien and (to many) awkward paradigms that distinguish deductive legal analysis. It is true that the goal of these courses and assignments was not to develop proficiency in using the paradigm of deductive legal reasoning. However, I would argue that the assignment of imaginative, non-traditional writings can be equally useful, if not more so, to students developing proficiency in formal analytic writing, especially first-year law students who are not yet steeped in lawyerly discourse and tend to be acutely aware of a dissonance between legal and non-legal forms and language. Incorporating non-formal writing *in legal writing courses* can help draw attention to when and how the conventions of legal vocabulary or structure may be preventing novice writers from communicating their analysis effectively in professional, practice-oriented writing. This work can also open up approaches to professional writing that preserve for the writer a sense of individuality.

At CUNY, I have been privileged to work with colleagues who

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<sup>81</sup> *Id.* at 1047.

<sup>82</sup> *Id.*

<sup>83</sup> Elkins, *supra* note 74, at 52.

<sup>84</sup> *Id.* at 56.

<sup>85</sup> *Id.* at 57-58.

use non-traditional legal writing in their courses. Reflective writing about the legal system, for example, allows a legal writer to consider the capacity of the law to achieve just results—and to bring to the surface systemic deficiencies in the administration of laws, or in access to legal services. In the context of student law clinics, meditations about lawyer-client interactions not only can heighten the writer's appreciation of a client's situation but also can deepen understanding of the writer's own emotional responses to that flesh-and-blood person. CUNY's public-interest professionalization mission<sup>86</sup> actually contributes to this willingness to work outside of professional genres. The desire to accomplish positive change in the law often requires working against forces that inhibit reexamination of established ideas. The capacity of law to adapt and develop is served by the capacity of language to challenge assumptions, provoke thought, and offer new ways of thinking about legal and social dilemmas. Although lawyers' language, in any area of law practice, should be clear, precise, and accessible, for those who use law in the service of a social-justice mission, it is crucial that this language be evocative, resonant, and humane.

Yet many readers (and, unfortunately, writers) of legal prose assume that legal writing mainly occurs in two registers: either dry and unimaginative or hopelessly arcane and convoluted. If left unaddressed, that kind of assumption by writers, and that low level of expectation among readers, will banish legal prose permanently to the cultural margins. Such writing will only be of interest to those involved in the legal disputes to which it relates, and then only for the technical guidance the writing may offer toward resolving a legal problem. One way to dispel this limiting idea that good legal writing and creative use of language are mutually exclusive endeavors is to showcase writing about law that is infused with a literary sensibility. In the Writer's Forum, a feature of CUNY Law School's Writing Center web site,<sup>87</sup> and the Creative Writer's Workshop, an ongoing gathering

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<sup>86</sup> See, e.g., McConnell, *supra* note 60, at 84-85, 88-94.

<sup>87</sup> The following excerpts from the Writer's Forum section of CUNY School of Law's Writing Center web site show some of the uses of non-formal writing that is informed by law:

**The Creative Writing Group**

Through the efforts of [former] CUNY Writing Fellow Ronaldo V. Wilson and Professor Ruthann Robson, the Creative Writing Group (creative writers of all genres) provide a weekly forum for participants to discuss their finished works or drafts-in-progress. In some sessions, the work of a poet, essayist, or visual artist would inform the discussion, often inspiring a writing assignment. For instance, poems from Cornelius Eady and Mendi Lewis Obadike served as models for students to write from the perspective of a person other than themselves. In other sessions, the group generated their own assignments; for Valentine's Day, for example, they all decided to write love poems limited to 23 lines.

What makes the writing that emerged from these sessions so unique is the variety of

of law students and faculty, the Law School offers discursive space for writing that transmutes legal knowledge or clinical experience into poetic, fictional, and other introspective or meditative forms.

Spearheaded by my CUNY Law colleague Ruthann Robson, whose own writing continually negotiates the borders between the professional and the personal, and former CUNY Writing Fellow<sup>88</sup> Ronaldo Wilson, a published poet as well as a Ph.D. candidate at CUNY Graduate Center, the workshop provides a framework for thinking about how lawyers can make legal doctrine and rhetoric more responsive to human experience. Writing produced in the workshop includes poetry, short opinion pieces, and even a hypothetical opinion rendered by the mythical Westside Creativity Board arising out of a dispute between long-time writing partners, whose collaboration appeared irreparably broken.

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forms—from the poem to the personal essay, the fictionalized court opinion to the autobiographical vignette—the writers find to express themselves as both creative writers and law students.

#### **Immigration Law Essays**

This semester, students in Prof. Janet Calvo's Immigration Law class were given a choice of topics for their midterm exam. In order to emphasize the real-world effects of the laws and policies studied in class—as well as to give students an opportunity to explore their views on these issues—Prof. Calvo asked each student to find a newspaper article dealing with some aspect of immigration or citizenship law. With the article as a starting point, each student wrote a two- to three-page essay giving a well-reasoned discussion of her/his position on the issue. Students chose a range of topics, including a proposed reform to the U.S. guest worker program, issues surrounding refugees from various nations, and the immigration and labor difficulties faced by migrant domestic workers.

#### **Reflections on Family Court Visits**

In the Spring 2002 semester several sections of the School of Law's first-year Lawyering Seminar were assigned to work on simulation-based problems set in the New York City Family Court system. During the semester the seminar students, preparing for careers in public service and public-interest practice, visited Family Courts in Queens, Manhattan, Brooklyn, and the Bronx. Working closely with Court Attorneys, students who attended court sessions on a regular basis reported to specific judges, and sometimes were called upon to assist Court Attorneys in research and drafting. Students in other seminars visited a Family Court on a single occasion, as they prepared for oral argument in their own simulation exercise. Asked to write a reflection on their visit, the students in one of the seminars were encouraged to consider the interactions and communications among judges, other court personnel, lawyers, and clients, as well as the effects of architecture and spatial arrangements in the courtrooms they visited.

Writer's Forum, <http://www.law.cuny.edu/wc/forum/forum.html>.

<sup>88</sup> Writing Fellows are advanced Ph.D. candidates at CUNY Graduate Center. Sophisticated writers and readers, CUNY Writing Fellows work with faculty and students on local CUNY campuses under the auspices of the university-wide Writing-Across-the-Curriculum Initiative (WAC), which has sought to infuse writing in all aspects of the university curriculum. CUNY Law School participates in WAC in a variety of ways to help faculty develop writing-focused assignments, encourage a range of approaches to responding to writing, and develop various media for supporting a writing-enhanced curriculum.



A poem that appears in the “Anthology” part of the Writer’s Forum on the Law School’s writing website, considers the implications of imposing or presuming a perspective on a writer in terms that raise the question of voice. In this meditative poem, “On Writing from Perspective,” the writer, Rachel Nicotra, then a second-year student at CUNY, contemplates the position of disenfranchised people who may be burdened by a sense of obligation to write from the particularity of their own experience and (presumably partial) perspective:

Up the spotted stairs, against the dusty mauve metal  
 A space is hidden when it is less than obvious and silent still  
 A prisoner sits against metal—dust collects that no one cleans  
 And who is permitted to write without identity?

The references to prison, punctuated by recurrent images of spotted stairs and metal layered with paint, invoke for me the carceral latticed gates that bar access to the upper reaches of the law school. CUNY was once a public middle school, and the gates—halting exploration, stifling curiosity, enforcing rules—perhaps conjure for this writer ways in which law as a system and as a discourse can seem oppressive. Or, to draw out the poem’s metaphors in a different direction, the gates also suggest ways in which law school itself can seem prison-like, when the principal lesson that legal education seems to impart is that its practitioners must write with objectivity, not perspective.<sup>89</sup>

The narrator identifies as a “prisoner,” and dreams of “open spaces,” and “the half frozen ground of spring,” but acknowledges a “continual nagging responsibility to write/. . .and record from this [the prisoner’s] perspective and not that.” But the unresolved dilemma for the writer is to address the forces that work against efforts to write at all, and that threaten to silence the writer’s voice, the source of “who we are”:

But when we speak  
 When we breathe  
 When all we are is boxed and blown from open mouths  
 When we sit waiting to dissolve  
 Why speak as who, or of who, we are at all?

CUNY’s attention to reflective and literary writing parallels developments in medical education. An increasing number of medical clinicians assign reading and writing in the humanities to guide their mentees toward a more reflective, empathetic approach to professional practice.<sup>90</sup> Dr. Rita Charon, professor of internal medicine and

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<sup>89</sup> And if law’s fabled objectivity is itself illusory, then the objectivity of legal writing is merely another kind of perspective. See, e.g., Krugman Ray, *Judicial Personality*, *supra* note 2, at 194-95, 211, 234.

<sup>90</sup> For a discussion of Dr. Rita Charon’s narrative and medicine project at Columbia

director of the Program in Narrative Medicine at the College of Physicians and Surgeons at Columbia University, requires her third-year students to write narratives (“parallel charts”) about their interactions with patients. Preliminary findings from an outcomes study on this project suggest that the students who have written in this way have improved their interviewing skills and strengthened therapeutic relationships.<sup>91</sup>

Lawyers, no less than doctors, must see a client’s situation as a human dilemma. As law students write themselves into professionalization, writing concurrently in non-professional forms can help them bridge the distance between lawyerly language, personal voice, and interpersonal communication. When lawyers write outside of their lawyerly paradigms to reflect on their lawyerly writing, they can gain necessary psychological distance from professional tasks, while continuing to focus on legal ideas and the possibilities for their formal expression.<sup>92</sup> This kind of writing may even promote empathetic appreciation of the human subjects whose conflicts and struggles a lawyer must document in formal legal writing.<sup>93</sup> That empathy, in turn, can stimulate a writer’s attention to and interest in the legal concepts and categories that underpin the client’s situation. And this writing with fluency and conviction about law and professional relationships, I would argue, is a necessary beginning to restoring flagging confidence in the legal writer’s abilities as a writer. As the discus-

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Presbyterian College of Physicians and Surgeons which describes this approach, see <http://www.narrativemedicine.org>. For a discussion of Dr. Danielle Ofri’s integration of humanities and medical practice at Bellevue Hospital, see <http://www.danielleofri.com>. For examples of parallel writing inspired by humane appreciation of the physician-patient relationship, see OLIVER SACKS, *THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES* (1998).

<sup>91</sup> Program in Narrative Medicine, College of Physicians & Surgeons, Columbia University, Research, Parallel Charts, available at <http://www.narrativemedicine.org>. Like Dr. Charon, Dr. Danielle Ofri, author of *SINGULAR INTIMACIES: BECOMING A DOCTOR AT BELLEVUE* (2003) [hereinafter *SINGULAR INTIMACIES*], and editor-in-chief of the *Bellevue Literary Review*, a twice-yearly review offering “creative interpretation” of themes relating to the “human body, illness, health, and healing,” see <http://www.BLReview.org>, incorporates the humanities into her clinical practice. She regularly asks interns to read and reflect on poems to help them develop the capacity to listen—to “hear the metaphor” behind a patient’s speech. See Ofri, *supra* note 90.

<sup>92</sup> See, e.g., Elkins, *supra* note 74, at 58:

Recognizing the person/lawyer or private/professional polarity pushed some students to reach out in their writing for dreams, forgotten ideas, and the rhythms of everyday life. Capturing and honoring what they called ‘emotional,’ ‘dormant,’ ‘buried,’ and ‘ordinary thoughts’ created a new sense of depth, even as they strove toward more disciplined, rigorous, and systematic legal analysis.

<sup>93</sup> See Patricia Connor-Greene, Hayley Shilling & Art Young, *Writing for Empathy, in THE WAC CASEBOOK: SCENES OF FACULTY REFLECTION AND PROGRAM DEVELOPMENT* 6 (Chris Anson, ed., 2002) for a discussion of pedagogical approaches within the writing-across-the-curriculum-movement designed to foster empathy.

sion in Part IV examines in greater depth, using non-formal writing to promote dialogue about the process of legal writing can be another way to nurture, or recapture, a sense of individual voice.

#### IV. WRITERS AND MENTORS: KEEPING UP A DIALOGUE

Legal writing teachers and lawyer mentors can structure dialogues about writing voice in the context of an individualized meeting with a student or mentee to review a draft of a practice-based legal writing assignment. The conference offers the student/mentee the opportunity to learn from a focused conversation with a more experienced teacher/mentor; although guided by the latter, the interaction at its best is exploratory and collaborative,<sup>94</sup> and also can be empowering and confidence-building for the newer writer.<sup>95</sup> Taking a dialogic approach to working with legal writers can encourage them to identify—to give voice to—the objectives and strategies that inform the legal writing they produce, before those of us who teach and mentor them perhaps too hastily consign these ideas and expressive approaches to the editor's scrap-heap. The individualized conference not only functions as an actual medium of intellectual exchange between the experienced writer and the beginner; it “renders literal the conversation between writer and audience.”<sup>96</sup>

My starting assumption is that it is useful to engage developing legal writers directly with the points of tension and struggle they experience when they try to reproduce a professional voice. To facilitate this dialogue, encouraging writers to keep a journal or otherwise to reflect in *writing* upon their experience of working through the paradigms of formal legal writing can bring to the surface the choices they make when they write in the modes of professional legal discourse. The benefits of journal writing noted in Section III have been long documented in the literature on adult learning and professional edu-

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<sup>94</sup> Wellford-Slocum, *supra* note 5, at 264-65, 268.

<sup>95</sup> *Id.* at 268-270. See also Jana French, *The Dialogic Writing Conference: Negotiating and Predicting the Role of Author*, in *TEACHING ACADEMIC LITERACY: THE USES OF TEACHER-RESEARCH IN DEVELOPING A WRITING PROGRAM* 144 (Katherine L. Weese, Stephen L. Fox & Stuart Greene eds., 1999).

<sup>96</sup> French, *supra* note 95, at 135, 141, 143. That conversation also runs between writer and text. See Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 *IOWA L. REV.* 1159, 1187-88 (2004). Ehrenberg notes:

The recursive process of writing, reading a draft, and rewriting creates continuous dialogue between a writer's partially completed text and his thoughts. (citation omitted.) Through this dialogue, the writer can engage in ‘a much fuller and richer consideration of contradictory evidence, counterarguments, and the complex elements of a subject than is ever possible in oral communication alone . . . .’

Ehrenberg, *supra* at 1187-88 (citation omitted).

cation.<sup>97</sup> By memorializing the *process* rather than the *product* of thinking or working through a learning challenge, a journal can aid learning in a variety of ways. J. P. Ogilvy identifies several pedagogical benefits in using journals in clinical and non-clinical law-school classes: (1) the active kind of learning that the very act of writing—here writing about writing—promotes;<sup>98</sup> (2) the development of students' self-awareness about approaches to learning and skill development;<sup>99</sup> and (3) the re-discovery of personal voice, or, in Ogilvy's words, "writ[ing] without trying to sound the way they think lawyers sound."<sup>100</sup>

My own use of reflective writings as a component of the dialogic process in the first-year Lawyering Seminar at CUNY consists of assigning "writer's memos" to accompany many of the formal legal writing assignments that students complete. These process-based memos pose questions that call for students both to identify specific aspects of writing assignments that were challenging, and to recreate the trajectory of their own writing process.<sup>101</sup> In the Fall 2003 semester, the students' first assignment in a semester-long simulation was a closed-universe law office memorandum presenting a question whether a diversionary facility (Queens Rising) for youth charged with low-level crimes implicated state action under the Fourteenth Amendment. Each of the four assigned cases offered variations on a factor-based test for predicting whether a court would likely determine that the assigned matrix of facts pointed to state action. The assignment thus called for students to formulate a multi-part rule for state action—synthesizing elements and factors that were overlapping but not linguistically identical—before applying it to a complex, fact-rich scenario.

Responding to the question "what aspect of this assignment did you find most challenging," my Lawyering Seminar students were articulate in locating the particular complexity of the analytic/writing tasks. Among the thoughtful responses I received, the following

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<sup>97</sup> See, e.g., JOHN C. BEAN, *ENGAGING IDEAS: THE PROFESSOR'S GUIDE TO INTEGRATING WRITING CRITICAL THINKING, AND ACTIVE LEARNING IN THE CLASSROOM* 106-109 (2001). See also Elkins, *supra* note 74.

<sup>98</sup> J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 *CLINICAL L. REV.* 55, 64-65 (1996).

<sup>99</sup> *Id.* at 71, 80-81.

<sup>100</sup> *Id.* at 80.

<sup>101</sup> For a discussion of how legal writing teachers applying insights from New Rhetoric composition theory (positing that reading and writing are integral to the formation of meaning) can incorporate writer's memos or student journals in the series of transactions between teacher and student consisting of writing, reading, response, and reflection, see Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 *J. LEGAL WRITING* 57, 58, 78, 82 (2000).

demonstrate the specificity of these students' narratives of process:

(1) Initial 'hurdle' of translating case knowledge and general rule into the specified structure (CRRACC, although fun to say, is more difficult to do than to read or talk about); (2) tightening up/regrouping ideas to make them more on point (still not sure how I did). Cutting did get easier after a while.

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Constructing the synthesized rule was the most challenging mentally, I think. Doing the rule proof took the longest and depended on complete knowledge of the cases—so it was challenging in a different way. Deciding what to put in the rule itself was the worst part, I think.

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The most challenging aspect was making sense of the formatting structure of the memo which was different from styles of writing I am accustomed to. I found it hard to be so structured at times. I also found it challenging to articulate the counter-counterarguments. It was also hard to keep from sounding redundant because so many aspects of the rules/elements overlapped.

Asked to describe their approach to the task of drafting the memo, students were explicit about the process of rule synthesis:

Most importantly I needed to solidify my rule synthesis in a way that felt clear and comprehensive. From there I began to see how the facts of the cases would apply. If I could do something differently I might take a closer, more analytical approach towards the cases.

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I started with the Rule then started figuring out/distinguishing cases, pulling exact parts and fitting them in. This took the longest, because I had to make sure after a while that I wasn't confusing ideas or case names or facts, since I knew them, but had spent so much time with them that they 'blurred' a bit.

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I started by making a list of each case and writing down the facts from each that I believed were important. Then I compared these facts to Queens Rising to see if there was any similarity in issues. The challenge for me came when I had to extract the various factors or tests used in each case and narrow them down, because different cases defined them a little differently from each other. On my paper with the Queens Rising facts I made little notations of where each test could apply. Then I wrote the discussion section, which tied all of the beginning work together.

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To prepare for individual conferences with these seminar students, I reviewed each student's response to the writer's reflection questions before reading the student's draft of the law office memorandum. Having the benefit of the responses enabled me to gauge the student's level of awareness of process, and the relationship between the student's conception of what she had been asked to do and the actual execution of that task. Even when the student struggled in drafting a structured legal analysis, the evidence in the writer's memo that she had understood the analytic and organizational steps required to articulate and apply a rule informed my own approach to providing feedback. Having access to the student's thinking enabled me to pitch my written comments and my conversation with the student in the conference at a more advanced level. I was able to begin by acknowledging signs of insight and even sophistication in the way the student approached the assignment, as well as the articulateness of the student's self-description.

These meetings typically have been conversational, animated, generally upbeat, and more often focused on process than on the substance of a legal rule. I begin such a conference by referring explicitly to one of the student's responses in the writer's memo. Whenever possible, I focus on evidence of where the student has been effective and self-aware and then segue toward how the student could work with her own insights to strengthen or clarify the analysis or expression in the formal legal writing assignment. Asking students to reflect on and recreate the steps of their writing process (including detours and road blocks) can help at least some students verbalize why they experience the use of professional voice as a loss of individual voice.

In addition to post-assignment reflective writing, typically I ask students to submit ungraded drafts while they are immersed in the drafting process to help prepare them for their more formal, graded submissions.<sup>102</sup> I review the drafts and provide some written feedback—typically posing questions, drawing out the student's ideas and strategies, calling attention to sections of the draft that do not seem to have a close fit with the writer's stated or apparent purpose, and that might benefit from further development or rethinking of organizational choices. Thus, the feedback at this stage is intended to be formative and future-oriented, designed to help the student develop as a writer while she is still actively working on an assignment.<sup>103</sup> My role

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<sup>102</sup> For support for the view that the most opportune time at which to hold student conferences is when students are "actively engaged" in writing, and thinking about the writing process, see Wellford-Slocum, *supra* note 5, at 277. See also Berger, *supra* note 101, at 90-91.

<sup>103</sup> See Berger, *supra* note 101, at 75-76.

here is that of a mentor or guide—either that of more experienced writer or experienced “fellow reader,” depending on the stage of the student’s work.<sup>104</sup> Even before there has been an actual meeting or conversation with a student about the draft, ideally my written response will function dialogically, as part of a “reflective conversation between the student-as-reader and the student-as-writer that help[s] produce a better student text.”<sup>105</sup>

The process by which students write these drafts and then read my responses, and the face-to-face meetings (and e-mail exchanges) with students that typically follow, have fostered an illuminating interchange about professional writing and voice. In these conversations, we start out wherever a student is at the moment in the thinking/drafting process, and thus we work from fairly complete drafts, half-drafts, and even rough outlines.<sup>106</sup> For a teacher/mentor, this process involves giving up a certain amount of control over how the document is taking shape (and I appreciate now that this self-restraint is necessary to the mutual learning that can occur during the dialogue).<sup>107</sup> I try to come to the meetings and the draft open to a variety of approaches about what would constitute a “good” brief or law office memo. Whatever tentative idea I may have about approaches or structures that would seem to work well, my goal for these meetings is to try to make the student draft work, to preserve not only the core idea that animates it but, to the extent possible, its organizational logic and even its language. We each bring many questions to the conversation. When students explain what they are trying to accomplish, participating in a “meta-analytical dialogue” that draws out their understanding of their assignment and planned approach to it,<sup>108</sup> I have learned a great deal. As Christopher Rideout and Jill Ramsfield have observed, individual meetings with students can “uncover attitudes, experiences, and questions” that will illuminate a student’s stance toward writing, and the course of that student’s progress over a longer period of time.<sup>109</sup>

By the end of this dialogic process, the shape of the paper, and often the student’s understanding of the work involved, are different.

<sup>104</sup> See *id.* at 79.

<sup>105</sup> *Id.* at 71.

<sup>106</sup> As Linda Berger has emphasized, it is crucial for a legal writing teacher to see writing during these preliminary stages in the composition process as a “work in progress,” and to respond to it as “an actual text, a particular draft produced at a particular time by a particular student.” *Id.* at 77.

<sup>107</sup> Robin Wellford-Slocum had addressed the risks presented to achieving a genuinely collaborative dialogue when teachers or supervisors dominate the conversation with a student, consciously or otherwise. See Wellford-Slocum, *supra* note 5, at 294-297.

<sup>108</sup> The term is quoted in French, *supra* note 95, at 138.

<sup>109</sup> Rideout & Ramsfield, *supra* note 1, at 67-68.

But the commitment to working with the writer's own product-in-progress, eliciting and acknowledging the writer's input and insight, offers crucial validation of the writer's efforts.<sup>110</sup> I believe that when law students—and novice legal writers in general—document their own writing process in an unfamiliar genre, and when they can recognize and name their experience of becoming inarticulate, they have already begun to locate and work through those moments in the writing process when their emerging professional voices seem to fail them.<sup>111</sup> This beginning is crucial to achieving the confidence needed to reclaim their personal voice.

## V. READING OUTSIDE OF PROFESSIONAL FORMS: PROBLEMATIZING PROFESSIONAL VOICE

The need for thoughtful consideration about the languages that lawyers use, and the perspectives that these languages reflect, should be broached directly with inexperienced writers as they struggle to negotiate the boundaries of professional and personal voice. In this

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<sup>110</sup> This dialogue can also occur in the classroom if the classroom environment is interactive and the learning is discovery-based and active, including, for example, hands-on writing, discussion of the task with peers, engaging in classroom-wide discussion of the task, and assessment of multiple examples drawn from student work. Such a classroom opens a "dialectic among the individual student, language, and the contexts for legal writing." See Rideout & Ramsfield, *supra* note 1, at 64-65. Writing more generally about discussion-based pedagogy, Stephen Brookfield and Stephen Preskill note that classroom-based discussion is empowering because it shows respect for students' voices and experiences and affirms students as co-producers of knowledge (thus decentering the teacher). STEPHEN D. BROOKFIELD & STEPHEN PRESKILL, *DISCUSSION AS A WAY OF TEACHING: TOOLS AND TECHNIQUES OF DEMOCRATIC CLASSROOMS* 30-33 (1999). These insights are also relevant to one-to-one discussions with a mentee, despite the risks implicit in the unequal power dynamic between a teacher/mentor and a solitary student/mentees noted above.

<sup>111</sup> Physician Danielle Ofri writes of a similar struggle to gain mastery over unfamiliar medical language as a first-year medical student. Recalling a meeting with her grandfather's doctor when her grandfather was dying of heart failure, she recounts the doctor's pronouncement of her grandfather's diagnosis, and her own halting efforts to explain the doctor's medical terminology to her family:

He's in atrial fibrillation, the doctor said.

My family looked to me for a translation. I didn't want to disappoint them. "That means, uh. . . that means the heart is fibrillating," I said, with extra emphasis on the last word so it would sound definitive. I recognized the term "fibrillation." I'd been in the medical environment long enough for "atrial fibrillation" to feel familiar on my tongue. I knew how to transpose the noun into a verb. But it was like a sentence gleaned from a foreign phrase book. I could memorize it, make it sound smooth and polished, but it wasn't truly absorbed into my own lexicon. Atrial fibrillation—I knew it was a term that I would soon understand, that would soon be part of my vernacular. That familiarity was so temptingly close. Too close to admit that I didn't actually know what fibrillation was, because I *almost* knew it. It was *almost* mine. The words were already physically comfortable in my mouth, but in reality I had no idea what atrial fibrillation was.

OFRI, *SINGULAR INTIMACIES*, *supra* note 91, at 11-12. (Emphasis in original.)



section I draw on my CUNY colleague Ruthann Robson's award-winning essay, *Notes from a Difficult Case*,<sup>112</sup> because it is a compelling example of an exploratory, "mixed genre" text that draws attention to the disconnections between lawyerly and non-legal language. *Notes* chronicles Robson's personal medical ordeal and responses to her experience of medical misdiagnosis and malpractice. The essay considers what Robson's malpractice complaint might look like, both as a formally pleaded legal document, and as an account of her depersonalizing and demoralizing experience as a patient. In this juxtaposition of formal and personal accounts, *Notes* illuminates ways in which professional legal writers must continually gauge how to use language that is effective for its context and its audience.

Exploring the hard edges of formal medical and legal language in this highly nuanced personal context, Robson provides us with an exemplary text through which legal writers can confront questions of stance and voice in their own professional writing, and in the legal texts they read. In a recent symposium honoring Robson's contributions to legal scholarship and teaching, as well as her accomplishments as a writer of fiction, poetry, and essays, I considered how *Notes* models a way of traversing the space between professional and personal voice.<sup>113</sup> At a conference of the Legal Writing Institute held several months before the symposium, I had begun to explore pedagogical applications of Robson's affecting and unsettling meditation as a way of directly considering the role of individual voice, and creativity, in professional writing. I proposed using the text as a teaching tool for stimulating reflection and strategic analysis about the linguistic choices lawyers make, and the perspectives these expressive choices reflect.

Shortly after I explored that idea at the conference, I learned that CUNY colleague Professor Janet Calvo had assigned *Notes* as a reading in the third-year clinically-oriented Health Law Concentration.<sup>114</sup> Professor Calvo reported that *Notes* was a highly effective teaching tool, in part because it promoted deep reflection on legal issues that were covered in the course, including medical malpractice liability and the process of decision making about who sues in a tort liability system, which implicates the larger issue whether tort law functions effectively as a regulatory mechanism for behavior that has negative effects

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<sup>112</sup> Ruthann Robson, *Notes from a Difficult Case*, in *IN FACT: THE BEST OF CREATIVE NONFICTION* 226 (Lee Gutkind, ed., 2005).

<sup>113</sup> Andrea McArdle, *In a Creative Voice: Talking Back to Lawyers' Texts in "Notes from a Difficult Case,"* 8 N.Y. CITY L. REV. 201 (2005).

<sup>114</sup> At CUNY, the Health Law Concentration is an intensive, twelve-credit, Fall semester course covering doctrinal law and public policy on health and medical issues, lawyering skills, professional ethics, and an externship in a health-law practice or judicial setting.

on individuals and society. In addition, *Notes* evoked powerful responses from her students because, as they remarked, it highlights parallels between the patient-physician and client-attorney relationships, and the challenge of humane legal representation, while contextualizing the effects of health law and policy on people who suffer the consequences of inadequate medical care. *Notes* also resonated with these students because the prominent treatment it gives to the drafting possibilities for a legal pleading touched on actual lawyering contexts that these third-year students were encountering in their course-related externships.<sup>115</sup>

The use of *Notes* in a legal writing course would speak to a different set of pedagogical concerns. What for me is especially striking in *Notes*, and what I believe would be meaningful for novice writers, is Robson's honesty in registering her frustration with the formal terms of law and medicine, which are neither graceful, supple, nor humane, and her willingness to translate those terms into language that is more resonant and resilient. That work of translation, of engagement and struggle with professional language, and with the structures of privilege and exclusion that such language can reinforce,<sup>116</sup> seems crucial to developing individual voice. At the same time, the very work of deconstruction and translation that Robson models in *Notes* can be demanding. It presupposes an ability to understand and then reframe formal language, an ability that novice legal writers are still developing. Thus, I will also consider the pedagogical challenges in using such a text with writers, especially law students, when they are still struggling to make legal language a part of their "lexicon."<sup>117</sup> Building on these observations, I consider here, in an exploratory discussion, how *Notes* might be used with developing legal writers as a starting point for a dialogue or a written reflection on the lawyer's role as professional communicator.

The following excerpts from Robson's essay trace the process by which she talks back to the obfuscating, uninviting language of legal and medical discourse, and renames it in her own words. In the first excerpt, she hypothesizes how a complaint initiating a lawsuit in her own case might read, and renders the stark terms of medical pathology with the unrelenting specificity of legal pleading:

*The circumstances of my ordeal are both simple and complicated. They could be allegations on a complaint, numbered and neat, and augmented by specific dates and quotes from the defendants' own records:*

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<sup>115</sup> Various conversations with Professor Calvo in Fall, 2004.

<sup>116</sup> See Stanchi, *supra* note 11.

<sup>117</sup> See OFRI, SINGULAR INTIMACIES, *supra* note 91, at 11-12.

*\*On such and such a date, the patient plaintiff was seen by the Chief Sarcoma Surgeon, who observed that the plaintiff had a “very large abdominal mass and lesions in the liver consistent with liver metastases.”*

*\*On a date approximately a week later, the patient underwent a liver biopsy, for which the cytology report read “suspicious cells present” on “scanty evidence.” (emphasis in original)*

*\*On a date approximately another week later, the patient plaintiff was seen by the oncologist, who told her that she had an “extensive intra-abdominal, presumed soft-tissue sarcoma, probable liposarcoma, with hepatic metastases,” with no “curative potential” and “no role for surgical intervention at this time, given the presence of metastatic disease.”*

*\*On yet another date yet another week later, the patient was ordered to have a biopsy of the abdominal mass, the surgical pathology report for which was liver biopsy with the diagnosis of “well-differentiated lipoma-like sarcoma.” (emphasis in original)<sup>118</sup>*

Robson then seems to rescue us from the unrelieved battering of this language of pathology with an act of translation:

*Meaning that within these four weeks, the patient was first diagnosed with liver metastases by the famous sarcoma surgeon, given a liver biopsy to confirm this judgment on “scanty evidence” that showed “suspicious cells,” then told that she was incurable by the oncologist because of liver metastases, and then given another biopsy of the abdominal tumor, which was mislabeled a biopsy of the liver.<sup>119</sup>*

As the reader takes in Robson’s reframed language—the series of confidence-shattering contradictions and errors, and, most devastatingly, the pronouncement that there was no cure for her condition—it becomes clear that the act of translation is itself double-edged. The clarity and directness of her language underscore the frightening realities that distancing professional language can obscure. As if to reinforce that disturbing irony, and our collective vulnerability in the face of it, she continues with a translation into even more provocative and unsettling terms, stripping away the illusions of expertise and certainty that professional knowledge may have held out for some of us:

*In other words, the doctors screwed up their biopsies.<sup>120</sup>*

After offering another jarring example exposing how, “[i]n other words, the doctors screwed up,”<sup>121</sup> she first re-translates this informal language into formal legal terms, then begins to unpack that legal terminology:

<sup>118</sup> Robson, *supra* note 112, at 227-28.

<sup>119</sup> *Id.* at 228.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

*“Screwing up,” translated into legal language, is a breach of the duty of care. “Deviation from the applicable standard of care” is one of the elements necessary to establish a cause of action for medical malpractice.<sup>122</sup>*

In this passage, it is evident that the work of translation is complex, and that it moves in two directions, as Robson demonstrates in this passage: (1) from a human dilemma expressed in non-formal term—from the client’s words, her emphases, her inflection—to a legal framework that matches facts to legal terms of art; and (2) back again from the language of legal pleading and argument—lawyer’s words—to more generally accessible terms. In *Notes*, Robson challenges language that is unresponsive to her personal situation as a medical patient and a possible malpractice litigant. In this way, she centers the need to hear and amplify the *client’s* voice. But her choice to problematize formal writing, her writing *about* writing, is a meta-critical stance that also raises squarely the question of how a writer preserves her own voice amid the requirements and conventions of professional language. Thus, the second act of translation illustrated in this passage—from formal to explanatory—benefits not only clients and non-legally trained audiences but keeps legal writers attuned to tone and perspective and assumptions about audience in their own writing. Confronting and translating their own lawyers’ words sensitizes legal writers to the risks of becoming perhaps too well “socialized” into the discourse of the profession, when insiders to a discourse do not consider the effects of their words upon those who stand outside of it.<sup>123</sup> The back-and-forth movement between languages that Robson models here helps to illuminate how legal writers can bridge the space between a socialized professional voice, individuality, and interpersonal client-attorney communication.

*Notes* also explores the limitations of legal doctrine itself, in its narrow definition of “damages” that had largely been foreclosed by Robson’s recovery.<sup>124</sup> Broadening the scope of the malpractice complaint to include injuries that were not legally compensable, she demonstrates how the rigid formula of legal pleading could not capture her fear and disbelief at the responses of her caregivers:

*My complaint would omit facts that are not legally relevant: details that do not establish breach of the duty of care and may not be objective or provable. I do not recall the dates of these occurrences and if they appear at all in the medical records, those narratives would differ from mine. These are the legally irrelevant facts that sub-*

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<sup>122</sup> *Id.* at 229.

<sup>123</sup> See Williams, *supra* note 1, at 25-28.

<sup>124</sup> Robson, *supra* note 112, at 240-243.

sume my complaint:

*\*The surgeon's secretary called me and told me the liver biopsy confirmed metastasis. His secretary. Who could not answer my questions. Who did not have a soothing voice. Who was not a surgeon.*

*\*The oncologist, when questioned, repeatedly told me that of course she/they were correct that surgery was useless because she/they were at the world famous cancer center. Though perhaps, she admitted, I could find 'someone off the street to do surgery.'*

*\*The oncologist smirked—I swear—when I lost my previously waist-length hair.*

*\*Despite my protests, I was repeatedly advised to take tranquilizers, given prescriptions for Ativan, and referred to a psychiatrist to help me deal with "it".<sup>125</sup>*

\* \* \* \* \*

*Notes* draws attention to the limits of the law and the language associated with it. It illuminates why lawyers must be able to imagine and articulate a client's situation as a human dilemma calling upon a shared humanity, as well as in the terms of legal pleading and argument that need a lawyer's skill to transmute human experience, suffering, and, loss into legally cognizable terms. This continual back-and-forth of translation can be unsettling for novice legal writers, and the risk of exposing them to a potentially destabilizing operation early in the process of learning the forms and structures of law should not be discounted.

At the same time, reading and working with the ideas in *Notes* can help sensitize a novice writer to tone and audience, and to choice of language. *Notes* raises questions that every legal writer who writes on behalf of a client should consider: are the allegations in a legal complaint a fair representation of a client's words and experience? What aspects of the client's narrative remain? What has been lost in translation? What has been added, and why is it there? What is its source? Focusing attention in this way on preserving the client's voice within the formality of legal language—a central concern in *Notes*—can make legal writers conscious as well of the modulation of their own professional voice in written legal argument and analysis. What kind of writer's sensibility are they developing? What is distinctive about their choice of language, tone, and sentence structure? How resilient is their language, how responsive to context?

*Notes* promotes reflection about all of these questions. It invites consideration of how legal writers decide—often by a strategic judgment—when language is appropriately “legal.” By showcasing writing about law that has a literary vibrancy, the essay operates on another

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<sup>125</sup> *Id.* at 229-230.

level as well: highlighting how and when language can effectively convey an experience that a writer seeks to memorialize, it dispels the idea that good “legal” writing and creative use of language, and creative thought, are mutually exclusive endeavors. In these ways, *Notes* illuminates the process of meta-analysis that all thoughtful legal writers must undertake. For novices, the process may be challenging, but it is a necessary first step in understanding the cognitive and linguistic operations involved in the work of translation—work that all legal writers must do on behalf of their clients, and ultimately for themselves. For these reasons, it seems feasible, and well worth the effort, for clinical, lawyering, and legal writing teachers to engage law students as developing legal writers in reading and discussing *Notes*.

### CONCLUSION

A central insight that readers should draw from Robson’s essay is that, as professional writers, lawyers always need to be conscious of the words they choose, and that creative choice is possible, and necessary, based on context, audience, and purpose. The language of law should reflect the humanity and the service-oriented goals of the legal profession. When clinical, lawyering, and legal writing teachers ask their students to confront and struggle with unfamiliar or ungainly legal language, they recognize that this struggle is a necessary first step to students’ understanding and renaming that language in their own words. It is an essential step for developing legal writers on the path from being outsiders to self-reflective insiders of this professional discourse community. Taking this step will enable them to increase their repertoire, and their possibilities and choices as writers.

My work as a teacher, confirmed by my experience as a writer and reader, is that preserving individuality when writing in a professional voice requires *confidence* in one’s ability to be articulate. The range of approaches discussed in this article—reflective and imaginative writing related to professional communication tasks, use of readings that problematize the question of professional and personal voice, facilitating dialogues that address the negotiation of voice in differing writing contexts, and close, rhetorical reading of judicial opinions and lawyers’ writing—serve a variety of learning styles and perceptual strengths, from the verbal mode (reading judicial and practitioners’ writing, readings outside of professional genres that consider voice), to oral and aural learning (dialogues facilitated in conferences and in the classroom), and tactile learning (reflective and narrative writing). Each of these approaches can help developing legal writers appreciate that effective legal analytic writing requires creative thought, close attention to choice of language, and personal engage-

ment with the subject matter. Each offers the possibility of bolstering students' confidence in their ability to learn, and internalize, the paradigms of formal legal writing, while helping them maintain, or recapture, a sense of individuality. Teachers and mentors across the clinical, lawyering, and legal writing spectrum thus have good reason to be in conversation about a matter of common concern: helping student writers come to terms with legal terms, and guiding their negotiation of professional and personal voice.