

## Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices

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### I. Introduction

Language is powerful. It is not only the method by which human beings communicate, but it also reflects and creates human social relations. As a reflection of society, language can function as a marker—as an indicator of the speaker's class, gender, or position in society.<sup>1</sup> In addition, language is an “active component” in the creation and constitution of social relations.<sup>2</sup> Indeed,

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The phrase “Resistance is Futile” is borrowed from StarTrek: The Next Generation. See *Star Trek: The Next Generation: The Best of Both Worlds, No. 73* (Sept. 17, 1990).

1. See Pauline Burton, *Women and Second Language Use: An Introduction*, in BILINGUAL WOMEN: ANTHROPOLOGICAL APPROACHES TO SECOND LANGUAGE USE 1, 6-11 (Pauline Burton et al. eds., 1994).

2. See Penelope Harvey, *The Presence and Absence of Speech*, in BILINGUAL WOMEN: ANTHROPOLOGICAL APPROACHES TO SECOND LANGUAGE USE 44, 49 (Pauline Burton et al. eds., 1994); DEBORAH CAMERON, FEMINISM AND LINGUISTIC THEORY 1 (2d ed. 1992);

language has the power to regulate human social relations in subtle ways that are difficult to see.<sup>3</sup> It is a powerful tool of social conditioning—because language and words encompass cultural norms and conventions.<sup>4</sup> What does it mean to act like a “lady?” Is it a sign of rudeness or interest to interrupt someone who is talking? Is the use of a qualifying word or phrase (maybe, I’m not sure) a way to be more accurate or a sign of weakness?

Teaching a new language teaches not only a new vocabulary, but a new culture, with history, rules, customs and conventions. Whether interrupting is a sign of interest or rudeness may depend on a variety of factors, including the culture of the speaker and audience, the geographic region, and the interrupter’s tone.<sup>5</sup> To communicate effectively, the speaker must understand the customs and culture of the language. Otherwise, use of the vocabulary, however accurate, will be ineffective.

In the first year of law school, legal writing is the course dedicated to teaching students to communicate effectively using the language of law.<sup>6</sup> In the last two decades, legal writing pedagogy has focused on methods of teaching language and language skills.<sup>7</sup> This focus has resulted in a dual strategy represented by the two prevailing methods of teaching legal writing: the process view and the social view.<sup>8</sup> Both views emphasize that to communicate as a lawyer—to be heard<sup>9</sup>—the writer or speaker must become a member of the culture and community of legal practice.<sup>10</sup>

The process view teaches the writer to focus on the audience to which the communication is directed, the purpose of the

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Lucinda M. Finley, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 887 (1989) (“Language, and the thoughts that it expresses, is socially constructed and socially constituting.”).

3. See CAMERON, *supra* note 2, at 1.

4. See *id.* at 189.

5. See, e.g., William Safire, *On Language: New Yorkese*, N.Y. TIMES MAG., Oct. 19, 1997, at 36.

6. See J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 60-61 (1994); Kathryn M. Stanchi, *Words From the Podium*, THE SCRIVENER (Scribes—The American Society of Writers on Legal Subjects) (Summer 1997), at 2-3.

7. See Rideout & Ramsfield, *supra* note 6, at 51-54.

8. See *id.* at 51-61.

9. I use “heard” in both its common and legal meaning. To be “heard” in common parlance means to have one’s voice reach another’s ear. See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 559 (9th ed. 1991). In legal parlance, it has a somewhat narrower meaning—it means to be listened to and understood. See Finley, *supra* note 2, at 903.

10. See Rideout & Ramsfield, *supra* note 6, at 59-61.

communication, and the constraints placed on the document by context and the conventions of the legal community.<sup>11</sup> In this way, the process view recognizes that language is interactive—its effectiveness depends not only on the writer, but also on the reader.<sup>12</sup> The social view attacks the teaching of legal language by having as its goal the socialization or acculturation of the novice legal communicator into the legal “discourse community” through the learning of legal vocabulary, legal customs, and legal culture.<sup>13</sup>

Both pedagogies have proven to be quite effective in teaching law students the language of law and introducing them to the legal discourse community. But, because legal writing pedagogy reflects the biases in legal language (including legal reasoning), its effectiveness in “socializing” law students comes at the price of suppressing the voices of those who have already been historically marginalized by legal language.<sup>14</sup> Law is a species of language that some linguists call a “language of power” or “high language”—a prestigious type of language that must be used if the speaker is to function effectively and to which only the most powerful members of society have access.<sup>15</sup>

Linguists have identified a tension associated with languages of power and those traditionally excluded from them: should the marginalized embrace the language of power, and risk being coopted by it, or reject the language of power and risk not being

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11. See Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719, 722 (1997).

12. See CAMERON, *supra* note 2, at 225; Laura E. Little, *Characterization and Legal Discourse*, 46 J. LEGAL EDUC. 372, 393-94 (1996).

13. See Rideout & Ramsfield, *supra* note 6, at 56-61; Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1, 13-14 (1991). Discourse community refers to the social context in which speaking or writing takes place—for example the people, the culture, the history. See Rideout & Ramsfield, *supra* note 6, at 57-58; see also *infra* notes 33-34 and accompanying text.

14. As a shorthand, I refer to those people who have been traditionally excluded from the creation and practice of the law as “outsiders.” This has become something of a term of art. See, e.g., Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds In Plowed-Up Ground*, 11 HARV. WOMEN’S L.J. 1, 1 n.2 (1988); Margaret E. Montoya, *Mascaras, Trenzas, Y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L.J. 185, 185 n.1 (1994) [hereinafter Montoya, *Trenzas*].

15. See CAMERON, *supra* note 2, at 199, 205; Finley, *supra* note 2, at 888 (“Law is a language of power, a particularly authoritative discourse.”). Marginalized groups may be denied access to the language through exclusion from the educational process or through societal or cultural expectations that the language is off-limits. See CAMERON, *supra* note 2, at 205.

heard?<sup>16</sup> In the legal writing context, the dilemma for the teacher is whether the teacher should “socialize” the student to the culture and language of law, thereby risking that the already marginalized will be further marginalized. Of course, the risk of cooption involves more than the loss or compromise of the individual’s voice, which itself is no small thing.<sup>17</sup> But, because language is such a powerful social tool, encouraging “socialization” means that legal writing pedagogy is contributing to the suppression of certain unique and valuable voices, cultures and concepts in law, and ensuring that law remains a language of power and privilege.<sup>18</sup> On the other hand, if students are not socialized, have legal writing teachers “set up” already marginalized students to fail in legal practice?<sup>19</sup>

This Article will examine the ways in which legal writing pedagogy contributes to the marginalization of outsider voices in the law.<sup>20</sup> In Part II, the Article explores the two reigning pedagogies of legal writing and describes the linguistic model used to gauge how teaching law as language marginalizes outsider voices. In Part III, the Article applies the linguistic model to explore

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16. See CAMERON, *supra* note 2, at 222; see also ELIZABETH MERTZ, LINGUISTIC CONSTRUCTIONS OF DIFFERENCE AND HISTORY IN THE U.S. LAW SCHOOL CLASSROOM 24 (1996) (American Bar Foundation Working Paper No. 9419) (stating that professors are trapped by the need to socialize students effectively to the system within which the students will be working).

17. See Finley, *supra* note 2, at 894 n.39 (recounting women law students’ alienation from the law as analogous to being forced to become bilingual and fearing loss of native tongue); see also Marina Angel, *Criminal Law and Women: Giving the Abused Woman who Kills a Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 247 (1996); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1305 (1988). The assimilation into legal culture can be particularly harmful to outsider law students. See Montoya, *Trenzas*, *supra* note 14, at 198 (postulating that for outsiders, “masking” through assimilation into legal culture is self-hating and has psychological and ideological consequences).

18. See Angel, *supra* note 17, at 247. Professor Angel writes:

To overcome the biases built into our current laws and perceptions of facts, we must expand our students’ perspectives at the beginning of law school. Otherwise, by the end of the first year both our methods of teaching and our teaching of existing doctrine result in fashioning intellectual clones who reflect society’s biases.

*Id.* (citations omitted).

19. See, e.g., Katharine T. Bartlett, *Feminist Perspectives on the Ideological Impact of Legal Education Upon the Profession*, 72 N.C. L. REV. 1259, 1270 (1994) (“It would be unfortunate, indeed, if in attempting to correct a systemic problem in which men and their values predominate, law schools further undermined women’s capacities to compete in a male world.”)

20. This Article focuses on legal writing pedagogy. Other law school courses certainly “mute” outsider students. How they do so is beyond the scope of this Article.

specific examples of how legal writing pedagogy may contribute to the marginalization of certain groups by focusing on audience and socializing them into the culture and language of law. In Part IV, the Article considers various solutions, all of which include the suggestion that law school must teach more critical legal theory and methodology in the first year, in a way that demonstrates how to incorporate them into legal practice. The Article concludes that, notwithstanding the practical problems associated with this suggestion, the academy should consider expanding legal writing courses to teach students to incorporate concepts of critical theory into the art of lawyering.

## II. Legal Writing Pedagogy and “Muting”

The two pedagogies of legal writing that prevail today in most American law schools with professional, long-term legal writing teachers—the “process” method and the “social” view—are built around the idea that legal writing is a way of teaching law as a language.<sup>21</sup> The term language is used broadly here; to teach law students how to communicate effectively in the language of law, legal writing must teach, among other things: how to master the appropriate tone, how to understand the culture and customs of the law, and how to use facts, reasoning, and analogy consistent with the law’s rules and constraints.<sup>22</sup> In other words, the goal of legal writing is to teach students how to be lawyers. The two pedagogies are complementary and many teachers of legal writing use them in tandem with one another.<sup>23</sup> However, the two methods have somewhat different, albeit complementary, goals, and have some methodological differences as well.<sup>24</sup> Section A will explore the process and social views of teaching legal writing by discussing the goals, methodologies, and contextual teaching frameworks of the two views. Section B describes the linguistic model of “muting,” which I use to evaluate how legal writing pedagogy affects outsider voices.

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21. See Rideout & Ramsfield, *supra* note 6, at 63; see also Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089, 1090 (1986).

22. See Rideout & Ramsfield, *supra* note 6, at 57; Williams, *supra* note 13, at 16, 23.

23. See, e.g., Jan M. Levine, *Legal Research and Writing Course Materials* (Spring 1997) (on file with author) [hereinafter Levine, *Course Materials*]; see also Phelps, *supra* note 21, at 1091, 1094.

24. See Rideout & Ramsfield, *supra* note 6, at 57.

### A. *Legal Writing Pedagogy: The Process and Social Views*

The process view of legal writing instruction is methodologically “inner-directed”—it focuses on the development of the writer’s personal method or process of writing.<sup>25</sup> One of the primary goals of the process approach is to move the writer away from a “writer-based prose,” to a “reader-based prose” by encouraging the writer to focus on the audience of the document, the purpose of the document, and the formal constraints placed on the document by the rhetorical situation.<sup>26</sup> Methodologically, the touchstone of the process view is that the process of writing is not only knowable, but teachable, and that the way to teach writing is for the teacher to actively “intervene” in many stages of the writing process.<sup>27</sup> The “interventions” emblematic of the process view are used in professional legal writing programs across the country: the requirement that students write numerous drafts of documents, pointed and frequent professorial written critique of drafts, individual conferences between professors and students to expand on and explain the critique, and student rewrites incorporating the critique.<sup>28</sup>

Included within the process view of legal writing is the “epistemic” view of writing, which emphasizes writing as thinking.<sup>29</sup> The epistemic perspective is that the process of writing is more than merely communicating knowledge, but a way of generating knowledge.<sup>30</sup> In the realm of legal writing, the epistemic view teaches that by writing, and concomitantly by analyzing, analogizing, and reasoning, lawyers are intimately involved in “constructing” the law.<sup>31</sup> An example of the epistemic view in law is a lawyer who has, through the process of document drafting, come to view the issues in a case differently, or has changed the focus or arguments of a legal case; that lawyer has gained knowledge by the act of writing (and maybe her audience will gain

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25. See *id.*; see also Phelps, *supra* note 21, at 1089-90.

26. Phelps, *supra* note 21, at 1094; see also Durako et al., *supra* note 11, at 722-23; Little, *supra* note 12, at 392 (outlining how audience is crucial to effective legal rhetoric).

27. See Rideout & Ramsfield, *supra* note 6, at 52-53.

28. See Durako et al., *supra* note 11, at 722-26.

29. See Rideout & Ramsfield, *supra* note 6, at 54; see also generally Phillip Kissam, *Thinking (by Writing) About Legal Writing*, 40 VAND. L. REV. 135 (1987).

30. See Rideout & Ramsfield, *supra* note 6, at 55.

31. See *id.* at 57.

knowledge, too). Thus, the epistemic view fits within the process pedagogy because it emphasizes writing as a recursive and overlapping process of thinking, analyzing, and writing.

The other dominant pedagogy that has emerged in the legal writing field is the social view, so called because it urges the writer to look beyond the personal process of writing to the context or culture in which the document is produced.<sup>32</sup> The social view, much more explicitly than the process view, is about law as a language, with its own culture, vocabulary, and customs.<sup>33</sup> As with any language, true fluency in law requires not just understanding the dictionary definition of the vocabulary or the rhetoric, but how to use the vocabulary and rhetoric correctly and effectively in a given context.<sup>34</sup> The social view regards law as a complex and highly conventionalized discourse and posits that the goal of legal writing training must be to introduce and socialize students into that discourse.<sup>35</sup> Scholarship describing the social view, as one might expect, is rife with words like acculturation, socialization, and initiation.<sup>36</sup> The goal of the social perspective is to get students immersed in legal language and culture—into the discourse community—so that their speech and writing marks them as experts, not novices.<sup>37</sup> Methodologically, the social perspective values active learning by immersion and dialogue.<sup>38</sup> Students learn to lawyer by practicing writing documents that lawyers write

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32. See *id.* at 56-57.

33. See *id.* at 57.

34. See Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 184-85 (1993). A good example of this true fluency is the use of legal vocabulary. As any legal writing professor could tell you, a law student's full understanding of the meaning of specialized legal terms (stipulate, motion, estoppel) only begins with Black's Law Dictionary. The true and complete meaning of these words requires an understanding of the context in which these words are used—as Fajans and Falk put it, an understanding of the entire set of discourse practices that underlie the words. See *id.* Legal writing is one law school course that not only puts words like this in context, but teaches students how to use them correctly in legal documents.

35. See Rideout & Ramsfield, *supra* note 6, at 57; Williams, *supra* note 13, at 9, 13, 24-30. A "discourse" is not only a language or a text, but is a "historically, socially and institutionally specific structure of statements, terms, categories, and beliefs." Finley, *supra* note 2, at 888 n.12.

36. See Phelps, *supra* note 21, at 1091 (noting that in their first year of law school, students "begin an initiation" by "mastering a new 'tribal speech'"); Rideout & Ramsfield, *supra* note 6, at 75; Williams, *supra* note 13, at 23 (drawing directly from cognitive behavioral theory in describing the socialization of teaching legal writing).

37. See Williams, *supra* note 13, at 16; see also *supra* note 1 and accompanying text.

38. See Rideout & Ramsfield, *supra* note 6, at 63-65.

and speaking in contexts in which lawyers speak. For example, in most legal writing courses, students write multiple drafts of legal memoranda and briefs; in many other legal writing courses, students also draft client letters and complaints.<sup>39</sup> These exercises require students to enter the discourse community of the law; the students and legal writing professors then engage in a dialogue through the professors' critiques on the drafts, individual conferences with the professor, and student redrafts.<sup>40</sup>

The social method's emphasis on context is also demonstrated by legal writing courses that teach legal language through first-year moot court, mock law firm models, and lawyer role-play.<sup>41</sup> These methodologies teach the language of law by placing students in true-to-life lawyering situations that require the students to speak and write law like a lawyer. Another example of active socialization is the trend in legal writing courses toward requiring first-year students to extract the legal issues and relevant facts from a legal record comprised of the types of legal documents that lawyers deal with all the time, such as depositions, pleadings, and trial transcripts. In this way, legal writing differs from many law school courses in which students are given facts that are already digested and summarized, such as the ones that students read in most edited case books.<sup>42</sup>

Of course, the process and social views complement each other: one cannot effectively envision and reach one's audience, understand the purpose of a document and its constraints, as required by the process view, unless one understands the discourse community of which one's audience is a part and the context in

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39. See, e.g., LINDA HOLDEMAN EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION* 1, 147, 309 (1996); RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 1, 67, 241, 301, 345 (3d ed. 1998); DIANA V. PRATT, *LEGAL WRITING: A SYSTEMATIC APPROACH* 1, 145, 252 (2d ed. 1993); Durako et al., *supra* note 11, at 726-27.

40. See Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method With the Writing Process*, 64 *TEMP. L. REV.* 885, 891-99 (1991).

41. See, e.g., Daan Braveman, *Law Firm: A First-Year Course on Lawyering*, 39 *J. LEGAL EDUC.* 501, 502 (1989); Bari Burke, *Legal Writing (Groups) at the University of Montana: Professional Voice Lessons in a Communal Context*, 52 *MONT. L. REV.* 373, 391-96 (1991); Nancy M. Maurer & Linda Fitts Mischler, *Introduction to Lawyering: Teaching First-Year Students to Think Like Professionals*, 44 *J. LEGAL EDUC.* 96, 99 (1994); Rideout & Ramsfield, *supra* note 6, at 69, 72.

42. See Durako et al., *supra* note 11, at 726.

which the document will be used.<sup>43</sup> The process and social views also share an emphasis on externally defined constraints and contexts. Although the process approach has been criticized by those favoring the social view for being too “inner-directed” because it deemphasizes social context by focusing on the personal *processes* of individual writers,<sup>44</sup> in terms of substance and language the process approach requires that the writer write for an external audience and an externally-defined purpose.<sup>45</sup> Similarly, under the social view, the unacculturated legal writer must learn to write within a discourse community that is foreign to the writer—to do so, the writer must adopt as context that which the discourse community defines as context. Finally, both methods also require a great deal of preparation and work from the professor. Both methods value individual attention to the student in the form of conferences and critiques of numerous drafts and redrafts, two very time-consuming tasks for the professor.<sup>46</sup> Both views additionally require a substantial time commitment to devise problems and prepare exercises that simulate the lawyering context in a way that reflects real-life lawyering while at the same time preserving pedagogic value to the students.

The general framework within which the social and process views are implemented is similar in legal writing programs throughout the country: a litigation context that focuses on writing memoranda of law to teach “objective” or predictive legal writing and appellate or trial briefs to teach persuasive writing.<sup>47</sup> Objective writing is traditionally taught first, usually in the fall semester of legal writing.<sup>48</sup> Generally, students are given legal documents, asked to determine the issue and relevant facts, to research and analyze the relevant body of law, and to determine how the law resolves the dispute.<sup>49</sup> Legal writing identifies the audience of

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43. See Fajans & Falk, *supra* note 34, at 176.

44. Rideout & Ramsfield, *supra* note 6, at 51-52.

45. See *id.* at 51; Phelps, *supra* note 21, at 1090-92.

46. One commentator estimates that an effective critique of a student memorandum by an experienced legal writing professional takes about ninety minutes. See Jan M. Levine, *Response: “You Can’t Please Everyone, So You’d Better Please Yourself”: Directing (or Teaching in) a First Year-Legal Writing Program*, 29 VAL. U.L. REV. 611, 623 (1995).

47. See, e.g., Durako et al., *supra* note 11, at 726-27 (describing Villanova Law School’s legal writing program); EDWARDS, *supra* note 39, at 2-3, 153; NEUMANN, *supra* note 39, at 67, 350-51; Levine, *Course Materials*, *supra* note 23.

48. See Durako et al., *supra* note 11, at 726; Levine, *Course Materials*, *supra* note 23.

49. See, e.g., NEUMANN, *supra* note 39, at 53-54.

predictive writing as a supervisory lawyer who is unfamiliar with the law raised by the issues of the factual scenario—someone who has asked the junior lawyer to research and analyze for him.<sup>50</sup> The writer's purpose in creating an office memorandum is primarily to communicate to the reader the writer's professional opinion about the outcome of the case and to use legal authority to demonstrate the reasoning supporting that opinion.<sup>51</sup>

After learning the basics of legal analysis and communication in the fall, legal writing then introduces law students to advocacy, which generally includes two components: persuasive writing and oral advocacy.<sup>52</sup> Students are given a litigation scenario and are assigned a client. The purpose of the document is to convince a judge or court to rule in favor of the client and the target audience of the document is the judge or court.<sup>53</sup> One of the purposes of teaching persuasive writing in the first year is to acclimate students to the language of advocacy: its tone, its use of authority and rhetorical devices, its strategies. Teaching persuasive writing also teaches students a great deal about context; it introduces students to litigation and requires students to argue a case within a given procedural posture.<sup>54</sup>

The goals, methodologies, and teaching framework of both the process and social views of legal writing teach law students how to communicate the language of the law effectively. The dilemma arises because these goals, methodologies, and framework are the tools by which legal writing contributes to the marginalization of outsider voices in the law. The following section presents a model of linguistics called "muting," which is the model used in this Article to evaluate the effect of legal writing pedagogy on first-year law students.

### *B. Linguistic Theories of Muting and Determinism*

The term "muting," as used in this Article, refers to the situation in which individuals without power in a given society are

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50. See Durako et al., *supra* note 11, at 728 n.31; NEUMANN, *supra* note 39, at 67-68. I use "him" purposefully here. Despite the influx of women into law schools in the 1970s, studies show that women are not largely represented in the supervisory and partner positions in law firms and legal organizations. See *infra* note 82 and accompanying text.

51. See Durako et al., *supra* note 11, at 728; NEUMANN, *supra* note 39, at 67-72.

52. See Durako et al., *supra* note 11, at 728 ; Levine, *Course Materials*, *supra* note 23.

53. See NEUMANN, *supra* note 39, at 253.

54. See *id.*

silenced by language. The term “muting” originated with Edwin and Shirley Ardener, social anthropologists who, in the 1970s, began to examine how social anthropology had ignored women and their voices.<sup>55</sup> Muting theory is based on the idea that different groups in a society will generate different realities and have different experiences and perspectives.<sup>56</sup> However, because not all groups have equal power in society, all groups will not have equal access to the language through which experiences, realities, and perspectives are expressed.<sup>57</sup> Under the muting theory, the language through which one can communicate, or express one’s reality, is created and controlled by the “dominant group.”<sup>58</sup> Thus, the only mode of expression that is heard or listened to is the dominant language.<sup>59</sup> Muting occurs within the subdominant groups in society because the “fit” between the subdominant reality or experience and the acceptable mode of expression is “imperfect.” Individual members of subdominant groups are muted in the sense that they are forced to express their reality in an imperfect way by using the language of the dominant group.<sup>60</sup> In other words, subdominant groups are forced to “translate” or “encode” their experiences and realities into terms understood by the dominant group—the experiences of the subdominant groups cannot be expressed in “their own terms” because the precise terms do not exist.<sup>61</sup>

Muting theory seems to be derived, in part, from the theory of linguistic determinism, the foundation of which is that language

55. See CAMERON, *supra* note 2, at 140-41.

56. See *id.* at 140-41; Shirley Ardener, *Introduction to PERCEIVING WOMEN* vii, xii (Shirley Ardener ed., 1975) [hereinafter Ardener].

57. See CAMERON, *supra* note 2, at 141. Muting theory posits that not every group has equal access to the “mode of specification,” which Deborah Cameron translates as “the linguistic system through which realities are publicly articulated.” *Id.*

58. See *id.*; Ardener, *supra* note 56, at xii.

59. See CAMERON, *supra* note 2, at 141; Ardener, *supra* note 56, at xii.

60. See CAMERON, *supra* note 2, at 141; Ardener, *supra* note 56, at xii.

61. CAMERON, *supra* note 2, at 141; Ardener, *supra* note 56, at xii. An example of this is women’s experience of sexual harassment before the term “sexual harassment” entered the English language. Women experienced unpleasant and unwanted sexual joking, overtures, and gestures that made their employment situations intolerable, but before the existence of the term “sexual harassment” (widely credited to Catharine Mackinnon), it was difficult to express that “reality” because it had no mode of expression, no name. Angel, *supra* note 17, at 236 (citing also marital rape, stalking, and separation attack as other examples); Finley, *supra* note 2, at 909.

creates our thoughts, our perception, and our reality.<sup>62</sup> To determinists, language is extremely powerful—ideas or experiences for which there is no language simply do not “exist.”<sup>63</sup> Determinism and muting theory share the idea that language can distort reality and alienate outsiders:

It is language that determines the limits of our world which constructs our reality . . . Human beings cannot impartially describe the universe because in order to describe it they must first have a classification system. But, paradoxically, once they have that classification system, once they have language, they can see only certain arbitrary things.<sup>64</sup>

The paradox of determinism, of course, is how outsiders or their experiences can “exist,” since they have no language to express themselves.<sup>65</sup> The answer seems to be that determinism is not absolute; one version of determinist theory is that language creates a self-perpetuating reality that is biased toward the powerful—by definition, those who control the language.<sup>66</sup> So, experiences do not “exist” in the sense that they are not heard and they are not “heard” because there is no language to express them. Thus, the reality created by language is self-perpetuating because the non-powerful are forced to support the hierarchy by learning, writing, and speaking the language.<sup>67</sup> The ideological biases in language may be obvious or may be more subtle.<sup>68</sup> For example, words may encode a particular point of view implicitly: thus, in English, the word “motherhood” has primarily nurturing, caring, and positive connotations.<sup>69</sup> There is no word that connotes negative feelings about motherhood—which many women may have—so, implicitly, the language has not only made invisible negative

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62. In this way, the “epistemic” view of legal writing subscribes, in part, to the determinist view of language, because the epistemic view is that by writing law, we construct and create law. See *supra* notes 29-31 and accompanying text.

63. See CAMERON, *supra* note 2, at 141. Determinists believe that “[w]ithout language, thought is a vague, uncharted nebula. There are no pre-existing ideas, and nothing is distinct before the appearance of language.” *Id.* Think of the Zen riddle of whether a tree falling in a forest makes a sound if no one is in the forest to hear it. Does your experience exist in any real way if you cannot express it?

64. *Id.* at 146-47 (quoting DALE SPENDER, *MAN MADE LANGUAGE* 139 (1980)).

65. See *id.*

66. See *id.* at 130, 146-49.

67. See *id.* at 149.

68. *E.g.*, the use of “man” to mean human in English.

69. See CAMERON, *supra* note 2, at 149.

feelings about motherhood, but has also implicitly marked them as deviant by excluding them from the linguistic community.<sup>70</sup>

Muting theory seems to fall within this less absolute version of determinist theory, although muting theory strongly endorses the premise that the different, unique perspectives and experiences of subdominant groups exist. Under muting theory the fault is in the "fit" between language and experience; determinist theory focuses on the power of language to suppress the existence of any perspective and experience that falls outside its culture and vocabulary.<sup>71</sup>

There are several important consequences that result from the muting of subdominant groups and the power of language to determine our reality.<sup>72</sup> First, the result of the imperfect fit of language and reality means that subdominant groups may be viewed as "inarticulate" because of their inability to express themselves using the dominant language.<sup>73</sup> Second, and relatedly, subdominant groups may be silent about "matters of special concern" for which there is no mode of expression in the dominant model, which means that these experiences and special concerns remain invisible to society and to those with the power to change social conditions.<sup>74</sup> Finally, the existence of a dominant language, and the requirement that an individual use it to be heard, means that alternative methods of expression will be suppressed or inhibited.<sup>75</sup> This is where muting theory overlaps considerably with determinism; because language determines our reality, any experiences for which there is no language are non-existent because they do not have meaning to the powerful.<sup>76</sup> If alternative models

70. See *id.* Another example is how the need for modifiers "single," "working," or "welfare" for the word "mother" means that the word "mother" means a woman who is married, supported by her husband, and not working. Any "mother" who does not fit this definition is "subtly deviant." Finley, *supra* note 2, at 887.

71. See CAMERON, *supra* note 2, at 141-42.

72. See *id.* at 141; Ardener, *supra* note 56, at xii.

73. See Ardener, *supra* note 56, at xii.

74. See *id.* "Muting" theory has much in common with Catherine MacKinnon's "dominance" theory of feminist jurisprudence. Both theories presume that a dominant group controls important aspects of society. For muting theorists, it is language, for MacKinnon it is women's sexuality. See CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 127 (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE].

75. See Ardener, *supra* note 56, at xii.

76. Of course, under an extreme determinist view, such ideas and experiences would not even exist, because there would be no language for them. But assuming a less extreme determinist view, the outcome is that such ideas cannot be expressed, or can be expressed only partially or falsely. See CAMERON, *supra* note 2, at 130.

are created—to the extent that realities can or do exist separate from language—they are devalued by the dominant culture their use is discouraged, and their speakers labeled inarticulate.<sup>77</sup> Thus, those in subdominant groups learn that their experiences are unimportant because there is either no language or imperfect language for them, and that any alternative models or languages are inferior.

### III. How Legal Writing Pedagogy Contributes to the Muting of Outsider Voices

Legal writing pedagogy contributes to the muting of outsider voices in the law because it teaches law as a language, and thereby both reflects and perpetuates the biases in legal language and reasoning. Indeed, because of the degree of cultural and ideological bias contained in the language of law, legal writing's effectiveness in teaching that language is directly proportional to its effectiveness in muting outsider voices: the better legal writing is at teaching the language of law, the more effective it is at muting those individuals whose voices are not included in the language of the law, and the more effective legal writing is at ensuring that those voices will continue not to be heard in the legal context. In this way, legal writing pedagogy results in the consequences predicted by muting theory: individual voices of subdominant/outsider group members are silenced or devalued, the creation of subdominant/outsider models or languages are suppressed and discouraged, and if created, are devalued. Therefore, the experiences and realities of subdominant/outsider groups are rendered invisible.<sup>78</sup>

The process view of legal writing contributes to the muting of outsider voices primarily through its emphasis on audience. The goal of the process method of legal writing to make the writer more outer-directed and more focused on audience means that to succeed in legal writing, the outsider writer must learn to think,

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77. See *id.* at 142, 188; Ardener, *supra* note 56, at xii. An example of this is Black English, or what has been controversially labeled "Ebonics." The use of this "subdominant" language in, for example, professional legal writing is unthinkable, not because it cannot be understood, but because the "dominant" group views it as slang. It is not difficult to imagine the label "illiterate" being attached to, for example, a lawyer who attempted to write a document in Black English, even if a person fluent in that language would easily understand the concepts in the document.

78. See *supra* notes 74-77 and accompanying text.

write, and reason in a way that will be heard by those in positions of power in the law. That means that thoughts must be “translated” or “encoded” into language that the audience will “hear.”<sup>79</sup> Indeed, it is the goal of the process method to have novice legal writers “internalize” the perspective of the legal audience so as to be able to edit documents effectively.<sup>80</sup> In the documents traditionally taught in first-year legal writing programs, predictive memoranda and briefs, the audience is either a supervisory lawyer or a judge.<sup>81</sup> Statistically, white, upper-middle class, heterosexual men tend to be overrepresented in these positions.<sup>82</sup> Even in those limited circumstances in which an outsider is in a position of authority, that outsider is likely to be a person who has successfully assimilated into the culture and language of the law.<sup>83</sup>

Because the social view has as its explicit goal the assimilation of the novice legal writer, it demonstrates the dilemma most acutely.<sup>84</sup> Although this goal envisions mostly that the student will gain new knowledge and skill, the goal of assimilation carries

79. See *supra* notes 55-77 (outlining muting theory); Little, *supra* note 12, at 394.

80. Kearney & Beazley, *supra* note 40, at 900-01.

81. See Durako et al., *supra* note 11 at 728; NEUMANN, *supra* note 39, at 67-68, 254.

82. See, e.g., Michael A. Cardozo, *Diversity: The Profession Must Do Better*, 44TH STREET NOTES (Association of the Bar of the City of New York, New York, N.Y.) Dec. 1997, at 1 (pointing out the dearth of women and African-Americans in positions of power in large New York law firms); Sam Attlesey, *Standoff Between Judicial Reformers Stalls Legislation*, DALLAS MORNING NEWS, Apr. 20, 1997, at 48A, available in 1997 WL 2663201 (noting that, in Texas, only 10% of appeals court judges are minorities, only 11% of the 396 district court judges are black or Hispanic, and that there are no American Indian or Asian-American judges in the entire state); see also Randi Lowenthal, *Learning to Deal With Diversity in the Office*, N.Y. LAW JOURNAL, Mar. 31, 1998, at 1, 5 (noting that women are three times less likely to make partner in large New York City law firms than men and revealing that only 5% of the 173 associates made partners in 1996-97 at New York's 25 largest firms were black).

83. Indeed, that is at the heart of the dilemma of this Article. This should make clear that the thesis of this Article is by no means that outsiders cannot succeed in the law or become “fluent” legal communicators, but that, to do so, they must assimilate. A study conducted by Dr. Sandra Janoff demonstrates the power of the assimilation process of the first year of law school. See Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 204-208. Dr. Janoff studied the 417 members of Temple University Law School's first-year class of 1992. See *id.* at 209. She used three sources of data collection to gauge moral reasoning: (1) the Washington University Sentence Completion Test, (2) the Real-Life Moral Conflict and Choice Interview, and (3) a demographic information questionnaire. See *id.* at 211-12. Dr. Janoff concluded that women tended to enter law school oriented to interpersonal relationships, but after one year, women tended to suppress their relational orientation and engage much more frequently in hierarchical, rights-based reasoning. See *id.* at 238.

84. See *supra* notes 32-42 and accompanying text.

with it the consequence that some part of one's self is replaced or lost.<sup>85</sup> In the context of new language acquisition, both in law and other disciplines, what is lost is not just voice, but perspective and culture.<sup>86</sup>

Finally, the epistemic view confirms that the muting of outsider voices damages not only the individual members of subdominant groups and the groups collectively, but also limits and cramps the dominant language.<sup>87</sup> The epistemic view, like the determinist theory, is that writing law is a way of creating and constructing law.<sup>88</sup> By contributing to the muting of outsider voices in the law, legal writing pedagogy ensures that the biases in legal language and reasoning will be perpetuated and new languages or realities will be devalued and suppressed.<sup>89</sup> Muting means that law will continue to lack the richness and diversity that should come with having lawyers from varied races, genders, ethnicities, and sexual orientations.

Thus, legal writing pedagogy aggravates the already imperfect fit between outsiders' realities and the language legal writing imposes on them.<sup>90</sup> Consistent with their goals of teaching effective lawyering "in the real world," neither the process nor the social pedagogy questions the validity or motives of the external rules imposed by the audience, language, or context of law. Their purpose is to ease the students' entry into the community, not to challenge the customs or culture of the community. Thus, both views have been criticized—by scholars and first-year law students—because in the quest for assimilation, they leave little room for personal definitions of context, or the development of a personal, original voice.<sup>91</sup> Attention to voice appears occasionally

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85. See Weiss & Melling, *supra* note 17, at 1304, 1314, (describing experiences of women at Yale Law School).

86. See Burton, *supra* note 1, at 11-12; Weiss & Melling, *supra* note 17, at 1320, 1354 (describing how women law students felt loss of voice, but also felt the loss of something greater than language, something integral to their "womanness").

87. See *supra* notes 29-31 and accompanying text; see also Ardener, *supra* note 56, at xii (muting of subdominant groups suppresses alternative models).

88. See *supra* notes 29-31 and accompanying text.

89. See *supra* notes 58-61 and accompanying text.

90. See *supra* note 60.

91. See Rideout & Ramsfield, *supra* note 6, at 51, 59 (positing that both the social and process views, by placing a high value on external constraints, contribute to law student complaints that legal writing stifles originality and creativity). Rideout and Ramsfield note that neither the process nor the social perspective of legal writing draws much from what they call the expressivist view of writing, the ultimately "inner directed" view of writing. See

in scholarship on legal writing pedagogy, but when it does the focus is largely on enabling the writer to find an authentic *professional* voice: in the process approach, by being sensitive to audience and purpose, and in the social approach, by immersing oneself in the professional discourse community.<sup>92</sup> The muting effects are exacerbated by the heavy workload and low class hours and credit awarded to legal research and writing—even the most dedicated professors are pressed for time and resources to teach students the basic fundamentals of legal research, writing, and analysis.<sup>93</sup> There is little time to engage students in a discussion about voice, outsider status, or bias in the law without seriously compromising the goal of teaching basic lawyering.

In the following sections, the article outlines some examples of muting in the law and how legal writing pedagogy contributes to it: by teaching students to choose rhetorical frameworks based on audience, by requiring students to analyze using the factual context outlined by the courts, by reflecting the law's overvaluation of the neutral and objective, and by teaching the vocabulary and register of legal language.<sup>94</sup>

#### A. *The Problem of Framing the Question*

Sensitivity to audience means, in part, characterizing or framing a legal issue in ways that the legal audience will understand, and using legal terms that are familiar and persuasive to a legal audience.<sup>95</sup> Framing or characterizing the issue in law is an

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*id.* at 51. Under the expressivist view, the task of the writer is to find a means of expressing one's innermost thoughts; it puts a premium on development of original, spontaneous, and authentic personal voice. *See id.*; *see also generally* Julius G. Getman, *Voices*, 66 TEX. L. REV. 577 (1988); Elizabeth Perry Hodges, *Writing in a Different Voice*, 66 TEX. L. REV. 629 (1988); Philip N. Meyer, "Fingers Pointing at the Moon": *New Perspectives on Teaching Legal Writing and Analysis*, 25 CONN. L. REV. 777 (1993).

92. *See* Phelps, *supra* note 21, at 1098 (explicitly linking the acquisition of an "authentic" voice with reaching one's intended audience); Rideout & Ramsfield, *supra* note 6, at 63 (comparing approach of social view to teaching and learning a foreign language).

93. *See* Rideout & Ramsfield, *supra* note 6, at 77-78.

94. This certainly is not an exhaustive list of the ways that legal writing pedagogy—and law school pedagogy generally—mutes outsider voices. The Article does not address, for example, the cultural and gender biases inherent in the law's dress codes. *See, e.g.*, Mairi N. Morrison, *May it Please Whose Court?: How Moot Court Perpetuates Gender Bias in the Real World of Practice*, 6 UCLA WOMEN'S L.J. 49, 60 (1995).

95. *See generally* Little, *supra* note 12, at 392-96; *see also* Diana Pratt, *Representing Non-Mainstream Clients to Mainstream Judges: A Challenge of Persuasion*, 4 J. LEGAL WRITING 79, 82 (1998).

extremely important tool of advocacy because it dictates what facts are relevant, what law applies, and who wins.<sup>96</sup> Thus, a primary goal of legal writing, especially in teaching persuasive writing, is to teach students how to take a set of facts and frame the legal issue in terms most likely to persuade the audience—a judge or panel of judges.<sup>97</sup> Although part of the creativity of the law is in choosing a framework, both the process and social views demonstrate that the available options are limited by the need to convince the target audience and by legal convention.<sup>98</sup> This creates a “fit” problem when the outsider lawyer or law student attempts to frame the issue in a way that reflects her world view.

Consider these questions asked by Professor Lucinda Finley in her description of the imperfect fit between legal rhetoric and women’s lives:

How can we fit a woman’s experience of living in a world of violent pornography into obscenity doctrine, which is focused on moral harm to consumers of pornography? How can women fit the reality of pregnancy into equality doctrine without getting hung up on the horns of the sameness-difference dilemma? How can women fit the difference between a wanted and an unwanted pregnancy into the doctrinal rhetoric of privacy and “choice”? . . . How can women fit the psychological and economic realities of being a battered woman into criminal law, which puts the word “domestic” before “violence”? . . . How . . . can [women] fit the experience of having what a woman thought was a pleasant social interaction but then crosses the invisible line to become threatening violence, into rape doctrine?<sup>99</sup>

Similarly, Professor Clark Cunningham eloquently expressed the imperfect fit between a client’s story and the need to translate it for a legal audience.<sup>100</sup> Professor Cunningham chronicled how the

96. See *id.* at 373-74; NEUMANN, *supra* note 39, at 258-62.

97. See NEUMANN, *supra* note 39, at 258-60.

98. See *supra* notes 25-42 and accompanying text.

99. Finley, *supra* note 2, at 904 (citations omitted); see also Angel, *supra* note 17, at 235-36.

100. See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1299-1304 (1992). Another wonderful example of the limitations that legal language places on advocacy is in Melissa Harrison and Margaret E. Montoya’s, *Voices/Voces In the Borderlands: A Colloquy On Re/Constructing Identities in Re/Constructed Legal Spaces*, 6 COLUM. J. GENDER & L. 387, 429-432 (1996) [hereinafter Montoya, *Borderlands*]. The story told in *Borderlands* is of

law shaped—and misshaped—his representation of Dujon Johnson, an African-American man stopped, searched, and arrested for disorderly conduct by a white police officer.<sup>101</sup> For example, Professor Cunningham tells how he immediately “translated” Mr. Johnson’s story into the language of law by framing the issue as an illegal *Terry* stop and a pretext arrest.<sup>102</sup> Not only did this translation, or framework, obscure facts important to Mr. Johnson that were not essential to the *Terry*-pretext theory,<sup>103</sup> but it also did not reflect how Mr. Johnson saw the case.<sup>104</sup> To Mr. Johnson, the fundamental issue in the case was how his dignity and respect were taken from him by the police officer, who treated Mr. Johnson like a surly teenager, in part because he was black and had the temerity to challenge the officer’s authority.<sup>105</sup> Professor Cunningham struggled with how to incorporate Mr. Johnson’s perspective into the case but in many ways was thwarted by legal language, which does not provide a framework or vocabulary for Mr. Johnson’s approach to the case.

Mr. Johnson’s story quite literally “lost something in the translation” required by legal language. One of the things lost was Mr. Johnson’s concept of the centrality of race to his legal predicament. For example, as a direct consequence of the chosen legal framework, the first tactic in the case was to move to suppress all of Mr. Johnson’s statements occurring after the illegal *Terry* stop because these statements were the sole basis for the disorderly conduct arrest.<sup>106</sup> So, literally, an effective (perhaps the most effective) legal strategy involved suppressing Mr. Johnson’s voice and story, which was the primary evidence of Mr. Johnson’s theory that he was arrested because he was an African-American man who

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the lawyer representing a developmentally disabled, wheelchair bound, and “almost completely” non-verbal client whose first language is Spanish. *See id.*; *see also* Pratt, *supra* note 96, 82-106.

101. I hesitate to summarize Professor Cunningham’s client’s story for fear that my translation would be an inaccurate oversimplification. Nevertheless, in brief, Mr. Johnson was stopped by police for a traffic violation, which he denied committing, and was then searched for a weapon. *See* Cunningham, *supra* note 100, at 1309-11. When he objected to the officers’ treatment of him, he was arrested for disorderly conduct. *See id.*

102. *See id.* at 1309.

103. *See id.* at 1324-26; *see also infra* Part III.B, which discusses the problem of factual context.

104. *See* Cunningham, *supra* note 100, at 1324-26.

105. *See id.* at 1381-82.

106. *See id.*

resisted being treated like a teen-ager by a white police officer.<sup>107</sup> Neither the *Terry*-pretext framework nor most other conceivable legal frameworks encompasses Mr. Johnson's view of the case. In the final analysis, although under traditional legal principles Mr. Johnson "won,"<sup>108</sup> Mr. Johnson was unhappy with the outcome because his perspective and voice were squelched by the legal framework.<sup>109</sup>

The framework problem identified by Professors Finley and Cunningham begins in first-year legal writing, because legal writing teaches students to frame issues in a way that demonstrates mastery of existing legal language. The process view requires a framework that the legal audience will understand and find persuasive; the social view teaches students to demonstrate expertise in legal language by learning and using the traditional frameworks.<sup>110</sup> Together, the two views teach that students, like lawyers, are limited not only by *stare decisis*, which encourages them to look to existing law to argue even novel legal questions, but also by the ways that law categorizes certain problems.<sup>111</sup> Thus, the dilemma of "translation" described by Professor Cunningham results, in part, from the effectiveness of the social and process views of legal writing, which strive to teach students to perform that translation and communicate it in writing.

Legal writing courses teach students to frame legal questions primarily through legal writing assignments. In memorandum writing, students must predict the outcome of a case by analyzing how a body of law applies to hypothetical facts.<sup>112</sup> Whether the

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107. *See id.* at 1324-25.

108. The case was dismissed by the prosecutor.

109. *See* Cunningham, *supra* note 100, at 1329-30. It is perhaps true that complete satisfaction and happiness is not possible for clients within our legal system—or should not even be the goal. But perhaps it should be a greater *part* of the goal than it is now. Otherwise, what are lawyers really giving to their clients?

110. *See* EDWARDS, *supra* note 39, at 244-46 (describing how to tailor legal arguments to judicial audience); NEUMANN, *supra* note 39, at 254, 260 (developing and testing theory of the case); PRATT, *supra* note 39, at 86-87 (analyzing legal problem and isolating issues).

111. *See* Finley, *supra* note 2, at 904. Professor Finley notes that, "[t]he law has a hard time hearing, or believing, other languages. That is part of its power." *Id.* at 903 (describing how the testimony of labor historian Alice Kessler-Harris was ridiculed at trial in part because of Kessler-Harris' failure to speak in "reductionist" legal terms).

112. *See, e.g.,* EDWARDS, *supra* note 39, at 28-29; Jan M. Levine et al., *Analytical Assignments for Integrating Legal Research and Writing* (1996-97 ed.) (collection of legal writing assignments formerly published by Adams & Ambrose Publishing) [hereinafter *Analytical Assignments*].

memorandum assignment specifies the legal framework, as is frequently done, or requires the students to issue spot, one of the primary goals is for the student to recognize and understand how the facts fit into the legal framework.<sup>113</sup> Both the process and social views of legal writing require teaching students to adhere to the issue or framework assigned; the process view emphasizes that the legal audience expects an answer to a particular legal question and the social view emphasizes that only novices to legal language and culture stray from the precise issue.<sup>114</sup>

In advocacy writing, the legal writing assignments are designed to teach students to analyze a set of hypothetical facts and develop a "theory of the case" and argument framework that will persuade a court to rule in their client's favor. Consistent with the focus on audience and context, legal writing teaches explicitly that the most persuasive theories and frameworks are those that judges will "buy."<sup>115</sup> As legal writing texts correctly point out, judges usually do not like doing things that are very novel without any legal authority—that is the nature of the legal system and of *stare decisis*.<sup>116</sup> Indeed, as lawyers not only assimilated to but also successful at the language and culture of the law, judges and other powerful audience members will be persuaded by arguments that use legal language, not those that reject it.<sup>117</sup> Thus, legal writing teaches that the most persuasive frameworks and theories tend to be those that are most mainstream. As one legal writing text states:

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113. See *Analytical Assignments*, *supra* note 112.

114. See NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., *LEGAL WRITING AND OTHER LAWYERING SKILLS* 165, 167 (3d ed. 1998).

115. Some legal writing texts explicitly describe judges as consumers of ideas. See EDWARDS, *supra* note 39, at 244-45; NEUMANN, *supra* note 39, at 260.

116. See Finley, *supra* note 2, at 890; NEUMANN, *supra* note 39, at 260 (noting that in developing a theory of the case, a judge "like any other kind of consumer . . . buys only when struck with a feeling of confidence that the purchase will turn out well, without causing injustice or embarrassment on appeal or before the public."); see also Little, *supra* note 12, at 394 (noting that when the audience is not strongly iconoclastic, the advocate benefits by the force of convention). Most successful lawyers and judges are most susceptible to arguments within frameworks with which they are familiar. To make a truly novel argument is to take a risk. See Little, *supra* note 12, at 394. Professor Little points out that in the advocacy context, the advocate is more likely to succeed (although not always) with her audience if the advocate "start[s] with widely accepted notions." *Id.*

117. Cf. Janoff, *supra* note 83, at 238 (studying the power of the first year of law school to assimilate people into culture of law).

Lawyers as a group tend to be personally conservative (though not necessarily politically so). This is particularly true of judges. Because of the public nature of their job and the fact that they are seen as safeguarders of public morality, lawyers who become judges tend to be conservative in their personal lifestyle.<sup>118</sup>

Relatedly, because it is also part of legal writing courses to teach *stare decisis* and application of legal rules, the assigned framework will almost always be one that reflects existing law. As a result, it will also reflect the law's biases and hierarchies.<sup>119</sup> Thus, legal writing contributes to the creation of lawyers afflicted with the legal tunnel vision described by Professor Cunningham in his representation of Mr. Johnson.<sup>120</sup> Although it was arguably the most effective framework, Professor Cunningham did not have to frame the question as an illegal *Terry* stop. However, he could only go "outside the box" at great risk to his client and his professional reputation. In addition, the available legal frameworks rarely encompass ideas like the special circumstances that race might play in an area of law that is not explicitly centered around race issues, such as Fourth Amendment law.<sup>121</sup>

For example, consider a student assigned to write a brief and confronted with a fact pattern similar to Dujon Johnson's experience with the Michigan police. In part because of its emphasis on reaching one's audience, legal writing would encourage and reward students who successfully recognized the case as an illegal *Terry* stop and pretext arrest, because this is likely to be how a judge would see the case as well. The same emphasis on audience would discourage an outsider law student, even one personally familiar with white police officers' treatment of people of color, from framing the case to reflect his outsider viewpoint. The process view's focus on audience, combined with the inherent conservatism of the law and *stare decisis*, would require the student to consider whether the court would "hear" an argument framed (i) to reflect

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118. See EDWARDS, *supra* note 39, at 245.

119. This point is demonstrated by the significant amount of space in legal writing texts devoted to rules, holdings, and precedent. See, e.g., EDWARDS, *supra* note 39, at 15-27; NEUMANN, *supra* note 39, at 15-25, 127-133; SCHULTZ & SIRICO, *supra* note 114, at 9-14.

120. See *supra* notes 99-107 and accompanying text.

121. That is, an area of law that purports and appears to be not about race and within which race is not "central" as a matter of law, unlike, for example, race discrimination law. See Cunningham, *supra* note 100, at 1370-71.

directly the view that race was central to the case and (ii) to reflect the goal of restoration of Mr. Johnson's dignity.

The answer is that a court probably would not "hear" either framework. Specifically, part of Professor Cunningham's point is that such a framework does not really exist in legal language. Because an attempt to create a novel framework would risk alienating the audience, legal writing pedagogy would counsel against it. Certainly, no existing legal framework permits a lawyer to change the goal in a criminal case; the law prescribes that the goal of the defendant, and thereby his lawyer, is the avoidance of conviction, not the restoration of dignity.<sup>122</sup> Moreover, legal writing pedagogy, in teaching students about the legal context and legal audience, would likely encourage a framework that appeals to judges' inherent conservatism. Because the law purports to be "neutral", those heavily invested in the law, like judges, can become angry at a lawyer or client who makes a bias argument in a case involving "neutral" law.<sup>123</sup> So, even if the legal writing professor is familiar with and gives a brief explanation of potential biases in the law, the focus on the audience requires that the student put aside critical jurisprudence and develop a theory and framework that will be most attractive to a mainstream audience.<sup>124</sup> Thus, legal writing, by acceding to the law's framing of

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122. See Finley, *supra* note 2, at 899, 902-03 (noting that the law's framework of simple dichotomies such as guilty/not guilty frame conflicts and exclude complex reality). The framework is hardly debatable; one wonders whether, under a traditional interpretation of the rules of professional ethics, arguments that serve the restoration of dignity at the expense of the client's liberty might amount to legal malpractice. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101-02 (1980) (mandating that a lawyer must not fail to represent a client zealously within the bounds of the law); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983) (requiring diligence) and cmt. [1] (stating that a lawyer should pursue a client's interests with commitment, dedication, and zeal in advocacy). If so, can the legal writing professor teach anything but the "no conviction" framing of the arguments?

123. The judge in Mr. Johnson's case not only became irritated, but directed his irritation at Mr. Johnson. To the extent Professor Cunningham tried to make race-based arguments, the judge disregarded them and characterized Mr. Johnson as a person with "a chip on his shoulder" who was "hollering racism." Cunningham, *supra* note 100, at 1370, 1376-77. Given the judge's irritation at Professor Cunningham's attempt to inject race into the legal proceedings, one can infer that the judge would have been less than open to a framework that had racial harassment at its center. See *id.* at 1320-21, 1377-78.

124. Of course, a professional, experienced legal writing professor would likely encourage students to emphasize the disrespectful nature of the officers' conduct and point out the race issues in the "Facts" section of the brief or memorandum, but it is unlikely that these facts, regardless of importance to the client or the writer, could form the framework of the issue or the basis of a legal argument for avoiding conviction without distorting them or losing the audience.

the debate and prescription of the goals, because these are the most likely to reach the audience, makes the unique concerns of the outsider student and client voiceless.<sup>125</sup>

Indeed, for the outsider student, the harm is more compound than voicelessness. Legal writing requires the student to speak in the law's voice—silence is not an option. The methodology of legal writing, which requires a number of critiqued drafts and individual feedback, ensures that by the final draft of a legal document, the student will frame the question to reach the audience and write it to convince the audience. More important, however, is that the student will have *internalized* the perspective of the legal audience—indeed, this is a primary goal of the process view.<sup>126</sup> Thus, once legal writing teaches the student the perspective of the legal audience and how to frame the issues in a way consistent with that audience, it is unlikely that the student will be able to step outside the legal framework, and use his or her “pre-lawyer” outsider voice to address legal issues.<sup>127</sup>

### *B. The Problem of Emphasis on Context in Use of Facts*

Related to the problem of framework is the problem of factual context, because the issue or framework determines which facts are relevant. In addition to teaching how to frame an issue, legal writing also teaches students to take the framework, research the appropriate law, and apply the law to the client's facts.<sup>128</sup> Inherent in teaching the application of law is the teaching of two skills related to facts: (i) how to identify outcome determinative facts in judicial opinions—those facts which are legally relevant and determine how a given rule is applied and the outcome of a case<sup>129</sup> and (ii) how to use the reasoning in judicial opinions to determine which facts from the client's story are outcome determi-

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125. See Cunningham, *supra* note 100, at 1387. In his final letter to Professor Cunningham, Dujon Johnson writes, “To be voiceless was the greatest pain of all.” *Id.* Of course, the way that the American legal system is set up, we must be more concerned about our clients' loss of voice than our students', but part of Professor Cunningham's point is that the myopia of the law—and the resultant myopia of lawyers—does a disservice to our clients.

126. See Kearney & Beazley, *supra* note 40, at 900-01; Meyer, *supra* note 91, at 792.

127. Janoff, *supra* note 83, at 236-38.

128. See NEUMANN, *supra* note 39, at 32.

129. See *id.* at 176-77; Jethro Lieberman, presentation at the Legal Writing Institute Conference (June 19, 1998) (entitled *The Art of the Fact*, publication forthcoming in 5 J. LEGAL WRITING).

native.<sup>130</sup> In their discussion of case law in a memorandum, for example, students must generally stick to the facts that a court found important in its reasoning and determine the outcome of their client's case by comparing the relevant facts from precedent to their client's facts. Similarly, students learn to cull the relevant facts of their client's story from legal documents provided in the assignment; for the most part, students learn to incorporate the relevant facts into the "Facts" section of the legal memorandum, and leave out facts that are not legally relevant.<sup>131</sup> In teaching these crucial fact skills, however, legal writing may contribute to the alienation of outsider law students because it teaches students to accept a court's finding of outcome determinative facts. Frequently, however, a court's perspective on which facts are outcome determinative may be biased.<sup>132</sup>

Professor Margaret Montoya tells a story about her first year of law school that illustrates the dilemma of the outsider forced to accept a court's decision about outcome determinative facts.<sup>133</sup> Professor Montoya remembers that the only Latina she encountered in a case in her first year of law school was Josephine Chavez, a young woman charged with manslaughter based on her having given birth in a toilet in her family's home and having hidden the baby under the bathtub.<sup>134</sup> Professor Montoya recounts that the appellate opinion focused on the "legal personhood" of the dead baby, also touching on issues of criminal intent, mens rea, and diminished capacity; however, little cultural or

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130. See NEUMANN, *supra* note 39, at 176, 258-62.

131. It is true that the better legal writing texts and courses teach students to skillfully use facts that are not strictly relevant. See, e.g., EDWARDS, *supra* note 39, at 184 (1996); NEUMANN, *supra* note 39, at 176. But, these facts still do not fall into that special category of legal relevance—they are peripheral, not "outcome determinative."

132. See Montoya, *Trenzas*, *supra* note 14, at 201-08.

133. See *id.* at 201. This problem is intricately connected to the problem of the sanctity of audience in legal writing and the problem of framework. The Dujon case is also an excellent illustration of the "bias" of outcome determinative facts. See Cunningham, *supra* note 100, at 1324-26; see also Getman, *supra* note 91, at 583. Professor Getman tells a story of a class discussion of *State v. Williams*, in which an American Indian couple is convicted of negligent homicide for failing to bring their baby to a doctor when he became seriously ill. An African-American student in the class interjected facts not stated in the opinion about why black people "often avoid doctors." The student interjected facts that the court did not even mention, much less find relevant, but the facts enhanced understanding of the case. See *id.*

134. See Montoya, *Trenzas*, *supra* note 14, at 201.

gender related information is discussed.<sup>135</sup> Missing, Professor Montoya argues, are the following questions:

What did it take to conceal [Josephine Chavez's] pregnancy from her familia? With whom did she share her secret? How could she have given birth with "the doors open and no lights . . . turned on?" How did she do so without waking the others who were asleep? How did she brace herself as she delivered the baby . . . ?<sup>136</sup>

Also missing are the key Latina cultural elements of *vergüenza* ("shame") that would begin to explain Josephine Chavez's desperation to conceal her pregnancy from her family, because her pregnancy, proof positive of her sexuality, would be viewed by her family as a lack of *respeto* for the family.<sup>137</sup> None of this appears in the opinion, however, because such information is inconsistent with "traditional legal discourse."<sup>138</sup> The silence of the judicial opinion on the facts that mattered to Professor Montoya, and, she argues, probably mattered to others who identified with Josephine Chavez's poverty, gender, or ethnicity, "invalidate" as irrelevant the culture of these outsiders.<sup>139</sup>

The alienation described by Professor Montoya occurs frequently and acutely in legal writing courses, because legal writing pedagogy places a premium on a student's ability to recognize, understand, and apply those facts a court has determined to be relevant and because legal writing courses require that students write their conclusions. Identifying outcome determinative facts and using them in a legal context is a part of legal language that separates novices from beginners, and is therefore a critical part of the social view's emphasis on immersion in the discourse community. Fact skills also are important to the concept of audience, both because use of outcome determinative facts is necessary to reach and persuade a legal audience, and because use of irrelevant facts

135. *See id.* at 203. Here again it is apparent how the legal framework determined the relevant facts. *See id.* at 204.

136. *See id.* at 203 (footnotes omitted).

137. *See id.* at 205. Professor Montoya frequently uses Spanish words when they have a special cultural meaning that cannot be conveyed in English. To remain as true as possible to Professor Montoya's meaning, and because one of the main points of this Article is how culture can be lost in translation, I use the Spanish here as well.

138. *See id.* at 204; Finley, *supra* note 2, at 897 (discussing that experience and perspective translate as bias in legal discourse).

139. *See* Montoya, *Trenzas*, *supra* note 14, at 205.

will be distracting and annoying to the busy lawyer or judge who is the audience of legal documents.<sup>140</sup>

Methodologically, legal writing teaches these skills through writing assignments and through written and oral critique on student drafts. Typically, a legal writing memorandum assignment gives students a hypothetical fact scenario and requires students to write a Question Presented, Brief Answer, Statement of Facts, and a Discussion. A primary goal of legal writing is to teach students to select and use only outcome determinative facts in most sections of the memorandum and to use “background” facts in the Statement of Facts *only* to the extent that they clarify the outcome determinative facts. Thus, legal writing texts caution students that in writing the Statement of Facts:

[Y]our busy law trained reader will want to know only two kinds of facts: (1) facts relevant to the question presented and (2) background facts necessary to provide context for these legally significant facts.<sup>141</sup>

Similarly, in the Discussion section, a principal goal of legal writing pedagogy is to teach students to resolve the hypothetical dispute by analogizing the facts of the hypothetical with the outcome determinative facts of precedent cases.<sup>142</sup> To master these skills, students must learn to recognize relevant facts in judicial opinions, use opinions to determine which of the client’s facts are relevant, and resolve the dispute by analogizing and distinguishing.<sup>143</sup>

To learn to select facts carefully and avoid cluttering a legal document with irrelevant facts, legal writing courses instruct students to locate outcome determinative facts by carefully examining a court’s recitation of the facts of a dispute and the court’s reasoning.<sup>144</sup> Students are taught to ask themselves “if a particular fact had not happened, or if it had happened differently, would the court have made a different decision?”<sup>145</sup> In addition, the process pedagogy teaches fact skills by critiquing students’ use of facts in their drafts. For example, a common student error is to

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140. See, e.g., EDWARDS, *supra* note 39, at 183-84; SCHULTZ & SIRICO, *supra* note 114, at 181.

141. EDWARDS, *supra* note 39, at 183-84.

142. See *id.* at 103-105; NEUMANN, *supra* note 39, at 130.

143. See EDWARDS, *supra* note 39, at 103-105; NEUMANN, *supra* note 39, at 130.

144. See, e.g., EDWARDS, *supra* note 39, at 183-84; NEUMANN, *supra* note 39, at 176; SCHULTZ & SIRICO, *supra* note 114, at 181.

145. NEUMANN, *supra* note 39, at 176.

include legally irrelevant facts when discussing the facts of the case or in the Statement of Facts. The legal writing professor might correct this by questioning the student's decision, asking in the margin: why did you include these facts from precedent case X in the memorandum? Are they relevant to the outcome of the dispute? It is common for legal writing professors to question why students included—or did not include—facts in the “Facts” section of the memorandum or brief. The goal is for the student to internalize the concept of relevance and to learn to use facts as a lawyer would.

However, outsider students may respond to the questions of relevance with frustration because the court's decision about what facts are outcome determinative seems biased and does not reflect the student's experiences or knowledge. In those situations, outsider students are faced with a wide gap between the professional and the personal—legal writing requires that they use facts as the court did even though this conflicts with their personal understanding. Moreover, the legal writing professor is faced with the dilemma of correcting the student's use of facts that a court did not find relevant (and thereby suppressing the student's experience and voice) or allowing the student to “misread” or “misapply” the case.

For example, legal writing pedagogy, because it emphasizes fluency in legal language and discourse, would discourage a law student asked to analyze the facts presented in the *Chavez* case from incorporating facts related to *verguenza* or *respeto* into the analysis. Legal writing pedagogy's emphasis on audience and legal convention would require that the legal writing student write the memorandum or brief at least in part accepting the outcome determinative facts in precedent cases, and accepting the legal irrelevance of the facts related to *verguenza* or sexuality. Thus, legal writing pedagogy rewards those students for whom the facts deemed relevant by the court make sense, and attempts to “correct” those students who cannot understand the court's choice of outcome determinative facts. Moreover, because it is one of the goals of legal writing to teach the crucial skills of recognizing outcome determinative facts, and because of the short amount of time most legal writing courses are awarded, it is unlikely that most legal writing professors would be able to have a discussion about the potential bias in a court's determination of relevant facts. Even if the professor had the time to acknowledge a court's failure to recognize certain facts related to culture, ethnicity, gender, or

sexual orientation, legal convention and audience requires that the final, written product focus on the facts that the court determined were relevant.

Legal writing, unlike most doctrinal courses, requires students to use outcome determinative facts actively in analysis and writing. The classroom experience of Professor Montoya involved only the reading and discussion of the Chavez case. Legal writing involves the far more personal act of writing—in the epistemic view, the act of constructing law. In addition, the process method means that the legal writing professor would analyze and critique the student's drafts to ensure not only that the student used only relevant facts in that document, but to indoctrinate the student with the concept of relevance as defined by legal language; a concept that frequently does not include the perspectives of outsider cultures or races.

Teaching students to internalize the labels of "relevant" and "irrelevant" as attached to certain facts requires outsider students to accept, use actively the law's value judgments and myopia about their own culture, gender, or sexual orientation. The students must acknowledge and write as though their realities and perspectives are "irrelevant" and not worthy to be included in legal analysis. In addition to causing individual pain for outsider students, the method of teaching these skills perpetuates the law's myopia and bias—under the epistemic or determinist views, it "creates" or "constructs" law that excludes certain viewpoints.

### C. *Teaching "Objective" Writing And the "I"*

A corollary to the problem of audience, the requirement of "objectivity" in legal writing is another predicament for outsider law students. In most legal writing courses, a full semester is devoted to teaching objective or predictive writing.<sup>146</sup> Writing legal memoranda is termed "objective" to distinguish it from the other primary category of legal writing, advocacy writing, which has an explicit perspective and agenda.<sup>147</sup> Legal writing teaches objective analysis and writing, in part, because objectivity is a hallmark of legal language, of the professional voice.<sup>148</sup> In

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146. See *supra* note 48 and accompanying text.

147. See EDWARDS, *supra* note 39, at 2-3; NEUMANN, *supra* note 39, at 52.

148. See, e.g., Finley, *supra* note 2, at 897-98; Getman, *supra* note 91, at 578 (contending that the professional voice and its rules, "stated in generalities that apply regardless of the persons involved, permit the legal system to avoid prejudice and to transcend invidious distinctions.").

objective writing, the task of the lawyer is to identify the legal issue, analyze the law, apply it to the facts of a given case, and give a professional opinion about how the law resolves the case.<sup>149</sup> The writer's professional opinion should be unaffected by the desires of the client; if the writer believes that, on balance, the law resolves the matter in a way unfavorable to the client, that is what the writer must say in the memorandum.<sup>150</sup> Hence, the memorandum is "objective" in the sense that it requires the writer to approach the law through the lens of neutrality, not as an advocate for one side. Objective writing is also frequently referred to as predictive writing, because a main purpose of it is to communicate the writer's prediction of the outcome of the case.<sup>151</sup>

Objective writing causes several problems for the outsider legal writer. First, outsider writers may feel alienated from the substance of the law that they are required to report as their "opinion," which widens the gap between their personal and professional voices.<sup>152</sup> The gap is widened further by the fiction that judicial opinions are objective and neutral, and therefore represent the writer's professional, not personal, voice. To many outsider law students, judicial opinions seem biased in a racial, ethnic, sexist, or heterocentric way, yet legal writing and lawyering require them to use the law without considering the hidden bias. In addition, the alienation is compounded by the requirement that the conventions of legal writing require that the writer's opinion be expressed without the use of the first person pronoun.<sup>153</sup> For outsider writers, who may already feel like their "I" is not a part of the law, the banishment of the explicit "I" from a document purporting to represent the writers' opinion means that these writers are further divorced from the document and from their professional voices.

Many first-year law students bristle at the notion that the memorandum reflects their "opinion" because of the disparity

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149. See NEUMANN, *supra* note 39, at 67-68, 77; SCHULTZ & SIRICO, *supra* note 114, at 168.

150. See NEUMANN, *supra* note 39, at 84; SCHULTZ & SIRICO, *supra* note 114, at 168.

151. See EDWARDS, *supra* note 39, at 2-3; NEUMANN, *supra* note 39, at 77.

152. I realize that because the underlying premise in this section is alienation from the substance and reasoning of the law, this section overlaps significantly with the previous discussions of framework and relevance. I believe, however, that the added requirement of objectivity in memorandum writing (and reasoning and speaking in the law) superimposes a new layer to the problem that merits separate attention. See *supra* Parts III.A and B.

153. See EDWARDS, *supra* note 39, at 219; HELENE S. SHAPO et al., *WRITING AND ANALYSIS IN THE LAW* 1, 73-74 (3d ed. 1995).

between their personal experiences and the reasoning or outcome of the cases. Indeed, the memorandum of law requires some personal input, but its bottom line is the accurate communication of the relevant court opinions and their application to the facts.<sup>154</sup> The separation of personal opinion and professional opinion may not be great if the writer agrees with or identifies with the rules and reasoning of the law. But when the writer's experiences run counter to the reasoning of a case, or when the writer cannot identify with the "rightness" of a rule or rationale, or worse, finds it repugnant to her personal values, the gap between the personal and professional becomes wide, and requires an uncomfortable perspective shift.<sup>155</sup> This gap between personal and professional voice is a particular problem for outsider law students and lawyers, because the foundation for legal language and reasoning is the experiences of the "dominant group," which has the luxury of terming its members' experiences and perspectives "objective" and pushing aside other experiences and perspectives as outside the norm.<sup>156</sup>

In legal writing, the outsider writer's discomfort may be exacerbated by the highly personal nature of writing—students have described feelings of hypocrisy and betrayal of personal mores when forced to write something that purports to be their professional opinion, but really is not their personal opinion.<sup>157</sup> In addition, the 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

154. See NEUMANN, *supra* note 39, at 89-91; SCHULTZ & SIRICO, *supra* note 114, at 138-39, 168-69.

155. See Montoya, *Borderlands*, *supra* note 100, at 422-24; Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League School*, 143 U. PA. L. REV. 1, 4-5, 42-43 (1994); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297, 298 (1988) [hereinafter Matsuda, *Quail Calls*]; Weiss & Melling, *supra* note 17, at 1307, 1314-20. Some scholars label this the gap between professional and "human" voice. See Getman, *supra* note 91, at 582; Hodges, *supra* note 91, at 634-35.

156. See Finley, *supra* note 2, at 893-94; CATHARINE A. MACKINNON, FEMINISM, MARXISM, METHOD AND THE STATE: TOWARD A FEMINIST JURISPRUDENCE, 8 SIGNS 635 (1983) [hereinafter MACKINNON, FEMINISM, MARXISM, METHOD AND THE STATE]; MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE, *supra* note 74, at 237-38.

157. Several students have expressed to me that the requirement that they write the "false" opinion down and present it as their opinion makes it that much more difficult. See also Weiss & Melling, *supra* note 17, at 1352.

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.<sup>158</sup> 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. Moreover, the process method, which places a high value on the professor’s early and consistent “intervention” into a student’s writing process, adds to the coercion to conform.

A good example of the “alienation” problem raised by objective writing is a discussion I had with one of my first-year students, who I will call “Kim.”<sup>159</sup> Kim was struggling with the first memorandum problem, which involved an adult male survivor of child sexual abuse who repressed the memory of the abuse and remembered it twenty years after its occurrence.<sup>160</sup> Having recollected the abuse, the survivor wished to sue the abuser civilly. The issue was whether the discovery rule would toll the statute of limitations for tort actions based on the repressed memory of the victim. Both parties lived in Pennsylvania, and the abuse occurred in Pennsylvania, so Pennsylvania law applied. Pennsylvania law is clear: the discovery rule will not toll for mental incapacity, and the courts unanimously categorize repressed memory as a form of mental incapacity.<sup>161</sup>

During our conference on her first draft, Kim told me that she was very uncomfortable with not only the result required by Pennsylvania law, but with the courts’ reasoning. She especially took issue with the implication in some of the opinions that

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158. See, e.g., EDWARDS, *supra* note 39, at 218 (suggesting to avoid personal references entirely unless they are legally relevant); SCHULTZ & SIRICO, *supra* note 114, at 139 (“A judge or senior attorney may not care about your personal opinion.”).

159. I gathered the anecdotal data that appears throughout this paper in two ways: (1) by taking extensive notes after student conferences, (2) and by interviewing former students of legal research and writing. For privacy reasons, I use pseudonyms for all students. Another example is a story told by Professor Philip Meyer about a student who adopted the professional voice, but felt isolated and alienated by the process. See Meyer, *supra* note 91, at 789-90.

160. This problem was adapted from *Analytical Assignments*, *supra* note 112.

161. See *Dalrymple v. Brown*, 701 A.2d 164, 170-71 (Pa. 1997).

repressed memory was a mental defect of the victim and demonstrated a lack of diligence on the part of the victim.<sup>162</sup> She politely challenged my assertion in class, and our textbook's characterization, that the memorandum should represent her professional opinion.<sup>163</sup> Rather, she argued, the memorandum required her to communicate someone else's opinion—one that was substantively different from hers—and present it as “the objective law” and her “professional” opinion. In addition, Kim felt that communicating, especially in writing, law and reasoning that she considered not only fallacious but also harmful, gave legitimacy to it.<sup>164</sup> She asked whether she could write the memorandum communicating her actual, personal opinion about the fallacy of the courts' reasoning and the unfairness of denying recovery.

I told Kim that she could take a short paragraph at the end of the memorandum to express her personal opinion, but that the purpose of the document and its intended audience required that the bulk of it be devoted to communicating what the law was, not what she believed it should be. Somewhat apologetically, I told her that I empathized with her feelings and agreed with her, but the bottom line was that her reader wanted to know the law, because that is what would most likely determine the outcome for the client.<sup>165</sup> In the end, she turned in a very good memorandum that

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162. See, e.g., *Baily v. Lewis*, 763 F. Supp. 802, 810 (E.D. Pa. 1991), *aff'd*, 950 F.2d 721 (3d Cir. 1991) (noting that the victim stated in his deposition that he knew the sexual act was wrong when it occurred). *Baily* also distinguishes repressed memory from traditional discovery rule cases (e.g., the sponge left in the stomach, exposure to asbestos) on this ground. See *id.* at 807.

163. We use the NEUMANN legal writing text. See NEUMANN, *supra* note 39, at 82.

164. Kim would get support for this opinion from the epistemic view of writing and from determinism. See *supra* notes 29-31 and 62-64 and accompanying text.

165. There is, of course, the possibility of arguing that the court should overturn precedent, but most lawyers would agree that this is an uphill battle. See *supra* Part III.A. In the problem assigned to Kim, there were several cases, including an opinion from the Pennsylvania Supreme Court, all of which denied recovery and that significantly lowered the probability of successfully arguing for an overruling of precedent. See Finley, *supra* note 2, at 890 (noting that *stare decisis* means that arguments outside existing norms are “suspect as radical, unthinkable, unexpressible, and unreachable by legal language.”). In the repressed memory context, therefore, the law has foreclosed not only the argument that an adult who represses memory of a childhood sexual assault is acting reasonably, but has also foreclosed the argument that “reasonableness” may be an inappropriate test. Even if one had the tenacity and resources to make these arguments, they would have to be based on something other than the subjective experience—they must use existing law and legal frameworks. See *supra* Part III.A.

succinctly analyzed the law and applied it to the facts, but contained no reference to her personal feelings.

The problem of dissonance between personal and professional voice is exacerbated by the law's disparagement of the subjective and the veneration of the perspective of the "dominant group" as neutral and objective. In legal writing, although the writer is always expressing an opinion, the formality of the writing forbids use of the pronoun "I" or any other reference to the writer's self or subjective feelings.<sup>166</sup> In addition to being too informal, legal writing teaches that the explicit use of "I" is either "distracting clutter" that calls undue attention to the writer<sup>167</sup> or redundant—that the memorandum reflects the writer's opinion is implicit in the purpose of predictive writing.<sup>168</sup> Thus, students are taught to state their opinion in abstract, definitive terms.<sup>169</sup> The idea that the use of "I" is redundant or mere "distracting clutter" assumes no disparity between personal and professional opinion—it assumes that there is one "opinion" and it is reflected in the definitive statement of what the law says.<sup>170</sup> Even in those limited circumstances in which it is appropriate in a legal memorandum to criticize or disagree with the law, students still must do so without using "I" or in any other way referring directly to their personal experiences—because in legal discourse, experience and perspective, the "I" translates as bias.<sup>171</sup> The law student must

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166. See SHAPO et al., *supra* note 153, at 73-74; EDWARDS, *supra* note 39, at 219. This is part of the law's "register." See *infra* notes 191-217 and accompanying text.

167. See EDWARDS, *supra* note 39, at 218-19; NEUMANN, *supra* note 39, at 402; SCHULTZ & SIRICO, *supra* note 114, at 139.

168. Most of the legal writing texts do not say this explicitly, but, especially in the explicit requirement that students state "a conclusion," they certainly suggest that the memorandum (and briefs) reflect the student's position or opinion about the law. See NEUMANN, *supra* note 39, at 82 (noting that predictive writing requires you to "take a position"); SCHULTZ & SIRICO, *supra* note 114, at 168 (noting that memorandum reflects "your position" and use of "I" reminds the reader that you are making the arguments).

169. See, e.g., EDWARDS, *supra* note 39, at 218-19; SCHULTZ & SIRICO, *supra* note 114, at 139; SHAPO et al., *supra* note 153, at 74.

170. See Finley, *supra* note 2, at 892-93.

171. See *id.* at 897; SCHULTZ & SIRICO, *supra* note 114, at 139 (using "I" weakens argument by reminding the reader that you are making the arguments); VEDA R. CHARROW et al., CLEAR AND EFFECTIVE LEGAL WRITING 182-83 (2d ed. 1995) (arguing that analysis is well-reasoned when it is, or at least appears, impersonal); EDWARDS, *supra* note 39, at 219 (noting that even when a personal reference is relevant, writer should not use "I"). That perspective means bias is not necessarily true, even though many treat it as an absolute truth in the law. See Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 983 (1991) (explaining that Susan Estrich used her personal rape story to establish her interest in and her unique authority to speak on the subject of rape).

write “the statute of limitations has expired,” not “I believe that the statute of limitations has expired;” or, “the reasoning in the precedent cases does not apply to the current case” not “I believe that the court’s conclusion is wrong because my personal experience tells me that the reasoning is faulty.”<sup>172</sup>

For the outsider writer, the problem with the requirement of stating the conclusion in abstract terms and prohibiting reference to the self is that it highlights the distance between the writer’s personal and professional voices and contributes to the writer’s already burgeoning sense of alienation from the law and from legal writing.<sup>173</sup> For writers who are more comfortable with the reasoning and language of the law, who find that their personal experiences are reflected accurately in legal reasoning, it may be fair to say that the “I” is implied in a firm statement of the conclusion. But for writers, like Kim, who cannot identify with the law, whose experiences are not reflected, and for whom legal rationales seem “false,” there is no implied “I.” Post-modern linguists and semiologists theorize that the use of the word “I” actually “calls the speaker into existence”—it is a way of defeating invisibility.<sup>174</sup> By prohibiting its use, legal writing contributes to the invisibility of outsider law students and, in determinist terms, contributes to the suppression of their “existence” in the language of the law.<sup>175</sup>

#### *D. The Vocabulary and Register of Legal Language Is Biased*

In addition to framework, relevance, and objectivity, the basic vocabulary and register of legal language can mute outsider voices. In linguistic theory, the “register” of language is the institutional style of a particular language, such as use of the passive voice and

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172. See SHAPO et al., *supra* note 153, at 74; CHARROW et al., *supra* note 171, at 183.

173. See CAMERON, *supra* note 2, at 161, 172 (discussing post-modern theories of Luce Irigaray).

174. *Id.* at 161. The use of the “I” is especially important for those who are already invisible in society—post-modern scholars have argued that the “I” is necessary to represent oneself as a “linguistic subject.” *Id.* at 172 (quoting Luce Irigaray, *L’ordre sexuel du discours*, LANGAGES 123 (Vol. 85, 1987)). Outsider writers—especially feminist writers—were the groundbreakers in the production of narrative legal scholarship. In part, they did this to make their “*Is*” visible and heard. See, e.g., ABRAMS, *supra* note 171, at 975; ANGEL, *supra* note 17, at 232-34.

175. See FINLEY, *supra* note 2, at 896-977. Professor Finley states that the law’s “language of neutrality and objectivity can silence the voices of those who did not participate in its creation because it takes a distanced, decontextualized stance.” *Id.* at 897.

Latin in science writing.<sup>176</sup> Legal writing, exemplified by the social view, strives to immerse students in the vocabulary and register of the law to make them fluent speakers.<sup>177</sup> As a result, students who need to express outsider concepts must use a vocabulary and register that may not encompass these concepts. The “translation” into legal terms and vocabulary can result in muting by altering the concept or by discouraging expression of it.

By immersing students in the vocabulary of the law, legal writing may subtly limit the way students think about legal problems. Words and their meanings can reflect cultural and gender bias.<sup>178</sup> Professor Lucinda Finley gives the example of the word “work,” which in the context of labor law means something that is done for wages outside the home.<sup>179</sup> Thus, to be effective, any attempt to reform labor law, for example, to include the concept of what women do in the home must use the vocabulary of labor law, including labor law’s definition of the term “work.” However, the definition of that term contains gender biases that go to the heart of the very reform to be accomplished.<sup>180</sup> Other examples are definitions of the words “parent” and “family” in family law that generally exclude the idea of a lesbian or gay couple with a child.<sup>181</sup> Even in those states in which courts have construed narrow statutory language to include gay and lesbian

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176. See CAMERON, *supra* note 2, at 197-98. The term “register” differs from discourse in that register refers to the formal features (one cannot use “I”) and discourse goes beyond the formal into the ideological (the absence of “I” reflects the ideology of law as objective and impersonal). See *id.*

177. See Stanchi, *supra* note 6, at 2-3; see also *supra* notes 32-40 and accompanying text.

178. See CAMERON, *supra* note 2, at 197.

179. See Finley, *supra* note 2, at 898.

180. See *id.*

181. See FLA. STAT. ANN. § 63.042(3) (West 1997) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”); N.H. REV. STAT. ANN. § 170-B:4 (1997) (“[A]ny individual not a minor and not a homosexual may adopt”). *But see* N.J. STAT. ANN. § 34-11B-3 (West 1997) (“‘Parent’ means a person who is the biological parent, adoptive parent, foster parent, step parent, parent-in-law, or legal guardian, having a ‘parent-child relationship’ with a child as defined by law, or having sole or joint legal or physical custody, care, guardianship, or visitation with a child.”); Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 n.8 (Cal. Ct. App. 1991) (stating that there is “nothing in [our] statutory provisions that would preclude a child from being jointly adopted by someone of the same sex as the natural parent”); In the Matter of the Adoption of a Child by J.M.G., 632 A.2d 550, 554-55 (N.J. Sup. Ct. Ch. Div. 1993) (“We cannot continue to pretend that there is one formula, one correct pattern that should constitute a family in order to achieve the supporting, loving environment we believe children should have.”); see also generally Joseph G. Arsenault, Comment, ‘Family’ But Not ‘Parent’: The Same Sex Coupling Jurisprudence of the New York Court of Appeals, 58 ALB. L. REV. 813 (1995).

families, the contortions required to include those families in the legislative definition mark the concept as unusual or deviant.<sup>182</sup>

In legal writing, students must struggle with the limitations of legal vocabulary, but in the end must use the vocabulary or work around it. For example, one of the first assignments in my legal writing class at Temple asks students to write a short memorandum about whether a lesbian has standing to sue for partial custody of her lover's biological child in Pennsylvania.<sup>183</sup> Students confront (as I did in the last sentence) the problem of what to call their client, the person who wishes to sue for partial custody. This is more than just a semantic problem; in the custody context, as in many other legal contexts, how a person is described or characterized can affect the outcome of a case. In the fact pattern, the client is not biologically related to the child and has no legal relationship with the child, such as adoptive or step-parent.<sup>184</sup> However, the client stays at home full-time to take care of the child, who calls her "mommy," while the biological mother works to support the family financially.

The process method focus on audience requires students to use words precisely, so as to communicate with their audience, a lawyer who may not be familiar with the facts. The social method reinforces the importance of precision, requiring students to use legal vocabulary carefully and accurately. This usually requires that the word chosen be used consistently with its widely-held legal or English meaning, which in turn usually means the traditional and conventional definition. The focus on audience means that the writer without vocabulary to express an outsider concept is not free to stretch the meaning of traditional words or to make up new words. In other words, the writer wishing to express an outsider concept is muted.

Thus, in the custody assignment, students struggling to describe their client eventually reject the words "parent" and "mother" because both words have narrow meanings, in English and in law

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182. *Compare* Alison D. v. Virginia M. (In the Matter of Alison D.), 77 N.Y.2d 651 (1991), *with* J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996). The very fact that, to be clear, I must use the modifier "gay" or "lesbian" before the word "family" is an indication that legal language marks the concept as unusual.

183. This problem was created and written by my colleague, Professor Elena Margolis.

184. Indeed, many states prohibit such a relationship by forbidding adoption by gay people and by refusing to recognize gay marriage (foreclosing the legal step-parent path). *See supra* note 181.

that strongly imply a biological relationship. Although the terms can connote a legal relationship, the existence of the modifiers “adoptive” and “step” indicate that unmodified, “parent” and “mother” mean biological. Thus, even though students argue that the client *should be* (and is, by the child) referred to as both “parent” and “mother,” these terms eventually must be rejected because the client does not fall within the widely-held, conventional definition and use of either term to describe her could easily mislead the audience of the document.<sup>185</sup> On the other hand, the legal term “third party,” sometimes used to connote someone who requests custody and is not a legal or biological parent,<sup>186</sup> does not really do justice to the client’s relationship with the child.<sup>187</sup> Thus, although students may see the bias in legal language, they are muted by the combination of the conventional, cultural limits of vocabulary and the need to reach the audience.

The problem of indoctrination into legal vocabulary is especially acute in legal writing because of its goals and methodologies. Both the process and social views of legal writing have as their goals to make students fluent in legal language and to help students develop a professional, legal voice. Legal writing accomplishes this by immersing students in the vocabulary of the law. The methodology of legal writing requires students not only to learn the vocabulary, but to use it actively in writing, speaking, and analyzing. Students write several drafts of memoranda and briefs in which they must use the legal vocabulary actively and correctly. The frequent critiques and individual conferences are directed, in part, toward helping the students to internalize the correct meanings of words, the correct context for the use of those words, and the process of discovering the meanings and correct context of legal vocabulary in the future. The social view especially places great emphasis on learning more than the dictionary meaning of the vocabulary and aims to teach the meaning of words in the broader context of law and legal practice. Quite simply, in

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185. They also tend to make the legal issue sound nonsensical. Imagine a question presented that reads “Can a mother sue for partial custody of her lover’s biological child?”

186. See, e.g., *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. Ct. 1996).

187. This is only a partial list of words that could describe the client. In the end, though, most of the descriptions one can come up with are either a bit off-the-mark (“domestic partner,” which emphasizes the relationship with the biological mother, not quite appropriate in this context), or wordy and clumsy (“person with a parent-like relationship”). Similarly, “primary caretaker” gets the students a little closer, but still does not convey the full meaning of the relationship—it implies someone like a hired nanny or au pair.

legal writing, escaping from learning and using legal language is difficult. In part, that is what makes legal writing so effective at teaching students to lawyer. But that effectiveness comes at the expense of perpetuating the bias inherent in legal vocabulary and alienating outsider students.

Teaching fluency in a vocabulary containing subtle social and ideological messages has both micro and macro consequences. By having fluency as its goal, legal writing teaches not only the vocabulary, but by necessity, the social message as well. On a micro level, legal writing inflicts an injury on the outsider law student who sees that her “work” or “family” is excluded or considered deviant by the law.<sup>188</sup> On a macro level, as determinist theory would predict, teaching fluency limits the law students’ and lawyers’ world views and keeps the law stagnant.<sup>189</sup> Once fluent in the vocabulary, it is difficult not to adopt or “buy into” the perspective reflected in the vocabulary.<sup>190</sup> Thus, legal writing’s focus on audience, and linguistic conservatism required by the focus on audience, perpetuates in law and legal language the bias that does not allow the lesbian who stays home and takes care of her lover’s child to be called “mother” or “parent” in a legal document. And it reinforces the ideological message to students that “mother” and “parent” encompass only a certain, traditional concept and encourages bias against gay people.

There is no question that the cultural and ideological messages imbedded in vocabulary are powerful and can alter a person’s perspective and beliefs. Linguist Deborah Cameron recounts the story of a feminist writer who went to a defense policy think tank to challenge the concepts of war and peace embraced by pro-defense intellectuals.<sup>191</sup> To talk to the pro-defense intellectuals with credibility, the writer had to learn the language, including the vocabulary.<sup>192</sup> As a result of her fluency, she began to understand and even share the viewpoint of the defense people she had endeavored to criticize; once immersed in the language, she found

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188. See, e.g., Montoya, *Trenzas*, *supra* note 14, at 205 (explaining outsiders’ commiseration with *Chavez* and its deviance in the legal community).

189. See *supra* notes 62-64 and accompanying text.

190. See CAMERON, *supra* note 2, at 223; Finley, *supra* note 2, at 898.

191. See CAMERON, *supra* note 2, at 223.

192. See *id.*

it difficult to hold on to the anti-weapon proliferation perspective that had brought her to the think tank in the first place.<sup>193</sup>

In the law school context, the Janoff study demonstrates that the immersion process of the first year of law school can change women students' reasoning processes from one that focuses on the relationships between people to one that focuses on abstract rights.<sup>194</sup> Although Janoff did not address the role of legal vocabulary in altering students' reasoning, clearly vocabulary drives the reasoning process, and teaching the meaning of legal terms such as "equality," "similarly situated," and "contract" can lead to the development of a rights-oriented reasoning process.<sup>195</sup> Because legal writing has as its goal the development of students' professional legal voices and accomplishes this by requiring students to use and internalize the meanings of legal words, legal writing teaches students the political and ideological biases inherent in the vocabulary.

Like learning vocabulary, novice speakers must learn the "register" of a language to become fluent. The register of legal language requires definitive, confident statements and conclusions, both in writing and in speaking.<sup>196</sup> It requires writing and speaking in abstract, objective rules.<sup>197</sup> As part of its goal to teach students fluency in legal language, legal writing courses teach students how to speak and write in the legal register. For example, part of legal writing pedagogy is to purge qualifying phrases such as "maybe" and "it can be said" from student writing because in legal language, such qualifiers connote weakness and uncertain-

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193. See *id.*

194. See, e.g., Janoff, *supra* note 83, at 238. One of the tests used by Janoff was a sentence completion test in which students were asked to complete various sentence beginnings, such as "When people are helpless." *Id.* at 218 n.135. A care or relational response is one marked by concern for others, such as: "When people are helpless, *I try to show them I care.*" *Id.* A rights oriented response focuses more on abstract obligation and values, such as: "When people are helpless, *society must step in and assist in rectifying some of their problems.*" *Id.* at 223 n.146. The care oriented/rights oriented dichotomy in moral reasoning was first described by Carol Gilligan. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 1 (1982).

195. See Finley, *supra* note 2, at 898-99; Janoff, *supra* note 82, at 208-11.

196. See CHARROW et al., *supra* note 171, at 181 (asserting that students must avoid qualifying language or "safety" words); NEUMANN, *supra* note 39, at 82 (noting that students must avoid "waffling").

197. See *supra* notes 39 and 167 and accompanying text.

ty.<sup>198</sup> Legal writing professors frequently strike qualifying phrases from student drafts and design writing checklists to help students edit qualifying language from their writing.<sup>199</sup> Part of the purpose of the critiques and the checklists is to help students internalize the professional voice so that they can delete qualifying language from future drafts.<sup>200</sup>

Similarly, in oral advocacy, legal writing teaches students to avoid speaking softly, rising intonation, and so-called tag questions (the facts are clear, *right?*) at the end of sentences.<sup>201</sup> Rather, the preferred register for oral advocacy is to maintain eye-contact and to speak loudly and declaratively.<sup>202</sup> The advocate must project certainty and confidence in writing and speech or risk losing her credibility. Credibility is defined and maintained by a certain, prescribed register. As one female law student described it:

Legal writing [places] a crazy value on curtness and posturing. You make unsteady arguments seem sound because of how you say them . . . . I got a sense that you were supposed to pare away all the blurry edges and confusion to get to a core. Slam, slam, to the conclusion.<sup>203</sup>

Consistent with the social view of learning in context, legal writing teaches the professional, legal register by requiring students to make an oral argument before a panel of judges who then critique the students' argument technique. The panel of judges is generally comprised of the legal writing professor and either other law professors or alumni judges and practicing attorneys. Both the classroom and textbook teaching of oral argument and the critique that follows the students' first attempt is designed to teach students to develop and use the professional, legal register.

The problem arises first because qualifying phrases, tag questions, soft-spokenness, failure to maintain eye contact, and rising intonation are features rarely found in the speech of the

198. See, e.g., NEUMANN, *supra* note 39, at 76, 198 (urging students to purge qualifying "throat clearing" language from their writing).

199. See Durako et al., *supra* note 11, at 749 (suggesting memorandum checklist exhorting students to edit "throat clearing" phrases from their drafts).

200. See *id.* at 732-33.

201. See NEUMANN, *supra* note 39, at 383-84; Levine, *Course Materials*, *supra* note 23, at 17. Linguist Robin Lakoff identified the "tag" question as one aspect of the overly polite and obsequious features of American women's speech. ROBIN LAKOFF, LANGUAGE AND WOMAN'S PLACE, 53 (1975).

202. See *supra* note 191 and accompanying text.

203. Weiss & Melling, *supra* note 17, at 1344.

powerful in our society; rather, they tend to be found in the speech of those without power, especially women.<sup>204</sup> Similarly, students from cultures other than Western culture may have a decidedly different perspective on the meaning of certain features of language, such as maintaining eye contact and speaking loudly.<sup>205</sup> Thus, a consequence of the valuation of certain features of language in legal communication is a disparate burden placed on outsider students to change their voices to succeed, and the underlying message that their voices and cultures are inferior.<sup>206</sup>

But, a thornier problem is why certain features of language are marked as incredible or ineffective.<sup>207</sup> The existence and cause of difference in register between the powerful and powerless is a matter of intense debate. For example, with regard to women, one theory is that women use less powerful and effective speech styles because they are socialized to do so, to keep them from positions of power and to avoid offending men.<sup>208</sup> Implicit in this theory is the acceptance of the notion that certain styles of speech are, objectively, less powerful and that women can succeed by changing their register to copy that of men.<sup>209</sup> Students of critical jurisprudence may recognize the commonalities shared by this linguistic perspective and the equality theory of feminism, a theory founded

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204. See generally CAMERON, *supra* note 2, at 70-71; LAKOFF, *supra* note 196, at 53-64. I want to make clear, however, that I am not making the "essentialist" claim that all women, or other outsiders, are biologically or otherwise predisposed to speaking a certain way. See, e.g., Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 590-607 (1990). I realize that there is a real danger in trying to express the problem legal language poses for outsiders. See Bartlett, *supra* note 19, at 1268-69. Rather, I am raising a number of questions about why legal culture values some features of language over others and whether this valuation contains an ideological, cultural, or sexist bias.

205. In some cultures, for example, eye contact connotes aggression, not respectful confidence. See Frank Reynolds, *Helpful Book Shows Learning A Few Foreign Customs Can Send Key Message*, J. COM., July 1, 1998, at 2C; Leslie Berger, *Learning to Tell Custom from Abuse*, L. A. TIMES, Aug. 24, 1994, at A1; see also Mary Beth Marklein, *What's Up In April: Don't Forget to Pack Your Manners*, USA TODAY, Mar. 20, 1989, at 1E (exhorting American tourists to refrain from speaking loudly so as not to offend people of other cultures).

206. For example, American women tend to have higher pitched voices than American men. Higher pitch, in American culture and American legal culture, is associated with lack of authority and demeaned as overly emotional. See CAMERON, *supra* note 2, at 74-75; PRATT, *supra* note 39, at 329. The PRATT text advises: "If your voice normally has a high pitch, it will tend to get even higher if you are nervous or speak too quickly . . . . If you have a naturally high pitched voice, remember to speak slowly and try to lower the pitch." *Id.*

207. See CAMERON, *supra* note 2, at 71.

208. See *id.* at 44.

209. See *id.* at 71.

upon the goal of seeking equality for women by demonstrating that women can meet male standards.<sup>210</sup> Another perspective questions why certain registers are more valued than others and encourages the valuation of “women’s language.” This perspective equates with feminist difference theory, which seeks to recognize and value women’s different voices and talents.<sup>211</sup> The difference perspective is also evident in the recent media commotion over Ebonics and the debates over bilingualism.<sup>212</sup> In linguistics, for example, it is conceivable that a qualifying phrase like “maybe” could be valued as a more accurate or honest communication of the writer’s thoughts.<sup>213</sup> Or, that a rising intonation during oral argument could be valued as effective because it is more polite or deferential to the judges or because it connotes reasonableness or lack of rigidity in thought.

Finally, still another perspective suggests that it is the identity and position in the social hierarchy of the speaker—not the particular features of speech, which may vary among members of subdominant groups—that causes speech to be devalued.<sup>214</sup> This linguistic perspective shares some foundations with feminist dominance theory and some with post-modern legal theory.<sup>215</sup> So, for example, a woman who pauses before answering is unsure,

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210. See *id.* at 77; Morrison, *supra* note 94, at 68; Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 14 WOMEN’S RTS. L. REP. 151, 170-72, 174 (1992).

211. See Morrison, *supra* note 94, at 69-70; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39 (1985); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 57-61, 65-66, 70-72 (1988).

212. See, e.g., Eldridge Cleaver, *We Need to Rescue Kids From Ebonics Education: Black Pride, Yes. But Keep it in the Context of Standard English*, LA TIMES, Jan. 31, 1997, at B9, available in 1997 WL 2178002 (“The only place for Ebonics is the streets. We don’t need it in the classroom.”); Bert Eljera, *Defending the Ebonics Decision: Jean Quan Moves Along the Front Lines of the Racially Charged Controversy*, ASIANWEEK, Jan. 30, 1997, at 15, available in 1997 WL 11561807 (noting that the goal of Ebonics is “to raise the learning opportunities of black students in the same manner that Asian and Latino students have benefitted from bilingual education”); *Is Ebonics the Right Approach to Education?*, ST. LOUIS POST, Feb. 1, 1997, at 34, available in 1997 WL 3321309 (“The use of Ebonics in the classroom would subjugate millions of inner-city children to lives of poverty by leaving them unable to compete for the opportunities of the 21st century.”).

213. See CAMERON, *supra* note 2, at 73.

214. See *id.* at 74-75.

215. See CATHARINE MACKINNON, *DIFFERENCE AND DOMINANCE: ON SEX DISCRIMINATION*, IN *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter MACKINNON, *DIFFERENCE*]; Morrison, *supra* note 94, at 76-77.

a man who pauses is thoughtful.<sup>216</sup> Or, a person of color who speaks in a confident or non-conciliatory way is “uppity,” but a white person speaking the same way is “confident.”<sup>217</sup>

Probably the reality involves a combination, or even synthesis, of these theories. And, in this synthesis lies a real double-bind for the outsider law student. There is no question that legal language places value on certain speech patterns, such as eye contact or declarative intonation, as forceful and confident and devalues others such as tag questions, rising intonation, and soft speech. The valued speech patterns are not merely valued, they *are* the legal voice, the professional voice.<sup>218</sup> For those outsider students who use the devalued speech patterns and associate those devalued patterns with their outsider status, legal writing’s emphasis on teaching them to cultivate the professional voice requires a painful dilemma: retain your outsider voice and fail to be heard or change and “mainstream” your voice.<sup>219</sup> On a macro level, the emphasis on teaching the professional voice means that legal writing perpetuates the legal culture reflected in that voice—the “slam, slam, to the conclusion” register certainly reflects the hierarchical and combative nature of law and litigation.<sup>220</sup> As muting and

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216. See CAMERON, *supra* note 2, at 46. Again, voice pitch provides a useful example. Is the problem that high pitch is “objectively” less authoritative, or that, through some distorted transitive logic, that women tend to have a higher pitch and women are not viewed as authoritative, therefore, higher pitch is not authoritative? See *id.* at 74-75; see also Morrison, *supra* note 94, at 76.

217. See, e.g., Cunningham, *supra* note 100, at 1368. During a presentation by Professor Cunningham in which he described the judge’s reaction to Mr. Johnson’s perception of the racial implications of his arrest, Professor Derrick Bell commented that Mr. Johnson got into trouble (during both his interaction with the police officer and the judge) because his verbal resistance to being treated with disrespect caused him to be “viewed as an uppity nigger.” *Id.* at 1368 & n.194.

218. See Finley, *supra* note 2, at 887; Menkel-Meadow, *supra* note 206, at 44-45.

219. The dilemma that legal pedagogy poses for outsiders has been described by many outsider legal scholars. See, e.g., Matsuda, *Quail Calls*, *supra* note 155, at 298 (noting that the “constant shifting of consciousness produces sometimes madness, sometimes genius, sometimes both.”); Montoya, *Trenzas*, *supra* note 14, at 202, 204-5; Weiss & Melling, *supra* note 17, at 1320. Of course, not all outsider students think of themselves as having an “outsider” voice or having aspects of their voice that they think are linked inextricably to their outsider status. My point is only that some outsider students (and lawyers) do feel that features of their voices are linked to their outsider status and, that by forcing them to change, the law and legal writing are devaluing that part of them. See, e.g., Menkel-Meadow, *supra* note 206, at 42-43.

220. See, e.g., Finley, *supra* note 2, at 899. Moreover, because lawyers are trained primarily in the adversary system, the language of this system affects behavior even outside the adversary context. See Carrie Menkel-Meadow, *The Trouble With the Adversary System*

determinism theory would predict, the dominant language—the “professional voice”—perpetuates the dominant culture of the hierarchy, and the existence of the culture supports the use and teaching of the dominant language in a perpetual loop.

Injecting dominance theory into the dilemma exacerbates it. If it is likely that the use of the valued register by the powerless will be viewed differently—and negatively—then the social view’s goal of assimilation is not only potentially injurious to outsider students but also an empty promise. Professor Carrie Menkel-Meadow recounts her experience with a judge who threatened to hold her in contempt for cross-examining a witness, even though her adversary had not objected, because the judge thought it “inappropriate for a young lady to be so argumentative.”<sup>221</sup> Similarly, Professor Mairi Morrison tells a similar story of linguistic bias in the context of first-year moot court. During the critique after the argument, a female judge criticized the female advocates mannerism of “cocking their heads” as “cutesy,” whereas Professor Morrison interpreted the same mannerism as indicative of careful listening.<sup>222</sup> Thus, the outsider student’s dilemma of whether to change her voice is complicated by the notion that it might make no difference—she still might not be “heard.” But she almost certainly will not be heard if she speaks in the devalued register. So, for the outsider student and lawyer, legal writing’s emphasis on fluency and assimilation imposes a Hobson’s choice.

#### IV. Conclusion: Toward Teaching Critical Thinking in the Context of Lawyering

Having identified the problem, the dilemma now becomes what to do about it. Law schools cannot sit back and hope that the profession changes. As teachers of law and legal language, all of us must acknowledge our contribution to our students’ alienation and our shaping of the practice of law. But we cannot ignore the realities of legal language and law practice. As Professor Lucinda Finley has written: “We cannot get away from the law, even if that is what we would like to do . . . . Nor can we abandon caring

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in a *Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 37 (1996). Weiss & Melling, *supra* note 17, at 1337-39.

221. Menkel-Meadow, *supra* note 206, at 54 n.81.

222. Morrison, *supra* note 94, at 62.

whether the law hears us [or our students]. . . . [W]e must engage it."<sup>223</sup>

We must find a way to teach our students to be effective lawyers, to be heard, while simultaneously minimizing the potential for and damage of muting. Many scholars have spoken and written about ideas that are potentially useful to alleviate the muting problem inherent in teaching legal language. Legal writing conference presentations have focused on how to incorporate feminism, critical race theory, and issues surrounding sexual orientation into legal writing pedagogy.<sup>224</sup> As a start, legal writing professionals can learn about the problem of outsider voices in legal writing and become more sensitive to outsider student concerns. As a result, the professor can point out bias in legal language and reasoning in comments on drafts, in class, or during conferences. An acknowledgement of the bias in legal language and reasoning may validate the feelings of outsider students. Legal writing professionals have also spoken about the need for more assignments that integrate issues of race, gender, sexual orientation, and disability, and the concurrent need to deal in the classroom, in conferences, and in the drafts with the issues of bias in those areas.<sup>225</sup>

All of these practical solutions go a way toward relieving some of the problems associated with muting. But they are not enough. The problem of muting requires a more systemic re-evaluation of legal writing and law school pedagogy.<sup>226</sup> To this end, Professor Marina Angel argues for injecting narrative theory into the first

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223. Finley, *supra* note 2, at 906-07.

224. See, e.g., Diana Pratt, presentation at the Legal Writing Institute Conference (July 30, 1994) (entitled *Educating the Judge: Diversity and Multiculturalism in Legal Writing*) (discussing how to educate judges about different social, cultural, and economic circumstances) [hereinafter Pratt, *Diversity*]; Mark E. Wojcik & Samara Marion, presentation at the Legal Writing Institute Conference (July 28, 1994) (entitled *Pink Ink: Pedagogy and Sexual Orientation*) (discussing how to integrate themes of sexual orientation, race, gender, and disability into legal writing assignments); Kristin Woolever, presentation at the Legal Writing Institute Conference (July 30, 1994) (entitled *Feminist Discourse and the Legal Argument*) (discussing how to incorporate feminist discourse into persuasive writing pedagogy).

225. See *supra* note 219. However, giving assignments that highlight issues of race, gender, or sexual orientation is not enough and might exacerbate the problem because of the acute bias problems of the law in these areas. Certainly, assignments that highlight areas of social concern must be taught with a sensitivity to the issues raised and with the knowledge that extra time must be spent discussing the politics of the law.

226. This article focuses on the problems in legal writing, and so the solutions focus on legal writing. But, many areas of law school pedagogy are ripe for reform.

year of law school to encourage students to tell their own stories, in their own words.<sup>227</sup> Legal writing professionals and other law teachers have begun to experiment with this approach by requiring students to keep journals or diaries.<sup>228</sup>

Professor Mairi Morrison argues for a bilingual approach to legal writing that teaches the value of both the legal voice and the personal voice, especially the voices of outsiders.<sup>229</sup> Professor Morrison drew this idea from the writings of Mari Matsuda on “multiple consciousness,” a kind of bilingualism required of outsiders who must learn to fit into the law and legal language.<sup>230</sup> Professor Morrison also recommended that law schools require a feminist jurisprudence component to first-year moot court to explain the biases in legal language and reasoning.<sup>231</sup> Relatedly, Professor Kate Bartlett describes a methodology of “positionality,” which urges that feminist legal theorists accept the varying perspectives of the law and learn to test their legal theory by looking at it from many different positions and perspectives.<sup>232</sup> A pedagogy that incorporated the “positionality” method would encourage students to try to think about different potential perspectives in a dispute, including their own perspectives, and to use the resultant knowledge to analyze texts, disputes, and language critically.<sup>233</sup>

Professor Clark Cunningham, speaking in the context of client representation, urges a methodology of ethnography, the goal of which is to penetrate unfamiliar cultures and concepts by studying

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227. See Angel, *supra* note 17, at 233-34.

228. See, e.g., J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool For Reflection*, 3 CLINICAL L. REV. 55 (1996).

229. See Morrison, *supra* note 94, at 76. Similarly, Professors Julius Getman and Elizabeth Hodges urge that law schools must teach students to incorporate the “human,” personal voice into the professional voice. See Getman, *supra* note 91, at 579; Hodges, *supra* note 91, at 639. Professor Getman writes: “The myopic focus on professional voice does a major pedagogical disservice by preparing law students for only a part of what lawyers do.” Getman, *supra* note 91, at 579.

230. Matsuda, *Quail Calls*, *supra* note 155, at 299. Professor Mairi Morrison also argues for the teaching of multiple consciousness and bilingualism in the moot court context. See Morrison, *supra* note 94, at 81-82.

231. See Morrison, *supra* note 94, at 81-82. Of course, the feminist readings would have to be chosen carefully to avoid some of the biases that have plagued feminist jurisprudence.

232. See Bartlett, *supra* note 19, at 881-85.

233. See Meyer, *supra* note 91, at 794. Professor Meyer praises New York University Law School’s lawyering program because it strives to train competent professionals in a *deeply self-reflected* context. See *id.* (emphasis added).

the words, images, institutions, and behaviors.<sup>234</sup> Ethnography applied to familiar surroundings like law or legal discourse is called ethnomethodology, which involves treating the familiar as “strange,” meticulously recording the patterns of events and “microscopically” analyzing the record.<sup>235</sup> Professor Cunningham suggests that applied to the attorney-client relationship, ethnomethodology might reveal “patterns of domination, control, and incomprehension that persist even when the attorney is consciously attempting to develop an open, listening ‘client-centered’ relationship.”<sup>236</sup> Beyond the attorney-client relationship, ethnomethodology may have much to offer the law professor struggling with the muting of outsider students. Not only might such a method give us insight into our relationships with our students, but might also be useful to incorporate into our teaching of legal language and legal texts. Perhaps part of the muting problem could be remedied by teaching students to treat legal texts as “strange,” in part to discover the patterns of bias and domination inherent in those texts.

Experimenting with all or any of these concepts would be a big step toward attacking the problem of muting in law school, because they include *as a requirement* in law school the teaching of the additional skills of critical legal theory and methodology.<sup>237</sup> Many law schools offer upper-level courses on critical jurisprudence, feminist jurisprudence, or even law and linguistics. But all of these courses focus on scholarly thought and writing and most do not teach how to translate critical theory into the practice of law.<sup>238</sup>

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234. See Cunningham, *supra* note 100, at 1341.

235. See *id.* at 1342. Professor Cunningham gives Deborah Tannen’s bestselling book, *YOU JUST DON’T UNDERSTAND*, as an example of ethnomethodology, because Professor Tannen discovered patterns of domination in male-female speech through meticulous examination of thousands of male-female conversations. See Cunningham, *supra* note 100, at 1347.

236. See *id.* at 1348.

237. This Article is meant to begin the dialogue on how to solve the muting problem. Critical legal theory and methodology, both the ones mentioned here and others, can be incorporated into law school and legal writing pedagogy in any number of ways. The idea is to include somehow the teaching of the biases in legal language in the quest to humanize and personalize the teaching of law. It is beyond the scope of this Article to list exhaustively the critical theories that might work, or to give a blueprint for their incorporation into legal writing.

238. See, e.g., Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561, 597-601 (1997). Professor Parker advises that law students should be encouraged to “think on paper” about justice and law reform and describes several creative ways to encourage students to think analytically

This is a crucial, missing link. First, because the critical theory courses have a scholarly bent and legal writing has a practical bent, students will likely compartmentalize critical theory as a scholarly activity and not as a part of good, effective lawyering. Second, many students may never take a course in critical theory—or may devalue them as impractical—because they are not required. Finally, if muting means anything, it means that after the first-year curriculum, especially legal writing, many students will already be assimilated into legal language—that, after all, is the goal. So, critical theory must be introduced in the first year, and must be followed by upper-level, practical lawyering courses that teach critical theory and how to use it in law practice.

To have any affect on both the muting of individuals and the ultimate problem of muting in law practice, critical theory and methodology would have to be incorporated in the first year and would have to be included in legal writing because it is the primary course that teaches lawyering and legal language most explicitly. The introduction of critical theory in the first year would have to be supplemented by upper-level practical courses that teach more critical theory and methodology in the context of lawyering. It is crucial that the critical theory and methodology be introduced in the first year and that it have a significant place in all first-year and upper-level courses that teach practical lawyering skills. Students must learn to use critical legal thinking *in the context* of lawyering—to use critical thinking in predictive writing, persuasive writing, legal analysis, oral advocacy, negotiation, and client representation. And, students must be exposed to some critical theory at the same time that they are learning conventional legal analysis and language. At a minimum, this would teach students to recognize bias in legal language and would validate students who feel uncomfortable with legal language. It would also educate “insider” students about the limitations and biases of the law and legal language. Through education, legal educators can change the

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about issues of policy, mostly in the context of scholarly writing. She also advocates giving writing and lawyering assignments that require students to confront ethical issues and issues of professionalism. All of these suggestions are excellent and, in many ways, consistent with my proposal here. But, my proposal differs in that I believe that law students should be encouraged to think about law reform and the bias of legal language in the context of lawyering, not scholarship. Ethics and professionalism are a part of this proposal, but they are not the whole picture.

audience targeted by the process view and the language taught by the social view, and begin to end the cycle of muting.

The practical problems of incorporating critical theory and methodology into first-year and any upper-level legal writing courses will be evident to anyone who has ever taught legal writing. Legal writing professors, although rising in status, continue to be underpaid and overworked. The individual attention required to teach basic lawyering to novices, such as critiques of multiple drafts and conferences, is extremely time consuming. Most professors barely have the time and course hours to teach conventional legal analysis, must less critical theory, positionality method or “meticulous” analysis.<sup>239</sup> Throughout this Article, I have noted that even legal writing professors conscious of bias in legal language are hard-pressed to share their knowledge because of low credit and class hours. And because most legal writing professors have no job security and are paid less than half of what their “doctrinal” colleagues are paid, they have little incentive to do more than they already do.<sup>240</sup> To suggest that they do so under current status conditions and salary structures would be very unfair.

Thus, law schools must take the initiative. Our responsibilities to our outsider students do not end with admission, and we cannot continue to foist all the blame on the profession. The epistemic view of writing and the determinist view of language teach us that as legal educators, we participate in shaping the contours and culture of legal language. Language is not static—it is dynamic and it can be changed. Teaching critical legal theory in the context of teaching lawyering skills—in the first year and beyond—goes a long way toward recognizing our role in shaping legal language. But, it requires that law schools commit to the goal of teaching students to lawyer, to increase the status and pay of those who teach legal writing and lawyering, and to devote the required time and credit hours to allowing those courses to include a substantial component of critical theory. Without doubt, the commitment would be worth the payoff: not only will we teach our students to challenge biased language and send them out to the legal market with the tools they

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239. See Rideout & Ramsfield, *supra* note 6, at 77-79, 87; Morrison, *supra* note 94, at 78-79; Jan M. Levine, presentation at the Legal Writing Institute Conference (1996) (entitled *Skills Training and Legal Writing Programs: “Tastes Great or Less Filling?”*) (unpublished transcript on file with author).

240. See generally Louis J. Sirico, Jr., Association of Legal Writing Directors & Legal Writing Institute 1998 Survey Results (on file with author).

need to succeed *and* the encouragement to stretch language and think outside the box, but in doing so, we can make law school—and law practice—a less alienating place.