

# VOICE, SELF, AND PERSONA IN LEGAL WRITING

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Voice, in writing, implies words that capture the sound of an individual on the page.

— Peter Elbow<sup>1</sup>

*A great lawyer said two thousand years ago, ‘The law is a voiceless magistrate, and a magistrate is the voice of the law.’*

— Judge Wilkin, *U.S. v. Offutt*<sup>2</sup>

[T]here are no voiceless words . . . .

— Mikhail Bakhtin<sup>3</sup>

Were we to break it down, the list of what we teach in legal research and writing programs is long—from case and statutory analysis, to legal research, to written patterns of legal analysis, to more discrete topics like persuasive headings, readable sentences, or citation form. Somewhere on that list, I would put voice. In fact, were I to list those topics in order of importance, I would place voice fairly high. Why? Because in teaching novice legal writers, we are not only teaching voice, but in that process we are also constructing a self—the self of a legal writer.

Teaching voice in legal writing may strike some as odd because voice in legal writing is not readily apparent. In fact, I reg-

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\* Professor of Legal Writing, Seattle University School of Law. In the run-up to this Article, I had several conversations with Jill J. Ramsfield, whom I thank for helping me with “the view from within.” This Article is based off of a presentation at the Thirteenth Biennial Legal Writing Conference, *Does Legal Writing Have a Voice?*, on July 17, 2006, in Indianapolis, Indiana.

1. Peter Elbow, *Writing with Power: Techniques for Mastering the Writing Process* 287 (Oxford U. Press 1981).

2. *U.S. v. Offutt*, 145 F. Supp. 111, 117 (D.D.C. 1956) (quoting Judge Wilkin).

3. Mikhail Bakhtin, *Speech Genres and Other Late Essays* 124 (Caryl Emerson & Michael Holquist eds., Vern McGee trans., U. Tex. Press 1986).

ularly hear people say that legal writing has no voice. While I was working on this paper, a neighbor (and practicing lawyer) asked me about the topic. As soon as I replied, she told me—with raised eyebrows—“legal writing has no voice.” But upon further reflection, as is often the case, the raised eyebrows came down, and she amended her response. “Well, yes,” she said, “it does have a voice—the voice of the law.” I find this type of response fairly common. When people claim that legal writing has no voice, they usually mean that it lacks what could be called a personal voice.

To support my initial proposal, then, that voice belongs high on the list of things that legal writing professionals teach, I need to tackle the question of what voice is—in particular, for legal writing. Does legal writing have a voice? If so, is there a place for the personal in that voice, or is the voice of legal writing more appropriately a professional voice? Or is the question of voice in legal writing more complex than this common dichotomy between the personal and the professional? To answer these questions is to dig deeply into the self of a legal writer and to explore what I would call the persona that legal writers must construct for themselves. If teaching voice in legal writing entails the construction of a particular kind of self, a persona, then for our students, the topic of voice is indeed important. That should make it important to us as well.

Voice. Self. Persona. Where to begin with such abstract and complex concepts? In discussing voice recently with a group of legal writing professionals,<sup>4</sup> I started by presenting them with a series of voice samples. Here is the first sample, which I chose for its lack of personal voice—and seeming lack of any human presence whatsoever.

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4. J. Christopher Rideout, Presentation, *Does Legal Writing Have a Voice?* (Indianapolis, Ind., July 17, 2008).

Voice Sample A  
Parking Regulation

No person shall stop, stand, or park, or permit a vehicle within his control to be parked in any parking meter space while the parking meter for such space displays the words "Violation," "Expired," or the international symbol for "No Parking," or otherwise indicates that the meter is out of order; provided that this section does not apply to a vehicle properly displaying an unexpired valid proof of payment receipt issued by a parking pay station.<sup>5</sup>

I thought most people in the room would have said this passage contains no voice, but a majority indicated that it did.<sup>6</sup> It did not surprise me, however, to hear that no one thought the voice was personal. When I asked them to characterize it, they called it "mechanical" or "robotic"—certainly impersonal terms. I believe that the voice in this passage could fairly be called an example of "the voice of the law." In addition to being impersonal, the voice in this sample is formal, general, and distant—the opposite of a voice in which we might hear a person speaking. I would also say that the voice in this passage is discursal—it is situated almost exclusively within the discourse features of statutory regulations. No one would expect to hear a human voice in statutory regulations. In fact, having one would undermine their appearance of neutrality and, thus, their textual authority.<sup>7</sup>

To say that a text speaks with the voice of the law is, of course, to say that metaphorically that text has a voice. In this sense, every text can be said to have a voice—all texts "speak" in some metaphorical way. But metaphorical voice may not be the same thing as human or personal voice, the voice that people most often mean when they talk about voice in writing. What about "professional voice" in the law, something different from the "voice of the law" but acknowledged by a number of commentators?<sup>8</sup> Is it metaphorical and impersonal only? At first glance, it

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5. Seattle Mun. Code (Wash.) § 11.76.015(A) (2006).

6. I believe that the title of my presentation, *supra* n. 4, posed as a rhetorical question—"Does Legal Writing Have a Voice?"—probably skewed the response.

7. For more on textual authority in the rhetoric of the law, see Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 Va. L. Rev. 1545 (1990).

8. See e.g. Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 Yale J.L. &

would seem to be. The following voice sample strikes me as representative.

### Voice Sample B

#### Argumentative Point and Case Discussion

The veracity prong of the *Aguilar-Spinelli* test is met because the informant would have been booked into jail if the information that he gave turned out to be inaccurate.

An informant's tip satisfies the veracity prong of the *Aguilar-Spinelli* test when the informant has a track record or when the informant makes statements that are against his or her penal interests. *Id.* at 437. Furthermore, courts attach greater reliability to an informant's admission against penal interest in post-arrest situations. *State v. Estroga*, 60 Wash. App. 298, 304, 803 P.2d 813, 817 (1991). In this case, the veracity prong is met because the informant made statements against his penal interest.

Courts conclude that an informant is reliable when he or she makes statements against interest; statements against interest demonstrate that the informant has a strong motive to be truthful. For example, in *Estroga*, the court determined that the criminal informant was reliable when he implicated himself in a marijuana growing operation in exchange for not being prosecuted for possession of amphetamines and marijuana. The court held that the credibility requirement of the *Aguilar-Spinelli* test was satisfied because the informant could have been charged and prosecuted for the crime he was in custody for. *State v. Estroga*, 60 Wash. App. at 305.<sup>9</sup>

When I asked that same group of legal writing professionals, mentioned above, about this sample, they characterized the voice in it, too, as impersonal. They also grudgingly admitted that this

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Humanities 201 (1990); Julius G. Getman, *Colloquy: Human Voice in Legal Discourse: Voices*, 66 Tex. L. Rev. 577 (1988); Elizabeth Perry Hodges, *Writing in a Different Voice*, 66 Tex. L. Rev. 629 (1988); Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 Clin. L. Rev. 501 (2006); Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Marginalization of Outsider Voices*, 103 Dick. L. Rev. 7 (1998).

9. From a student's motion brief (Manuscript on file with the Author).

is the type of professional voice we commonly teach in legal research and writing programs.

In addition to its impersonality, I would say that the voice in this sample, like the voice in Sample A, is largely discursal. That is, it too is situated within the features of its discourse type, although that discourse type (a pre-trial motion) is different from that of the first voice sample (statutory regulations). Nevertheless, the voice here is still general and distant. For example, the agents in this passage are either the “informant,” an abstracted role, or “the court,” an institutional actor. Neither is situated very close to the reader or writer. The voice is also fairly formal, something that is reinforced by the citations for any extra-textual references. Few could argue that this voice is personal, or that it offers evidence of human presence.

But this next sample comes from the same student brief, following on the heels of the passage in Sample B.

#### Voice Sample C

##### Application of Case Discussion to Argument

The informant in our case had everything to lose if he lied to the Seattle Police. Similar to the criminal informants in *Estroga* and *Bean*, the informant in our case was charged with a crime, and a deal was arranged where he would be offered leniency for providing accurate information about the defendant’s drug operation. The informant in our case was in custody throughout the duration of the investigation. Being in custody the entire time provided the informant with a constant reminder that the police were relying on the information he was providing. Although he had no track record, he had a motivation to provide accurate information because, if he did not, then he would be booked into jail. Thus, like the informants in *Estroga* and *Bean*, the informant had a strong motivation not to lie or state mere rumors because if the detailed information he provided about the defendant’s active methamphetamine lab was false, then he would have lost his freedom by being placed in jail.<sup>10</sup>

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10. From a student’s motion brief (Manuscript on file with Author).

Although at first this voice largely sounds like a continuation of the voice in Sample B, I hear a shift—and more of a self in the voice. The most obvious change comes with the use of the first-person pronoun “our,” repeated three times in the phrase “our case.” Now the voice is tied to the author of the passage<sup>11</sup> and, thus, is less distant. The discussion is positioned differently as well. Instead of offering a general discussion of the law on the reliability of informants, the discussion now focuses on a specific case—“our case.” In doing so, the passage—and its voice—are again less distant, and less general. Finally, the passage no longer makes extra-textual references to the corpus of the law, but rather applies those references to the present case—again, “our case.” This grounds the passage more in the world of the author and the case at hand, less in the world of the law at large. And with no extra-textual references, the passage contains no citations, one of several features that made Sample B above seem more formal.

I am not arguing that the voice in this passage is a personal voice. I do not think it is. But I am trying to demonstrate not only that legal texts, including the kind that we teach our students to write, can contain what might be called a professional voice, but also that this professional voice might offer evidence of a writer’s self. How the professional voice of the law might do so, however, and what the nature of this self might be, is complex and something I hope to untangle in this Article.

This Article has already stumbled into the complexities that occur in discussions of voice, including voice in legal writing. For one thing, the discussion quickly breaks down into polarized categories—for example, between personal voice, professional voice, and no voice. In this breakdown, personal voice, or authorial presence, becomes the touchstone for “real” voice. Peter Elbow, quoted at the beginning, states the commonly-held view: “[v]oice, in writing, implies words that capture the sound of an individual on the page.”<sup>12</sup> But such dichotomies between personal voice and professional voice, or between voice and no voice, quickly truncate any discussion of voice in legal writing. Although legal prose may

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11. The “author” may not quite be the same as the student writing the passage; I will discuss this later in the Article.

12. Elbow, *supra* n. 1, at 287.

contain a professional voice, that professional voice rarely includes a personal voice and thus, under the commonly-held view mentioned above, would be regarded as incomplete or limited.<sup>13</sup>

And then there is the matter of no voice, at least in certain legal documents—like contracts, for example. A recent manual on contract drafting explicitly advises against including any voice: “Contract prose is limited and highly stylized—it’s analogous to computer code. It serves no purpose other than to regulate the conduct of the contract parties, so any sort of writerly ‘voice’ would be out of place.”<sup>14</sup> Documents like contracts indeed seem voiceless, offering little sense of human agency behind them, especially when the language is boilerplate. It is difficult to find any voice in them whatsoever, except in the general metaphorical sense of the voice of the law.

If personal voice, or human voice, is the touchstone for voice in writing, then voice in legal writing—whether the professional voice of certain legal writings or the apparent voicelessness of others—seems problematic. Either way, there is little room for the individual writer and that writer’s sense of self. Perhaps this discussion of voice in legal writing should appropriately end here, but I think not. Behind the dichotomies lies something rich and important, having to do with the rhetorical stance that we ask legal writers to assume and with the identity that we ask writers to adopt within that stance. This Article will pursue that below.

Part of the complexity to discussions of voice may also lie in some slippage in what is meant by voice. Although the voice of the law and professional voice in the law may both be metaphorical descriptions, they may not be metaphorical descriptions of the same thing. And although professional voice in the law may not be the same as personal voice, the contrast between them seems starker than is perhaps necessary when personal voice remains the touchstone for voice in writing. It may be that professional voice and personal voice are simply two manifestations of a writer’s self—or, to put it slightly differently, two different forms of a writer’s self-representation. This Article will pursue this idea below as well.

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13. *Supra* n. 8 (citing almost all of the commentators).

14. Kenneth A. Adams, *A Manual of Style for Contract Drafting*, at xxvii (2d ed., ABA 2008).

In my view, sorting out the complexity of voice—and discussing voice in legal prose—requires a rethinking of who the writer is in legal discourse and, importantly, how that writer is represented in legal prose. It becomes a question not of self-expression, but of self-representation and persona. In this Article, I will first look at discussions of voice in writing—beginning with what we might mean by voice, then with discussion of personal voice, and then of professional voice. I then offer another model for looking at voice—a discursal model—and use that model to reconstruct the idea of a professional voice in the law, using the idea of discursal identities, or persona. Finally, I will discuss the implications of this for those who write in the law and for us—those who teach in legal writing programs.

### *I. WHAT DO WE MEAN BY VOICE?*

Anyone who surveys the available literature will discover that voice is difficult to define. In a prominent collection on voice in writing,<sup>15</sup> Kathleen Blake Yancey admits as much in her opening chapter: “[A]s I sought to identify what voice is, . . . the more I seemed to know about it, the less certain I became, and the less I actually knew.”<sup>16</sup> Why this difficulty?

First, although there is a literal, physical voice in speaking, there is no such literal voice in writing. As mentioned earlier, then, any discussion of voice in writing is of something that is necessarily metaphorical—or even, according to Yancey, fictional, figurative, or mythical.<sup>17</sup> Nevertheless, voice is one of the most frequently employed metaphors in the field of rhetoric and composition.<sup>18</sup>

Second, voice—even when used metaphorically—can mean many things, some of them mutually exclusive or even contentious with one another. For example, voice in writing has been discussed in the following ways:

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15. Kathleen Blake Yancey, *Introduction: Definition, Intersection, and Difference—Mapping the Landscape of Voice*, in *Voices on Voice: Perspectives, Definitions, Inquiry*, at vii–xxiv (Kathleen Blake Yancey ed., Natl. Council of Teachers of English 1994).

16. *Id.* at vii.

17. *Id.* at xviii–xix.

18. *Id.* at vii.



- as a reference for human presence in a text;
- as a reference for multiple, often conflicting selves in a text;
- as a source of resonance, for the writer or the reader;
- as the appropriation of other writers or texts;
- as a *synecdoche*<sup>19</sup> for discourse;
- as a reference for truth, or for the self;
- as a myth.<sup>20</sup>

Yancey herself admits that the term “voice” has multiple meanings, but after considerable discussion, and like others, she finally settles on the idea that whatever else can be said, voice is best viewed as a metaphor.<sup>21</sup>

In *Rescuing the Subject*, Susan Miller traces these difficulties with written voice to the shift from orality, in classical Greek and Latin rhetoric, to written rhetoric, or what she calls “textual rhetoric.”<sup>22</sup> In oral rhetoric, voice was the literal, speaking voice of the orator. With the shift to writing, the concept of voice—and its source in a self—had to shift to something else. And in the process, rhetoric had to redefine itself. For example, “elocution, which for decades had been an embarrassment both to rhetoricians and to historians of composition, begins to acquire an easily explained importance when it is placed against the growing eighteenth- and nineteenth-century possibilities that words that had never been *heard* would have to be *read* to revive their formerly assumed human ‘voices.’”<sup>23</sup> Voice in textual rhetorics was still primarily characterized by its contrast with spoken voice, and those textual rhetorics never fully re-established voice as something present in the text itself.

Like Miller, Darsie Bowden sees the origins of the metaphorical sense of written voice in the literal notion of speaking voice and also looks back to classical rhetorics and the concept of *ethos*. “Much of what we understand about voice today is rooted in Classical definitions and debates about the pragmatic and ethical di-

19. That is, voice is the “part” that stands in for the “whole,” the discourse.

20. *Id.* at xviii.

21. *Id.* at vii–viii; see also Jane Danielewicz, *Personal Genres, Public Voices*, 59 *College Composition & Commun.* 420 (2008).

22. Susan Miller, *Rescuing the Subject: A Critical Introduction to Rhetoric and the Writer* 4–6 (S. Ill. U. Press 2004).

23. *Id.* at 6 (emphasis in original).

mensions of rhetorical *ethos*.”<sup>24</sup> Bowden sees *ethos* as central to the shift in voice from the literal to the figurative. *Ethos* was originally a feature of spoken rhetorics, and part of the *ethos* of the spoken word would literally be the actual voice of the speaker. But *ethos* also included a sense of a figurative, or constructed, voice—closely tied to the literal voice, but not quite the same—because of the need for the orator to manipulate the actual speaking voice.<sup>25</sup> Thus, the classical concept of *ethos* helped to open the way for a dual concept of voice and of the self that lay behind it.

Classical notions of *ethos* are still closely tied to oral rhetoric, however, and so the broader notion of voice that Bowden describes still relied on the presence of an actual orator for its metaphorical underpinnings. The writer as a subject was still linked closely to the physical author. Miller suggests that Western rhetoric may have taken a step toward the freeing of that writing subject in the Middle Ages, with the development of medieval formalism.<sup>26</sup> She observes that medieval writers “created elaborate conventional formats for sermons, letters, and legal documents. These documents began to legitimately stand in for oral voices, who may never be heard and whose possessors may be irrelevant to the text’s truth.”<sup>27</sup> With this shift, texts, not people, could possess rhetorical authority, and the sources of that authority could shift, at least in part, from the attributes of the speaker to the conventions of the text itself. The question remains in Miller’s analysis as to whether the concept of voice was freed from the idea of physical presence as successfully as was the concept of the writing subject. Many recent commentators suggest not.<sup>28</sup>

In a survey of recent scholarship on voice, Freisinger finds that the terms “voice” and “self” are still almost automatically linked to a third term, “authentic voice.”<sup>29</sup> Voice remains a mat-

24. Darsie Bowden, *The Mythology of Voice* 23 (Boynton/Cook Publishers 1999).

25. *Id.*

26. Miller, *supra* n. 22, at 79.

27. *Id.*

28. Miller observes that the beginnings of a natural writer’s voice lie in this “textual self-effacement” of the physical author, and I agree, but the idea of the privileging of authorial presence over the text has persisted to the present. For the quintessential treatise on presence and the privileging of speech, see Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans., Johns Hopkins U. Press 1976).

29. Randall R. Freisinger, *Voicing the Self: Toward a Pedagogy of Resistance in a Postmodern Age*, in *Voices on Voice: Perspectives, Definitions, Inquiry*, *supra* n. 15, at 242.

ter of authentic voice, and of presence in the text, because of the enduring appeal of the idea of the writer as an independent subject, autonomous and unshaped by the text or its discourse conventions. Freisinger traces this link to a long-standing tradition in Western humanistic thought, at least since time of the Oracle at Delphi.<sup>30</sup> Central to the Western liberal tradition is a sense of human agency within history: “[T]he Western liberal humanist tradition has accepted belief in a central core of stable, unified, transcendent, even transcultural self, a belief which served as a matrix out of which definitions of citizenship and ethical behavior and creativity are thought to evolve.”<sup>31</sup> A writer’s voice, even if it is inescapably metaphorical, remains well-anchored in the idea of a real self and in voice as the authentic expression of that self.

## II. PERSONAL VOICE AND SELF-EXPRESSION

In the contemporary literature, much of the discussion of voice in writing has focused on personal voice,<sup>32</sup> partly because of this continuing link between voice and presence. Voice continues to be seen as a way of asserting the presence of the “real” writer in the text.<sup>33</sup> For a certain school of thought in composition studies, voice also becomes central. When tied to process pedagogies or to student-centered pedagogies, the teaching of personal voice becomes one of the primary goals of the classroom.

This school of thought goes back to the 1960s, as part of a shift from product to process approaches to writing instruction and to notions of writing as an act of self-discovery.<sup>34</sup> Some date the shift to a prominent conference on college writing instruction at Dartmouth in 1966.<sup>35</sup> In a prominent textbook that followed that conference by a few years, Donald Stewart affirms the link between these approaches and voice when he advocates “authentic voice”—a product of the focus on self-discovery in writing.<sup>36</sup>

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30. Over whose entryway was inscribed “Know Thyself.” *Id.* at 244.

31. *Id.*

32. Whether they support personal voice or question its utility, personal voice remains the touchstone for these commentators. See e.g. Bowden, *supra* n. 24, at 39–62.

33. Yancey, *supra* n. 15, at ix.

34. Freisinger, *supra* n. 29, at 248.

35. See Bowden, *supra* n. 24, at 49.

36. Freisinger, *supra* n. 29, at 248; see Donald C. Stewart, *The Authentic Voice: A Pre-Writing Approach to Student Writing* (W.C. Brown Co. 1972). Another important textbook

“The development of an authentic voice is a natural consequence of self-discovery. As you begin to find out who you are and what you think and to be comfortable with the person you are, you learn to trust your own voice in your writing.”<sup>37</sup>

One of most prominent of the voice advocates has been Peter Elbow,<sup>38</sup> who sees each writer as having his or her own unique voice. In describing that unique voice, Elbow—not surprisingly—uses speech metaphors: “In your natural way of producing words there is a sound, a texture, a rhythm—a voice—which is the main source of power in your writing.”<sup>39</sup> The goal for the student writer, and the writing classroom, is to draw this voice out. If the writer can do so, the effect will be to inject a kind of “magic” into that person’s writing.<sup>40</sup> The magic comes from an authenticity to writing that has found that resonating voice.<sup>41</sup> By the early 1980s, Elbow had become the leading spokesperson for a movement that links voice to self and that finds “real voice” and “real self” to be almost synonymous.<sup>42</sup>

Because of the link of voice to self and to the expression of that self, this school of writing instruction became known as expressivism.<sup>43</sup> It encouraged writing that “resonates” with the individual, “real” voice of the author, partly because writing like this would be empowering. Voice, in writing, was an engaged personal voice. Voice Sample D, below, although perhaps not a prime example, seems closer to this kind of voice than any of the other voice samples mentioned above. It is more personal.

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in the emergence of voice in American writing instruction was Ken Macrorie’s *Telling Writing* (Hayden Book Co. 1970).

37. Stewart, *supra* n. 36, at 2.

38. Elbow advocated developing one’s personal voice in two popular textbooks, *Writing without Teachers* (Oxford U. Press 1973) [hereinafter *Writing without Teachers*], and *Writing with Power: Techniques for Mastering the Writing Process*, *supra* n. 1; for his more recent thoughts on voice and writing, see “What Do We Mean When We Talk About Voice in Texts?” in *Voices on Voice: Perspectives, Definitions, Inquiry*, *supra* n. 15, at 1–35, and *Reconsiderations: Voice in Writing Again: Embracing Contraries*, 70 *College English* 168 (2007).

39. Elbow, *Writing without Teachers*, *supra* n. 38, at 6.

40. Elbow, *supra* n. 1, at 282.

41. *Id.* at 286.

42. *Id.* at 293; see also Freisinger, *supra* n. 29, at 250–251.

43. Danielewicz, *supra* n. 21, at 423. This school of thought is sometimes also known as “expressionism.” See also Susan L. DeJarnatt, “Law Talk”: *Speaking, Writing, and Entering the Discourse of the Law*, 40 *Duq. L. Rev.* 489, 500 (2002).

Voice Sample D  
Student Note

Dear Professor Rideout,

I have attached revision assignment two. I used a sample of a motion I wrote in legal writing two last semester. In revising the sample, I did my best not to change the sample's original meaning. However, I did have to make some changes in certain sections because what I originally wrote seemed to make no sense. As with revision assignment one, I prioritized increasing cohesion and clarity in the passages, and then subsequently worked to revise the structure of each sentence. I hope that I have clearly and coherently identified my revisions and my reasons for making them. If you have any questions or are unclear about any of them, please let me know. Thank you.<sup>44</sup>

This voice sample comes from an explanatory note that was attached to the same motion brief that I excerpted for Voice Samples B and C. Although the content of the note is fairly prosaic, I find the voice in it more striking, especially in contrast with the voice in Samples B and C—written by the same author. The voice here seems more authentic and natural, and it sounds as if it is attached to the “real” author. I admit that I find it more engaging. But if Sample D is the one that expresses the real author, where is the real author in Voice Samples B and C? Do writers possess no self when they write legal prose?<sup>45</sup>

Expressivism has been subject to critique since the late 1980s or early 1990s,<sup>46</sup> partly because its proponents seemed to inadequately respond to questions like the ones above. If voice is linked to self and if writing like that in Samples B and C lacks a voice, then it follows that such non-personal, non-expressive writing also lacks a self. Certainly in non-expressive prose, like the prose in Samples B and C, what we would call the real author is effaced. But that does not mean that the real author is absent, or

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44. Note attached to student's revision of his motion brief (Manuscript on file with Author).

45. I believe that they do, but we will have to come back to that.

46. For an early and comprehensive critique, see I. Hashimoto, *Voice as Juice: Some Reservations about Evangelic Composition*, 38 *College Composition & Commun.* 70 (1987).

that the author—in these samples, a law student—is not struggling to establish some relationship between himself and the text, and perhaps even to locate himself in that text.

Philosophically, the critics of expressivism point out that the self in an expressivist view is overly simplified. Expressivism seems to presume a stable, unitary, and unchanging self,<sup>47</sup> one that is independent of the discourse and bears no necessary relationship to it. Locating voice in this central self, then, relies upon a false epistemology.<sup>48</sup> The author's self is independent of and prior to the text, and that author can choose—or choose not—to “voice” herself in the text. But perhaps part of this “voicing” occurs, not independently of the text, but through the text itself, and through the discourse in which the text is located.

For example, the student author in Sample D above notes that he worked to increase “cohesion and clarity,” but I doubt very much that this phrasing is original with that student. In class, we used this phrase repeatedly as a theme to guide our initial approach to revision, and I am sure that the student is using those words for that reason. He is not “voicing” those words, words that might originate from an autonomous self, but rather is “revoicing” them from the class and from the language that we used there. I would argue, then, that his language and voice are constituted by the language of the class as much as they are a reflection of a self independent of the class, or are independent of what he has written for that class. In that sense, the self and voice in Sample D are “discoursal”—they are a product of the discourse in which that writing is located as much as they are a product of an independent, a priori self.

Similarly, the words in Samples B and C are a “revoicing,” this time of the language of legal texts. Here, the revoicing is positioned more fully in the language of legal discourse, and so we hear much less of a personal voice. But the process is no different, and in that sense, Samples B and C, like Sample D, contain a voice—also a discoursal voice. That voice may not be the personal voice allowed by the expressivists, but viewed differently, it is a voice. Given its close relationship to the language of the law, it may be what is meant by professional voice in legal discourse.

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47. Danielewicz, *supra* n. 21, at 423.

48. Freisinger, *supra* n. 29, at 257.

### III. PROFESSIONAL VOICE AND PERSONAL VOICE

Although the literature on voice in legal discourse is limited, what literature there is, not surprisingly, discusses voice in terms of a professional voice. In a colloquy on voice in legal discourse,<sup>49</sup> Julius Getman observes that establishing this professional voice is a primary goal of law school. “The great bulk of legal education is devoted to inculcating ‘professional voice.’ The magical moment at which the ‘light dawns’ and bewildered first-year students are transformed into lawyers occurs when this voice becomes the student’s own.”<sup>50</sup> Getman does not use the term “revoicing,” but the process that he describes sounds remarkably similar.

Getman lists some of the features of this professional legal voice: it is objective and registers at a high level of generality; its style tends to be formal, erudite, and “old-fashioned”; it contains both terms of art and Latin phrases; and it situates itself at a distance, “as though its user were removed from and slightly above the general concerns of humanity.”<sup>51</sup> All of these features entail an erasure of the personal from what we would consider professional voice in the law.

Elizabeth Mertz mentions voice in her discussion of legal language, but she takes her analysis one step further than Getman, tying the features of a professional legal voice such as those of objectivity and generality, above, to what she describes as the underlying epistemology of legal discourse and to the legal persona that emerges from that epistemology.<sup>52</sup> The core trope of most legal discourse, according to Mertz, is that of argument. Accordingly, the legal narratives contained within that trope convert the persons involved in those narratives into “speaking subjects whose primary identity is defined by their location in an argument,” or defined by the doctrinal requirements of that argument.<sup>53</sup> The roles of these speaking subjects, or characters, within the argument are narrowly shaped by the limits of the corresponding legal doctrine, and speaking about them requires dis-

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49. Getman, *supra* n. 8.

50. *Id.* at 577.

51. *Id.* at 578.

52. Elizabeth Mertz, *The Language of Law School: Learning to “Think like a Lawyer”* 97–101 (Oxford U. Press 2007).

53. *Id.* at 100.

tance and a stripping away of emotional and moral content. In the role-playing setting of law school, law students in turn internalize the limits of those roles, learning themselves "to speak in the voices of persona defined by the demands of . . . legal discourse."<sup>54</sup> They acquire the professional voice of a lawyer, and doing so is a powerful measure of their success at learning "to be and think like a lawyer."<sup>55</sup>

Both Mertz and Getman acknowledge the importance of acquiring the professional voice of a lawyer, but both also lament the narrowness of that voice. Mertz calls the process "double-edged."<sup>56</sup> She acknowledges that stepping into the legal persona of a lawyer, including its professional voice, can be "liberating" for students in that it allows for a more neutral and objective approach to human conflict. But at the same time, that objectivity can erase some of the more important emotional and moral underpinnings to such conflict.<sup>57</sup> This, in turn, can be alienating. In a somewhat cruel twist, the very process of acquiring the voice of a legal professional can also unavoidably alienate the student from some other, more personal voice.

Getman offers a similar analysis. He admits that it is "desirable, indeed crucial, that legal education teach professional voice."<sup>58</sup> Doing so allows for a voice that focuses on general rules and distances students from feelings and empathy, and Getman observes that such a voice is one of the "trappings" of legal professionalism.<sup>59</sup> Yet that same professional voice distances lawyers not only from the concerns of "ordinary people," but also from themselves. "[T]oo exclusive a focus on professional voice is dangerous to the lawyer's psyche."<sup>60</sup> Getman adds that this distanced professional voice even detracts from some of the most important activities that lawyers undertake, such as counseling and negotiating.<sup>61</sup> He concludes that legal education, and the law, undervalue what he calls "human voice," a voice that would analyze

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54. *Id.* at 126.

55. *Id.* at 127.

56. *Id.* at 101.

57. *Id.* at 133-134.

58. Getman, *supra* n. 8, at 578.

59. *Id.*

60. *Id.*

61. *Id.* at 579.



legal issues using “ordinary concepts” and without “professional ornamentation.”<sup>62</sup> In a companion piece to Getman’s, Elizabeth Perry Hodges agrees that the professional voice of the law overshadows a more human voice and calls for more attention to that voice in legal education.<sup>63</sup> By “human” voice, both Getman and Hodges seem to advocate something more authentic and personal, perhaps akin to the expressivist voice mentioned above. Neither, however, offers a model for capturing this kind of voice within the law and legal discourse.

More recently, Andrea McArdle argues that law students need to “preserve some sense of individual voice and ownership of their writing” as they enter into the professional voice and idioms of the law.<sup>64</sup> Like Getman and Mertz, she acknowledges the importance of acquiring a professional voice and ties this voice to the formation of a professional identity. But McArdle, too, observes that in developing a professional voice as a legal writer, students lose something in the process. In her view, students lose a part of their writing self—the very personal voice that Elbow and others, mentioned above, try to inculcate in their student writers. “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.”<sup>65</sup> In response, she advocates that students engage in reflective writing assignments as well as in professional writing assignments, as a way of negotiating between professional voice and personal voice and of “maintain[ing], or recaptur[ing], a sense of individuality.”<sup>66</sup>

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62. *Id.* at 582. Getman does not elaborate specifically on what human voice is, and he does not address the problem of how a legal analysis could employ ordinary concepts and still remain legal analysis. He seems, unlike Mertz, to separate legal epistemology from voice.

63. Hodges, *supra* n. 8, at 639–640. Hodges seems to recommend that these more human voices be “integrated within a legal style,” although like Getman she does not elaborate more specifically.

64. McArdle, *supra* n. 8, at 501.

65. *Id.* at 504.

66. *Id.* at 520–526, 538–539. For models of reflective writing in law school settings, she points to Mark Weisberg, *Epilogue: When (Law) Students Write*, 27 *Leg. Stud. Forum* 421 (2003), and James R. Elkins, *Writing Our Lives: Making Introspective Writing a Part of Legal Education*, 29 *Willamette L. Rev.* 45 (1993). She also draws on work by Ruthann Robson, in particular, *Notes from a Difficult Case*, in *In Fact: The Best of Creative Nonfiction* 226 (Lee Gutkind ed., W.W. Norton & Co. 2005). See also Andrea McArdle, *In a Crea-*

McArdle offers the most direct call for inculcating personal voice in the writing of law students, and her article describes a rich set of assignments that engage students in reflective writing as a way of enlivening this voice in her students. I am not sure, however, that her methodology fully bridges what I see as an inevitable gap between the more individual voice allowed by expressive or reflective writing and the professional voice that we almost universally encourage in our students' legal writing and that lawyers uniformly adopt in practice. In my view, this gap is difficult and problematic because the different voices that I have discussed so far—personal and professional—emerge, in a sense, from different selves, or different identities. That is, from a certain perspective, it is not just one unitary self that is negotiating back and forth between these personal and professional voices.

I would call this perspective “discoursal.” In the next section, I develop this perspective more fully and suggest that it can provide a model for understanding what we are teaching when we teach our students to write in a professional voice. And I hope, in the end, to use that model as a way of enriching what we can mean by professional voice.

Kathryn Stanchi offers another recent critique of professional legal voice in her article, *Resistance Is Futile*.<sup>67</sup> Like Getman, Hodges, and McArdle, above, she finds that in the process of becoming socialized into law and legal writing, law students lose their opportunity for “the development of a personal, original voice.”<sup>68</sup> And like Mertz, Stanchi views this loss as having larger implications for the self. Likening the learning of legal writing to “assimilation” into a new language, she notes that “the goal of assimilation carries with it the consequence that some part of one’s self is replaced or lost.”<sup>69</sup>

Stanchi carries her analysis one step further, however, by noting the effects of this assimilation on marginalized groups and “outsider” voices.<sup>70</sup> For them, the loss of voice—and of self—in legal discourse is even more alienating because, as Stanchi de-

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*tive Voice: Talking Back to Lawyers' Texts in Notes from a Difficult Case*, 8 N.Y.C. L. Rev. 415 (2005).

67. Stanchi, *supra* n. 8, at 7.

68. *Id.* at 22.

69. *Id.* at 21–22.

70. *Id.* at 9–10.

scribes it, legal language is the language of power, dominance, and privilege. For students who are situated outside the dominant group, and outside the cultural experiences of that group, the gap between the personal and the professional becomes even wider.

[T]he existence of a wide gap between personal and professional opinion means that the part of the writer's identity that causes the gap is not "professional" and has no place in the law. When that part of the writer's identity is the writer's outsider status, whether race, ethnicity, gender, or sexual orientation, the outsider status is what is devalued—it is that part of the writer's "I" that is expunged. The teaching of objective writing exacerbates this because it teaches that the information that belongs in the memorandum is professional and, therefore, valued. This means that any other opinions are devalued, and the experiences on which the opinions are based are not the norm. The social method of acculturation contributes to this by imposing, and therefore valuing, the existing legal language and culture and expunging, and therefore devaluing, any competing language and cultures.<sup>71</sup>

Stanchi acknowledges that part of the process of becoming a legal writer entails socialization of the writer into the culture and language of the law, but laments the concomitant loss of the unique voices that outsiders can bring to the law. She calls this the dilemma that legal writing teachers face.<sup>72</sup> In response, she advocates ways of introducing critical theory into the law school and legal writing curriculum, as a way of educating students into the limitations and biases of legal language.<sup>73</sup>

Stanchi's article is part of a larger effort to broaden the character and composition of the legal profession. Of course all students, in acquiring the professional voice of the law, lose some part of their "personal" voice as they acquire the professional voice of the law. McArdle, while acknowledging Stanchi's position, even argues that all law students (and even most beginning

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71. *Id.* at 37–38.

72. *Id.* at 9–10.

73. *Id.* at 54–56.

lawyers) are outsiders to legal discourse.<sup>74</sup> Stanchi seems to argue that the outsider positioning of marginalized students is sufficiently different as to warrant special consideration.

Of interest to me is the fact that both McArdle and Stanchi join Getman and Hodges in calling for greater attention to personal voice, but without fully examining or defining what personal voice is. They, like the expressivists, seem to imply that a personal voice is a more authentic voice, and therefore of value. By "authentic," at times they seem to mean "real," or "true," or something that comes from inside. And even when outsider voice is discussed as emerging from the different experiences and values of an outsider group—as being situated differently—it still seems valued in part for being a more personal voice. But so long as authentic voice means personal voice, and vice versa, then any discussion of professional voice in legal discourse will be problematic and, in my view, incomplete. In the next section, I look more closely at what we might mean by voice and at how, if voice is viewed as a social and discursal phenomenon, this dichotomy between professional and personal voice may begin to collapse. In doing so, I hope to enlarge the possibilities for professional voice.

#### IV. *THE SOCIAL VIEW AND DISCOURSAL VOICE*

Another way of looking at voice is to view it not as personal, or as the expression of an individual, or as coming from within, but rather as social, as coming from outside the writer—from the discourses and the uses of language in which the writer is embedded. Earlier in this paper, I began calling this voice "discursal." In this view, voice in writing is not so much a matter of looking within and trying to express what is there, but rather of trying to control or appropriate the voices that surround the writer in a given writing context.<sup>75</sup> This view, I think, has promise for looking at the voice of legal writers.<sup>76</sup>

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74. McArdle, *supra* n. 8, at 503–504.

75. Joseph Harris, *A Teaching Subject: Composition Since 1966*, at 34 (Prentice Hall 1996).

76. The implications of this view for legal writing will be discussed later in this Article.

In this more social view,<sup>77</sup> voice in writing is intertextual.<sup>78</sup> That is, the language that a writer uses—the words and phrases—do not spring from within, but rather are a “revoicing” of other words and phrases that the writer has encountered. All uses of language are a borrowing from other uses of language, prior uses that the writer has encountered and appropriated for a new writing occasion. In this sense, language becomes “dialogic”—any effort to produce a piece of written discourse is influenced by prior, similar discourses that the writer has encountered and through which those discourses are mediated, as well as by the immediate context for the writing task.<sup>79</sup> This is by now a well-rehearsed view of language, most usually associated with the work of Mikhail Bakhtin and what is known as “dialogism.”<sup>80</sup>

Because most of us are attached to personal, individualistic notions of voice, the social view can be disconcerting at first. Prior notes that it entails a more collective sense of voice that carries over into individual written texts:

It should be clear that romantic notions of voice as the expression of an autonomous individual are not the only notions of voice available to us, whether in everyday or specialized usage. Notions of collective or social voices also exist. . . . [T]hese notions link discourse to typified social identities, relations, and activities found in particular social contexts.<sup>81</sup>

Prior takes this even further, claiming that voice in written texts is what he calls “typified voice.” The voice in a written text is typified in that it derives not from that particular text (for text he uses the word “utterance”),<sup>82</sup> but rather from the chain of texts (utterances) that typify that type of discursive practice. Bakhtin

77. See generally J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35 (1994).

78. See e.g. George Kamberelis & Karla Danette Scott, *Other People's Voices: The Coarticulation of Texts and Subjectivities*, 4 Linguistics & Educ. 359, 363 (1992).

79. See Paul Prior, *Voices in Text, Mind, and Society: Sociohistoric Accounts of Discourse Acquisition and Use*, 10 J. Second Lang. Writing 59 (2001).

80. See e.g. Mikhail Bakhtin, *The Dialogic Imagination: Four Essays* (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., U. Tex. Press 1982), and M.M. Bakhtin, *Speech Genres and Other Late Essays*, *supra* n. 3.

81. Prior, *supra* n. 79, at 62.

82. “Utterance,” for Prior (who follows the usage of Bakhtin) means either a spoken or written use of language. See *id.* at 71.

called the chain of utterances that typifies a particular discursive practice “speech genres.”<sup>83</sup>

Speech genres are central to a dialogic view of language and discourse because they embody the prior discursive practices of a particular type of utterance. Any individual utterance is constructed not from words and phrases, but from speech genres.<sup>84</sup> Thus, the typification of voice relies on an interplay—or “intertextuality”—between a given text and other texts within that discursive practice—the speech genre to which it corresponds. For example, all the appellate briefs that have been written in modern American appellate law practice could be said to comprise a speech genre.<sup>85</sup> Through typification, a particular, individual text—say, an individual writer’s appellate brief—acquires the voice of other texts like it—the voice, say, of appellate briefs. In that sense, the voice of any individual text is social, or dialogic, rather than personal. The voice of an appellate brief is more the typified voice that belongs to appellate briefs than it is a personal voice that belongs to the individual lawyer who wrote the brief.

Although not writing primarily about the dialogic nature of legal prose, Robert Ferguson offers a short account of what could be called typified voice in judicial writing.<sup>86</sup> Judges “explain every action with an individual writing, which then becomes the self-conscious measure of their performance.”<sup>87</sup> As Ferguson acknowledges, however, the voice within that opinion is complex and “profoundly monologic.”<sup>88</sup> By monologic, Ferguson means that the voice of the judicial opinion is not the personal voice of the individual judge writing the opinion, but rather — in the appellate context — a compilation of the voices of the individual judges who decided the case.<sup>89</sup> The task of the writing judge is to appropriate those individual voices, including his or her own voice, into the single authoritative voice of the court—the typified voice of the court. In fact, the individual, subsumed voice of the writing judge may not belong to that judge at all, but rather to

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83. Bakhtin, *supra* n. 3, at 78.

84. Kamberelis and Scott, *supra* n. 78, at 366.

85. Prior, *supra* n. 79, at 64.

86. See generally Ferguson, *supra* n. 8.

87. *Id.* at 202.

88. *Id.* at 205.

89. *Id.*

the judge's clerk.<sup>90</sup> No matter. All voices merge into the voice of the written opinion, typified in that it has the authority and characteristics of a judicial opinion. Its voice draws upon the voice of that speech genre. The voice is "enmeshed within the social machinery of decision-making," so that the voice does not sound like it is acting on its own, but rather is forced to the decision by the logic of the situation—the "perceived boundaries, compelled narratives, and inevitable decisions" that typify a judicial opinion.<sup>91</sup>

Ferguson also calls the voice in a judicial opinion "self-dramatizing." That is because the meaning in a judicial opinion must be absolute and authoritative, the voice in the text must speak wholly for itself and allow for no slippage between that voice and the conclusions of the text.<sup>92</sup> For this reason, the voice within a judicial opinion will often inject a judicial persona, a rhetorical feature of the judicial voice that can give a reassurance of authority.<sup>93</sup> This judicial persona, however, is still different from the personal voice of any individual judge.

So far, the discursal view presents a promising, although more complex, account of professional voice in the law. If dialogism offers a social, collective, and intertextual notion of voice, however, the question remains—what about the individual writer and his or her role in the construction of voice? Bakhtin may offer help here as well. According to Prior, too many of those who read Bakhtin overemphasize Bakhtin's notion of language as being social, and thus of voice as being an act of appropriation only (appropriation of prior utterances). Prior notes, however, that Bakhtin also emphasizes particular people and their intentions.<sup>94</sup> In this notion of voice and writing, the individual act of writing<sup>95</sup> and the context in which it takes place are "co-constitutive."<sup>96</sup> Any individual act of writing takes place within a speech genre (e.g., an appellate brief) and a context (e.g., a law school course, or law practice), but the act of writing that individual appellate brief is not merely a rote exercise in creating a typical appellate brief—or,

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90. *Id.* at 202 n. 5.

91. *Id.* at 207.

92. *Id.* at 206–207.

93. *Id.* at 206.

94. Prior, *supra* n. 79, at 71.

95. The "utterance," using Bakhtin's term, which may be spoken or written. *See id.*

96. *Id.*

in Bakhtin's terms, a mere "instantiation" of a genre.<sup>97</sup> Rather it is also a situated occasion that generates, along with all the other instances of writing of appellate briefs, the genre of the appellate brief. In Prior's words, in any individual instance of writing, "the person is socialized and the social is personalized."<sup>98</sup> In this way, despite the seeming turn away from the individual and the personal, voice is not merely a mechanical or rote echoing of prior discursal voices, but also a product of the relationship between those prior voices now embedded within the discourse and the specific, individual act of writing. The individual act of writing, in other words, represents an instantiation of those voices in a particular moment and context, and through a particular subjectivity.

Under the social view, then, voice includes the personal or the individual, but the personal or individual as redefined. If the individual act of writing and the context in which it takes place are co-constitutive, then the subject at the center of this act<sup>99</sup> (and the voice that metaphorically represents that subject) is also both constituting and constituted.<sup>100</sup>

[The subject] is a particular configuration of discursive and material practices that is constantly working on itself—constructing, deconstructing, and reconstructing itself in and by multiple discourses and social practices, their effects, and the ways they intersect, transverse, and challenge one another. The self is continually created in the integration of one's discourses, experiences, and practices into a single social being.<sup>101</sup>

Under this view, the writer's self is discursal—a product of discourses and discursive practices.

Kamberelis and Scott point out that this co-constitutive relationship between the self and discourse, between the writer and

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97. *See id.* at 72.

98. *Id.*

99. Or, the subject occupying this subject position. On the use of the term "subject position," see Roz Ivanic, *Writing and Identity: The Discursal Construction of Identity in Academic Writing* 10–11 (John Benjamins Publ. Co., 1997).

100. For a study of how the process of constructing a text and the construction of the subjectivity that lies behind that text are mutually constitutive, see Kamberelis and Scott, *supra* n. 78.

101. *Id.* at 361.



the text, distinguishes this view from Cartesian, or expressivist accounts of the writer's self—where the self is autonomous and unitary—and from postmodern or deconstructionist accounts of the writer's self—where the subjectivity of the writer is extinguished, the writer being entirely a product of text and discourse.<sup>102</sup>

### V. DISCOURSAL VOICE AND SELF-REPRESENTATION

Kamberelis and Scott offer a discorsal view of the writer's self, as both constructed and constructing, but they do not break down that discorsal self any further. To what extent is the writer's self constituted, or typified—a product of prior discursive practices? To what extent is that self resisting, the personal pressing back against the social, the situation of the writer pressing back against the genre and the discourse? Another literacy researcher, Roz Ivanic, offers a model for this discorsal self, using the work of Erving Goffman as a model.<sup>103</sup>

Ivanic briefly summarizes the history of voice in modern composition scholarship, from expressivism through social views, noting the limitations of an expressivist sense of voice and its rejection by the social-constructionists.<sup>104</sup> In her opinion, however, some social-constructionist accounts of writing go too far in the other direction, claiming the “death of the author” in writing and overlooking the conflicts of identity that real writers experience.<sup>105</sup> She also points to the revival of interest in voice in scholarship, drawing upon Mikhail Bakhtin. In doing so, she notes the “multiply ambiguous” sense of the word “voice”: on the one hand, as a socially-shaped, or typified, voice upon which a writer can draw, but on the other as the voice of the individual writer, drawing upon that individual writer's history and sum of experiences and adding them to the discorsal voice of the text.<sup>106</sup> “The idea of writers conveying, intentionally and unintentionally, an impression of themselves through their writing is not incom-

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102. *Id.* at 360–361.

103. Ivanic, *supra* n. 99, at 19–23, 98–105 (discussing her use of Goffman and the social-interactionist model of the self); see also Mertz, *supra* n. 52, at 104 (citing Matoesian).

104. Ivanic, *supra* n. 99, at 94–97.

105. *Id.* at 97.

106. *Id.*

patible with a social constructionist view of writing, but complements it. . . .”<sup>107</sup> Ivanic injects the individual writer back into the social view of writing and voice.

The key is through her model of the writer, in which she sees the “writer-as-performer,” or what expressivists might call the “real” writer, engaging in an act of self-representation, presenting herself or himself as the “writer-as-character” in the text.<sup>108</sup> When we encounter what we think of as the real writer within the words of the text, we are actually encountering a discursal self-representation, the “writer-as-character,” a complex portrayal of the writer’s self that is just as much a product of the text (and the forces that compose that text) as is the subject matter of the text.<sup>109</sup> This distinction, between the “real” writer and the writer portrayed in the text, is in her view a crucial oversight in expressivist views of the writer.<sup>110</sup>

As noted above, in making this distinction Ivanic is drawing upon the work of Erving Goffman and his social-interactionist model for social identity.<sup>111</sup> Goffman saw social identity, not as an intrinsic characteristic of individuals, but rather as something that was constructed and then portrayed. His model for the portrayal is important to Ivanic, who adapts Goffman’s model to social-constructionist views of writing.<sup>112</sup> For Ivanic, drawing upon Goffman, a writer’s self exists in the portrayal of that self within the writing—its self-representation—distinct from the writer’s “real” self. This distinction mirrors Goffman’s distinction between the self as performer and the self as character. Ivanic uses different terms for these aspects of a writer’s self, however, and breaks down the self-representation of the writer, the “writer-as-character,” more fully.

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107. *Id.*

108. *Id.* at 96-97.

109. *Id.* at 94-95.

110. *Id.* at 95.

111. On Goffman’s work, see Erving Goffman, *The Presentation of Self in Everyday Life* (2d ed., Allen Lane 1969), and Erving Goffman, *Forms of Talk* (U. Pa. Press 1981). For a study of legal identity that also draws upon Goffman’s work, see Gregory M. Matoesian, *Law and the Language of Identity: Discourse in the William Kennedy Smith Rape Trial* (Oxford U. Press 2001), and Mertz, *supra* n. 52, at 104, who draws upon Matoesian.

112. See Ivanic, *supra* n. 99, at 19-23. Ivanic also notes the shortcomings of Goffman’s model for a social-constructionist model of a writer’s identity and addresses those in her adaptation of it. *Id.* at 20.

In Ivanic's model, the writer's "real" self is what she calls the "autobiographical self."<sup>113</sup> This autobiographical self is what we commonly assume to be the writer's self and what a writer would regard as his or her "real" identity. The autobiographical self, however, is situated prior to the act of writing and any portrayal of the self in the text; it corresponds to Goffman's "performer." Thus, although the autobiographical self is closely tied to who a writer thinks he or she is, no direct evidence of the autobiographical self exists in the written text. It is the self that Ivanic defines as shaped by a writer's "prior social and discursal history,"<sup>114</sup> and it is the self that produces the self-representation of the writer in any given text. It is not, however, the same self as the self that is discursively portrayed in the text. Hence, this self has no direct voice in the written text.

The voice in the text that is most self-evident is the second aspect of a writer's identity, what Ivanic calls the "discursal self."<sup>115</sup> This self, and its voice, is directly represented in the text, corresponding to Goffman's "character." The discursal self is the self-representation, or portrayal, engaged in by the autobiographical self. It would be a mistake, however, to equate the discursal self with the autobiographical self.<sup>116</sup>

A writer's discursal self, in this model, corresponds to the discursal self noted above in the work of Kambrelis and Scott, and thus it is the product of the discursive practices that define and shape any given act of writing. The discursal self of a legal writer clearly manifests itself in Sample B above, as the voice of legal analysis. When the author of Sample B writes, "Courts conclude that an informant is reliable when he or she makes statements against interest; statements against interest demonstrate that the informant has a strong motive to be truthful," we hear the general voice of the law and the discursal voice of legal analysis. But in Ivanic's model, we also hear a self behind those words, although a self represented as a particular manifestation of a discursal self, not a "real" self. Nevertheless, it is the representation of that writer's constructed self.

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113. *Id.* at 24–25.

114. *Id.* at 24.

115. *See id.* at 25–26.

116. This, broadly speaking, is the mistake made by the expressivists.

To the extent that the writer of Sample B followed and appropriated the conventions and practices of legal analysis, those conventions and practices shaped both his discorsal self and the voice of his text. Ivanic notes that the discorsal self is constructed through both the discourse characteristics of the text and the social context in which that discourse is located, including its web of values, beliefs, and power relations.<sup>117</sup> She also notes that this aspect of a writer's self can be multi-voiced and even contradictory.<sup>118</sup>

Ivanic breaks down Goffman's model more fully, however, by positing a third aspect of a writer's identity, what she calls the "self-as-author."<sup>119</sup> With this third aspect, Ivanic's model accounts for the co-constitutive nature of the writer's self, mentioned above,<sup>120</sup> and also presents a fuller notion of a writer's voice. Ivanic observes that writers have a sense of themselves as authors, a sense that they will often establish through an authorial presence in the writing itself.<sup>121</sup> The degree to which writers will assert this type of authorial presence in their writing varies. In some writing, writers will not assert their authorial presence at all, as in Sample B. The extent to which writers will assert their authorial presence is also in part a matter of how much authority they claim. "[S]ome attribute all the authority in their writing to other authorities, effacing themselves completely; others take up a strong authorial stance. Some do this by presenting the content of their writing as objective truth, some do it by taking responsibility for their authorship."<sup>122</sup>

Because the self-as-author is a matter of authorial presence, I would say that this aspect of a writer's identity is what we often regard as voice in writing. As Elbow notes, when we hear the sound of an individual on the page, we hear a voice. But in fact, that is only one part of a writer's voice. The discorsal voice, a representation of the writer's discorsal self, is also an important part of a writer's voice, and in many ways is the central self-

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117. *Id.* at 25.

118. *Id.*

119. *Id.* at 26–27.

120. See *supra* nn. 103–115 and accompanying text.

121. Ivanic, *supra* n. 99, at 26.

122. *Id.*

representation of the writer in a piece of writing.<sup>123</sup> Were an appellate brief not to sound like an appellate brief, or were it not to appropriate the discourse conventions and voice(s) appropriate to an appellate brief, it would not be an appellate brief.<sup>124</sup> That is, a legal writer must construct a discursal self that is the discursal self and voice appropriate for an appellate brief. Nevertheless, the self-as-author also represents an important aspect of the writer's self and voice, especially in that it often is the voice that concerns the writer's positions, values, and beliefs.<sup>125</sup>

Like the discursal self, the self-as-author is also still a self-representation, manifested in the text. It is not the direct expression of the autobiographical self, as expressivist theories would imply, although it may be a product of the autobiographical self.<sup>126</sup> It may also, however, be a product of the discursal self, especially insofar as "one characteristic of a writer's discursal self which can be discursively constructed is authoritativeness."<sup>127</sup>

I find Ivanic's model important for legal writing and voice in two ways. First, it accounts for part of the struggle that law students encounter in our classes when they enter into them and attempt to "become" a legal writer. That "becoming" is in part an effort on our students' part to negotiate with the available discursal voices of legal writing and to construct a new identity—a

123. Ivanic confirms the need for these two aspects of voice in writing, corresponding to the two aspects of a writer's self to be found in written texts. *Id.* at 331.

124. It would still, of course, be something and have the voice of something, depending upon the context from which it emerges: perhaps, for example, a parody of an appellate brief, or (given the situation) a pro se appellate brief—something that many lawyers would deny is a proper appellate brief, but that appellate courts receive regularly.

125. *Id.* at 26.

126. Ivanic notes,

The self as author is likely to be to a considerable extent a product of a writer's autobiographical self: the writer's life-history may or may not have generated ideas to express, and may or may not have engendered in the writer enough of a sense of self-worth to write with authority, to establish an authorial presence.

*Id.* I would add that writers establish an authorial presence not only as a result of their sense of self-worth, but also as a product of their position in the context within which they are writing and the authority that that position offers them. First-year law students writing legal memoranda possess almost no authority to establish a direct authorial presence, separate and apart from the fact that the available discourse conventions for a legal memorandum seldom call for much authorial presence, if any.

127. *Id.*

new self-representation for themselves, one as a legal writer.<sup>128</sup> That self-representation must include the voice of a legal writer, and, as is emerging in this discussion, that voice is largely the product of a discursive self that must be constructed and then represented. Second, her model is sufficiently well-articulated and detailed to allow for a discussion of the co-constitutive nature of voice (the role of the writer's "real" self in voice). Both of these considerations lead me to the concept of persona.

## VI. VOICE, PERSONA, AND PUBLIC VOICE

So the concept of voice is complex. Voice in writing appears to be a matter, not so much of self-presentation, but of self-representation. That self-representation may be largely submerged into the discursive self and a discursive voice—a common voice in legal writing, represented, for example, by Voice Sample B. But that self-representation may also allow for an authorial presence as well, the voice of what Ivancic calls the "self-as-author." If voice, then, is a matter of the writer's self-representation, discursively, how can we readily talk about the relationship between the writer and the voice in a text? Borrowing from what she says is the only other preceding work that directly discusses self-representation in writing, Ivancic suggests the concept of "persona."<sup>129</sup>

Persona is generally regarded as a literary concept, originating in Latin as a theatrical term meaning, roughly, "mask," but then extending in usage to the broader notion of "role."<sup>130</sup> In the twentieth century, literary critics appropriated the term for a more specialized usage in which they distinguished between a literary author and that author's presence in a literary text.<sup>131</sup> The term also started to carry over into composition studies, most notably in the late 1960s with the publication of Walker Gibson's textbook *Persona: A Style Study for Readers and Writers*.<sup>132</sup> "Per-

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128. This construction of a new identity, as a legal writer, is the focus of another project in which I have been engaged with Jill Ramsfield.

129. *Id.* at 89. On persona, she points to an article by Roger D. Cherry, *Ethos Versus Persona: Self-Representation in Written Discourse*, 5 *Written Commun.* 251 (1988).

130. *Id.* at 256–257.

131. *Id.* at 257; see also Robert C. Elliott, *The Literary Persona* (U. Chi. Press 1982).

132. Walker Gibson, *Persona: A Style Study for Readers and Writers* (Random House, Inc. 1969). Although Gibson defines "persona" as "mask," *id.* at 3, he then conflates perso-

sona” as a composition term never quite caught on, however, I suspect in part because the expressivists who followed preferred to focus on the “real” writer and saw writing as self-presentation (or self-expression), not self-representation.

The concept of persona, and the voice of that persona, is perhaps easier to see in narrative fiction. Consider the fifth sample of voice below, from the Preface to Charles Dickens’s novel *Bleak House*, in which the narrator vouches for the veracity of the novel’s portrayal of the mid-nineteenth-century Chancery Court:

#### Voice Sample E

##### Literary Narrator

I mention here that everything set forth in these pages concerning the Court of Chancery is substantially true, and within the truth. The case of Gridley is in no essential altered from one of actual occurrence, made public by a disinterested person who was professionally acquainted with the whole of the monstrous wrong from beginning to end. At the present moment there is a suit before the Court which was commenced nearly twenty years ago; in which from thirty to forty counsel have been known to appear at one time; in which costs have been incurred to the amount of seventy thousand pounds; which is a *friendly suit*; and which is (I am assured) no nearer to its termination now than when it was begun.<sup>133</sup>

In this sample, the author of the novel seems to be speaking directly to the reader. The voice of the passage appears to be the voice of the actual author, Charles Dickens—an act of self-presentation. But anyone assuming that direct relationship between the author and the voice of the passage would no doubt be mistaken.

Dickens is in fact inserting a literary persona into the Preface to his novel, an act of authorial presence that is not quite the same as Dickens inserting himself directly into the Preface. Al-

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na with the actual author, a conflation for which Cherry takes him to task. See Cherry, *supra* n. 129, at 259–260.

133. Charles Dickens, *Bleak House: An Authoritative and Annotated Text* 3 (George Ford & Sylvere Monod eds., W.W. Norton & Co. 1977) (internal footnote omitted).

though Dickens himself was well aware of the inequities that took place in the Chancery Court and wrote other pieces about them,<sup>134</sup> the prefatory statement above, and its persona, are part of the fictional technique of the novel. The persona refers confidently and directly to an actual Chancery case from which the fictional case in *Bleak House* is “in no essential altered” as a way of underscoring the verisimilitude of the work. But the voice of that persona—presumably, but not really, the voice of the author—is just as effective an artifice of fiction as is the reference to an actual, although unnamed, case. It establishes an authorial presence through an act of self-representation.<sup>135</sup>

What about legal texts? Do they contain a persona, and what of the voice of that persona? I would argue that they do, although that persona may be largely discursal—through the voice of Ivanič’s discursal self, or through what Bakhtin calls a “monologic” voice.<sup>136</sup> Voice Sample B, quoted above, offers a good example of that discursal voice in law student writing and is worth revisiting. Remember that when I read this passage out loud at a conference, the idea of its having a voice made some uneasy because it could not be said to contain a personal voice. But the passage definitely contains a discursal voice, and, importantly, this student had to construct it.

### Voice Sample B

#### Argumentative Point and Case Discussion

An informant’s tip satisfies the veracity prong of the *Aguiar-Spinelli* test when the informant has a track record or when the informant makes statements that are against his or her penal interests. *Id.* at 437. Furthermore, courts attach greater reliability to an informant’s admission against penal interest in post-arrest situations. *State v. Estroga*, 60 Wash. App. 298, 304, 803 P.2d 813, 817 (1991). In this case,

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134. *Law Courts, Inquests, and Police*, in Dickens, *supra* n. 133, at 923.

135. Wayne C. Booth has written extensively about the manner in which literary authors construct a presence in the text, through the device he calls the “implied author.” See *The Rhetoric of Fiction* (2d ed., U. Chi. Press 1983). Cherry also discusses the relationship between persona and Booth’s implied author. Cherry, *supra* n. 129, at 260–263.

136. Cherry makes a similar argument for scientific and technical writing. See *id.* at 266–267.



the veracity prong is met because the informant made statements against his penal interest.

Courts conclude that an informant is reliable when he or she makes statements against interest; statements against interest demonstrate that the informant has a strong motive to be truthful. For example, in *Estroga*, the court determined that the criminal informant was reliable when he implicated himself in a marijuana growing operation in exchange for not being prosecuted for possession of amphetamines and marijuana. The court held that the credibility requirement of the *Aguilar-Spinelli* test was satisfied because the informant could have been charged and prosecuted for the crime he was in custody for. *State v. Estroga*, 60 Wash. App. at 305.<sup>137</sup>

Every year, thousands of law students write passages similar to the one above, as do thousands and thousands of practicing lawyers. The passage makes a simple argumentative point and then supports that point with reference to a case. The passage, viewed apart from its content, seems unspectacular, in part because of its typicality and in part because of its seeming lack of authorial presence. An analysis of the initial agents in the sentences quickly illustrates this. In four of the sentences, the court is the agent: “courts attach,” “courts conclude,” “the court determined,” “the court held.” In one other sentence, the informant is the agent: “the veracity prong is met [by the informant].” And in one sentence, the informant’s tip is the agent: “an informant’s tip satisfies.”<sup>138</sup> Nowhere does the author appear as an agent in the passage.

Nevertheless, there is a persona here, a legal persona, with its own voice. The voice is not distinctive—it does not establish what a casual observer would call voice in writing—because it establishes almost no authorial presence. In fact, paradoxically, it is precisely because this passage contains no direct authorial presence that it acquires authority—by virtue of its seeming objectivity and by its reference to underlying layers of textual authority (*State v. Estroga*) spoken through the repeated agency of

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137. Manuscript on file with the Author.

138. Actually, through metonymic extension, the informant is the agent in this sentence as well.

“the court.” It also acquires authority because its voice is so typified. But the student who wrote this passage had to construct that persona and that voice.<sup>139</sup> For the purposes of this motion brief, they represent the student in that section. They are that student’s self-representation.

In fact, as Voice Sample D, quoted earlier in this paper, illustrates, this student is quite capable of projecting a recognizable, or more immediate, voice into his writing: “I have attached revision assignment two. . . . As with revision assignment one, I prioritized increasing cohesion and clarity in the passages, and then subsequently worked to revise the structure of each sentence. I hope that I have clearly and coherently identified my revisions and my reasons for making them.”<sup>140</sup> This voice, too, emerges from a persona, but a persona that is constructed differently from the voice in Sample B. Here, the voice contains more authorial presence.

In Ivanic’s terms, the voice in Sample D, and the persona that lies behind it, emerge more from the self-as-author, less from the discursal self. And this is entirely appropriate. The textual footing for Sample D (a note to explain and justify what the student did for the assignment) is different from the textual footing, and accompanying discourse conventions, for the excerpt from a motion brief in Sample B. Two different textual footings, two different voices, emerging from a persona that is constructed somewhat differently. My point is that the voice in Sample D, seemingly more personal or authentic, still emerges from a persona, a constructed self-representation of the author. That persona may be positioned closer to the self-as-author, but the self-as-author is in turn still discursal, still a self-representation. The self-as-author, here, is positioned as a student writing to a teacher—not quite the same thing as the autobiographical student—and the voice of this persona, although it contains more authorial presence, is the voice of the persona that this student has adopted for this textual occasion. In fact, this persona interests me because it mixes some formality (“prioritized . . .”) with an appeal that sounds more personal (“I hope . . .”). This persona and voice, posi-

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139. And this construction may have run counter to discursal constructions of self and voice that the student had experienced prior to entering law school.

140. See *supra* n. 44.

tioned more closely to the self-as-author, acquires some authority through the positioning.

Law students, of course, are novice legal writers, not yet licensed legal practitioners, and in many respects they are struggling to master a discursal voice in their legal writing. No one should be surprised that their legal writing contains little, if any, authorial presence like that discussed in Sample D above. At the other end of the spectrum from law student writers, perhaps, are Supreme Court justices, writers who are situated very differently within the profession and who possess very different authority as writers. That voice is worth examining as well. The final voice sample below comes from Justice Stevens's dissent in a recent Second Amendment case, *District of Columbia v. Heller*.<sup>141</sup>

### Sample F

#### Supreme Court Dissent

Until today, it has been understood that legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations. Today judicial craftsmen have confidently asserted that a policy choice that denies a "law-abiding, responsible citize[n]" the right to keep and use weapons in the home for self-defense is "off the table." *Ante*, at 64. Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.

The passage begins with a voice common to Supreme Court opinions, essentially the voice of the Court. This voice is collective, magisterial, and—insofar as it could be called a typified voice of the Court—a discursal voice. That is, although Stevens is the

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141. 128 S. Ct. 2783, 2846 (2008).

author of this dissent, the passage opens with the general voice of the Court. His choice of subject-verb combinations contributes to this general, typified voice. He begins with "it has been understood," a passive construction that establishes long-standing precedent ("has been understood") and, as the voice of the Court, needs no explicit reference to agency (the agency being, by implication, the Court—as in "by the Court.")<sup>142</sup>

As the passage continues, however, this discursal voice begins to shift, becoming less the collective voice of the Court and more the voice of Stevens's particular judicial persona.<sup>143</sup> The subject-verb combination of the second sentence is "[t]he Court's announcement . . . upsets." The agency in this sentence still belongs to the Court ("Court's announcement"), but the verb ("upsets") changes the long-standing precedent of the first sentence. With this shift, the persona of the passage begins to step away from the collective voice of the Court with which it began.<sup>144</sup> This distancing between the voice of the persona in this passage and the collective voice of the Court continues in the third sentence, where "judicial craftsmen have confidently asserted." Here, the persona removes itself from the agency in the sentence—it does not join in with the "judicial craftsmen"—and the voice of this persona contains almost a tinge of irony<sup>145</sup> with the choice of the word "craftsmen" and with the modifier to the action—"confidently."

In the final sentence, the voice in this passage becomes much more direct, again as evidenced in the subject-verb combination—"I fear." Here the voice shifts, more to the voice of what Ivancic calls the "self-as-author." Although Stevens maintains his judicial persona, he seems to speak more directly through that persona, and the passage acquires more authorial presence. I would argue that this increased authorial presence extends to the meta-

142. The ambiguity of the omitted agent may have the effect of broadening the long-standing "understanding" by bringing in other agents as well—for example, "long understood by Constitutional scholars."

143. In fact, given that this passage comes from a dissent, the seeming collective voice of the opening sentence—"it has long been understood"—is, of course, also the voice of this persona and may have been consciously adopted as a way of establishing credibility for this judicial persona.

144. Although it is still a discursal voice—the typified voice of a judicial dissent.

145. Irony is a form of distancing. See Wayne C. Booth, *The Rhetoric of Irony* (U. Chi. Press 1974).

phor with which Stevens ends the final sentence. With the Court's change in Second Amendment jurisprudence, the policy of the respondent in this case, the District of Columbia, "may well be just the first of an unknown number of dominoes to be knocked off the table." This is a graphic metaphor, and it entails the destruction of a well-structured arrangement (the jurisprudential dominoes) with little hope of their reordering ("knocked off the table"). It also turns against itself the original metaphor, "off the table," used by those same judicial craftsmen in the third sentence.

I believe that many people, were they to read Sample F above, would claim (at least initially) that the voice of the passage emerges in the last sentence. I say this in accordance with my earlier assertion, backed by Ivanic, that many readers identify voice with authorial presence, like the authorial presence that emerges in that last sentence above. I argue, however, that the passage contains a voice all along, although a more discursal voice, and that that voice shifts, acquiring more authorial presence as it became less the voice of the discursal self—a Supreme Court justice writing a dissent—and more the voice of a particular justice, Justice Stevens, writing as the author of this dissent—the voice of the self-as-author.<sup>146</sup> Stevens can shift the voice in his judicial writing and in doing so insert greater authorial presence because, in part, the discourse conventions for judicial dissents allow this and because, in part, as a Supreme Court justice he has both the legal and the rhetorical authority to do this. He is positioned to insert authorial presence, should he choose to do so.<sup>147</sup>

The persona that he adopts in this passage is correspondingly complex. It begins as a seemingly collective persona, appropriate to the voice of the Court. But as Stevens begins to inject an authorial presence, the voice of the passage also starts to turn against that collective persona, using its own words against itself and almost (but not quite) rendering the original persona to be an ironic one. Roger Cherry, who also views the device of persona as a way describing self-representation in writing, describes this as a

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146. Although it still remains, in part of course, a discursal voice and is also still the voice of Stevens's judicial persona—a persona that has been constructed and that represents, but does not "present," the "real" person writing those words. In fact, given that those words may have been written by Stevens's judicial clerk, this voice has to represent a persona.

147. On subject positioning, see Ivanic, *supra* n. 99, at 27–29.

kind of complex positioning. “[S]elf-representation in writing is a subtle and complex multidimensional phenomenon that skilled writers control and manipulate to their rhetorical advantage. Decisions about self-portrayal are not independent, but vary according to the way in which writers characterize their audience and other facets of the rhetorical situation.”<sup>148</sup> Stevens, with the kind of legal and rhetorical authority mentioned above, can do this. Our students, as novice writers who occupy very different roles and positions within legal discourse, largely should not, at least at first.

It may be, however, that we can show our students examples of legal prose that contain this kind of authorial presence and explain that it, too, can have a place in the professional voice of the lawyer. But it would be wrong to call this presence a personal voice. It is not personal and not quite a manifestation of the “real” writer. It belongs, rather, to the legal persona that they must construct for themselves as they learn to write in the law and through which they will represent themselves. Jane Danielewicz calls this “public voice” and describes it as

that quality of writing that conveys the writer’s authority within a community and ensures a place of participation: when located, the writer assumes an invested position, confident of having equally invested readers. In other words, I’m interested in voice as a social phenomenon with rhetorical effects and social recognition, not as a private, internal, or authentic experience.<sup>149</sup>

Danielewicz is clearly interested in establishing some kind of authorial presence to voice, but she is also clearly distancing herself from notions of personal, or authentic, or expressivist voice. Not surprisingly, she too turns to persona. “Perhaps ‘persona’ is a better word because it signifies something real but fabricated, impermanent but effective nevertheless. . . . There is no direct relationship to or fundamental representation of the writer in the words she chooses to reproduce.”<sup>150</sup>

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148. Cherry, *supra* n. 129, at 252.

149. Danielewicz, *supra* n. 21, at 422.

150. *Id.* at 425.

Danielewicz, then, in advocating for a public voice, turns to persona, as do Ivanic and Cherry. She does not break down this persona into the more detailed self-representation that Ivanic does, but she is clearly interested in establishing authorial presence without falling into the limitations of an expressivist notion of self. And, although she does not use the terms of Kambrelis and Scott, she is further interested in the co-constitutive nature of this public voice, in the contribution of the voice of any individual writing to the typified voice of that genre.

A public voice is one that enters the ongoing conversation to change, amend, intervene, extend, disrupt, or influence it. Where does such authority come from? Power, like voice, results from the relationships among and between individual subject positions, between individuals themselves, and between individuals and institutions. . . . In other words, the writer is not independent of but is influenced by the discourse she herself produces.<sup>151</sup>

These distinctions do not strike me as too fine to teach to our students.

## VII. CONCLUSION: INCULCATING VOICE AND PERSONA IN LEGAL WRITING

As we help our students to become legal writers, we are, among other things, inculcating in them a voice—the voice of a legal writer. We would do well, however, to point out to them that this voice is not a personal voice, at least not in the sense in which they would understand personal voice. But to call it a professional voice—the voice of a lawyer—is not to diminish the importance of that voice, because in a certain way that professional voice still belongs to them. It represents the legal persona that they have constructed for themselves. We could point out that in the other types of writing that they have done before law school, they have also constructed persona, although beginning early on in school, they may have constructed a persona that has remained with them for a long time and with which they may feel very familiar—the persona of student-as-writer. The legal persona that

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151. *Id.* at 425.

we ask them to construct may be new to them,<sup>152</sup> and it may be more difficult to construct because it is more fully positioned within a particular discourse and because that discourse—legal discourse—can seem overly constraining.

Constructing this legal persona entails a complex negotiation between who students think they “really” are as writers and how they are learning to position themselves in legal discourse. If we can explain that they are constructing a new persona, they may find the transition into legal writing a little easier. This may especially be true for students whose writing experience has been shaped by expressivist assumptions or for students whose language experience lies outside dominant discourses. The concept of persona can be useful to students as they move beyond the legal writing classroom as well. Often, when students enter internships or judicial clerkships, they are expected to write in the style and voice of someone else—a judge or law partner. It may be useful for them to see that taking on that voice is a matter of adjusting or reshaping their writing persona—but not necessarily of losing their self.

In tying voice to persona, and to the positioning of that persona, we might also be able to show them that their professional voice can also, at least at times, assert an authorial presence—that part of their persona that represents the self-as-author. Insofar as the typified voice of much legal writing requires an effacing of the self-as-author, or a submerging of it to the discursal self, law students probably receive the message that in its objectivity, neutrality, and distance, that voice leaves no room for themselves. But they are always authorially there in that persona, although not always represented in the voice. And at certain times, the self-as-author can emerge, even if subtly, as I argue for in Voice Sample C above (“our case”). Sometimes, a legal text can represent the self-as-author even more fully, as in Sample F above, which represents the voice of Justice Stevens, a complex voice that shifts within its persona. Our own students may or may not become Supreme Court justices, but they will certainly have the occasion to write in legal settings in which they are positioned with more authority, with the ability to assert more au-

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152. Or not so new for those students who have, for example, worked as a paralegal before entering law school.



thorial presence—in a voice and through a persona that are larger than the merely discursal. In that sense, they would possess a public voice, not the same as a personal voice and perhaps more engaging than what is commonly meant by professional voice.

Finally, if we can not only demonstrate to them that they are acquiring a voice in legal writing, but also explain how that voice is tied to a discursal identity, to a persona, we might also be able to illustrate how they individually contribute to the professional voice of the law. Their contribution would not be direct—within a discursal view, no autobiographical self speaks directly in a text. But the legal persona that they construct can assert an authorial presence, not directly but through a public voice, one that in turn becomes a small part of the professional voice of the law. As Prior points out, “the person is socialized and the social is personalized.”<sup>153</sup>

Even the small choices that they make about their discursal identity shape the professional, typified voice of the law. For example, most of our students, and most lawyers, increasingly choose to avoid blatant legal archaisms.<sup>154</sup> They may do so because we advise them to, or because they want their legal prose to be more readable; but I think they also do so because the demographics of the legal profession are changing, and they no longer identify with the stuffiness that legal archaisms lend to both their prose style and the voice of that prose. Choices that they make about their discursal identity contribute as well to the voice of the profession.

Both through these small changes, then, and in the much larger task of constructing a legal persona, we can help our students to understand who they are as they become legal writers and how that construction entails voice. They may be using the words of the law, but those words are never voiceless. Neither are legal writers.

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153. See Prior, *supra* n. 79, at 72.

154. See e.g. Bryan A. Garner, *Legal Writing in Plain English* 34–37 (U. Chi. Press 2001); David Mellinkoff, *The Language of the Law* 11–23 (Little, Brown & Co. 1963); Richard C. Wydick, *Plain English for Lawyers* 61–63 (4th ed., Carolina Academic Press 1998).