Legal Writing: The View From Within

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"[W]riting is an act of identity . . . ."[1]

> We have seen that law professors systematically focus their students' attention on layers of textual and legal authority when deciphering the conflict stories at the heart of legal cases. But what happens to the people in these stories? What aspects of their identities and lives remain important when refracted through this legal lens? We can ask as well: What aspects of the law students' and professors' lives and experiences are considered to be salient during the conversation?[2]

Why is writing hard to do? For lots of reasons, most people would say. But if pressed, the majority would acknowledge that among those reasons, writing in general is hard to do because your self is on the line when you write. Writing is an act of self-expression and, in turn, self-revelation. Writing involves the self. At the mention of this idea, people almost always nod their heads in agreement.

So why is legal writing hard to do? Most people would acknowledge that legal writing can indeed be challenging, especially doing it well, again for a number of different reasons. Many of those reasons would

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1. ROZ IVANIČ, WRITING AND IDENTITY: THE DISCOURSAL CONSTRUCTION OF IDENTITY IN ACADEMIC WRITING 104 (1998).

2. ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" 99 (2007).

be what we call text-based: legal writing is difficult because, among other things, it requires the mastery of a number of discourse conventions—some of them complex, many of them constraining, and many of them unfamiliar to beginning legal writers.

Another way to approach the question is to keep in mind the relationship between writing and thinking. If "thinking like a lawyer," the purported goal of legal education, is complex and challenging to master, then "writing like a lawyer" must, to some extent, be equally challenging. Although a little more vague, this seems like a good reason for legal writing being similarly difficult.

Much further down the list of reasons for legal writing being difficult—if on the list at all—would be that legal writing involves questions of the writer's self. But we think otherwise. In fact, we believe that questions of the self are one of the reasons why legal writing is such a challenging type of discourse to write and especially to write well. And we further believe that for beginning legal writers, questions of the self are primary and are one of the central challenges. We also know that at first blush, this sounds unlikely. But that is because, when people talk about a writer's self, they usually have in mind notions of the self that we do not.

When people talk about a writer's self, they commonly think of an essentialist, or expressivist, or even a romantic notion of the self.[3] A writer's self is a kind of individual's core from which ideas, arguments, feelings, and attitudes emerge. This is not unlike how people think of their "self" generally—as something stable, unitary, coherent, and "theirs."[4]

In our view—what might be called "the view from within"—a writer's self is something different from these commonsense notions of the self.[5] Although there is a way in which a legal writer brings a self to the writing task, that self becomes only one part of the self that is in the legal document. In other ways, the legal document, or rather the legal discourse within which the document is situated, also contributes to and constructs that self. For these reasons, upon which we will elaborate

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3. *Romantic* in this sense means that the self is the source of ideas and inspiration for the writer. For a discussion of this in the poetic tradition, one that spills over into general cultural notions of the writer's self, see M.H. ABRAMS, THE MIRROR AND THE LAMP: ROMANTIC THEORY AND THE CRITICAL TRADITION 77 (1953).

4. *See generally* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 174 (2000); PIERRE SCHLAG, THE ENCHANTMENT OF REASON 127 (1998).

5. We will sidestep any discussion of the "self" generally, although we have ideas about that as well.

later in this Article, we think it is best to view the self, or identity, of a legal writer as a discoursal identity.[6]

In offering this view of a legal writer's identity, we are elaborating on and extending what we described in an earlier article as the social view of legal writing—a view that we consider important to a full understanding of what law students and lawyers do when they write in legal contexts.[7] Before we turn, then, to the discoursal identity of legal writers, we need to review and comment on the social view of legal writing generally.

I. A REVISED VIEW REVISITED

A. *Contexts for Legal Writing*

In our earlier article, we reviewed and criticized what we considered traditional but incomplete views of legal writing.[8] Rather than seeing writing as something you can either do or not do, a "skill" divorced from intellectual activity, or a necessary evil in the law curriculum, we suggested seeing legal writing as legal thinking itself.[9] Professors, jurists, lawyers, and law students write their livings, so to speak. And legal writing is, of course, the written law itself, not to be taken lightly. In fact, legal writing requires attention and study by experts in a range of fields, including linguistics, anthropology, sociology, and rhetoric. Such studies are emerging, and they help legal writers and professors of legal writing to see themselves anew.[10]

We suggested a richer vision of teaching law and legal writing, one that included primarily three views: the formalist, process, and social perspectives.[11] These theories, derived from work by composition

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6. We take the phrase *discoursal identity* from Roz Ivanič. *See* IVANIČ, *supra* note 1, at 25. We first encountered her work at a conference on knowledge and discourse in Hong Kong in 2002, and her work has greatly influenced our own thinking since we attended that conference.

7. *See* J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 56–58, 61, 67 (1994).

8. *Id.* at 39.

9. *Id.* at 54–55.

10. *See* MERTZ, *supra* note 2; JOHN SWALES, GENRE ANALYSIS (1993); Dorothy H. Evensen, *To Group or Not to Group: Students' Perceptions of Collaborative Learning Activities in Law School*, 28 S. ILL. U. L.J. 343 (2004); Laurie C. Kadoch, *Legal Writing: The Third Paradigm: Bringing Legal Writing "Out of the Box" and Into the Mainstream: A Marriage of Doctrinal Subject Matter and Legal Writing Doctrine*, 13 J. LEGAL WRITING INST. 55 (2007).

11. Rideout & Ramsfield, *supra* note 7, at 48–61.

theorists and linguists,[12] suggest that legal writing is the embodiment of the analytical and intellectual work of all writers within the legal community: students, scholars, and practitioners.[13] As such, legal writing requires complex analysis, challenging to the individual writer at any level:

> [L]aw school offers an invitation into one of the richest and most complex of the professional discourses: a community that is demanding in its argumentative and analytical paradigms, challenging in its research and writing processes, and complicated by its social pressures. Such a complex discourse and its accompanying social contexts require strategies for discovering and mastering its conventions, for writing as a situated member of the legal community. The legal writing classroom should, appropriately, initiate students into these conventions and practices. And that process of initiation should continue through the three years.[14]

Such strategies include awareness of all three perspectives: the formalist perspective offers techniques for discovering the textual boundaries of legal discourse; the process perspective offers techniques for mastering research and analytical tasks required by each project; and the social perspective offers techniques for analyzing a document's context and the bases for individual writers' design decisions. Working together, these perspectives enrich the law classroom, initiating students into the legal discourse community—an approach embodied in what we called the "social view" of legal writing:

> In certain ways, the social perspective has a kinship with traditional views of legal education. For example, a common assumption is that law school teaches students to "think like a lawyer." In other words, through their three-year exposure to law casebooks and oral questioning in class, students will be molded into lawyers. The social perspective allows for a similar view of writing. As Lester Faigley explains, writing "shapes the writer as much as it is shaped by the writer." In other words, to learn legal writing is to learn how to write within the conventions and practices of a particular professional group more than it is to write original ideas that the law might then claim as its own,

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12. *See, e.g.*, ENGLISH FOR ACADEMIC PURPOSES (A.P. Cowie & J.B. Heaton eds., 1977); Anne J. Herrington, *Writing in Academic Settings: A Study of the Contexts for Writing in Two College Chemical Engineering Courses*, 19 RES. TEACHING ENG. 331, 356–57 (1985); Ann M. Johns & Tony Dudley-Evans, *English for Specific Purposes: International in Scope, Specific in Purpose*, 25 TESOL Q. 297, 297, 304–05 (1991); Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1, 2, 13 (1991).

13. Rideout & Ramsfield, *supra* note 7, at 99.

14. *Id.*

> as being "legal." This seeming loss of the ability to "be original" is something every law student encounters. Indeed, most writers— in all fields—make a commonplace assumption that, when they write, they are constructing original ideas that represent their own individual thinking. Thus, law students are frustrated by what they see as the lack of "creativity" in legal writing and analysis. In fact, they are learning to write within a highly conventionalized discourse, law, in which legal arguments are constructed according to certain unwritten discourse rules, or conventions. Because of their unfamiliarity with those conventions, law students are unable to see the creativity afforded them within the conventions, for example in constructing legal arguments.[15]

All of this meant students and faculty needed to be aware that learning and performance needed to be put into a context.

B. Impact of the Formalist, Process, and Social Perspectives

Legal educators have adopted all three perspectives. Ostensibly leaving behind the formalist perspective, legal writing faculty have embraced both the process and social perspectives in the legal writing classroom. Seeing writing as a "process of making meaning,"[16] professors have begun to create curricula built around the writing process, giving students opportunities to explore stages in the legal writing process and to see professors as mere interveners in that process.[17] The number of courses requiring rewrites of an assignment, for example, continues to increase steadily[18] as professors encourage recursive

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15. *Id.* at 59–60 (footnotes omitted) (quoting Lester Faigley, *Nonacademic Writing: The Social Perspective*, *in* WRITING IN NONACADEMIC SETTINGS 231, 236 (Lee Odell & Dixie Goswamie eds., 1985)).

16. Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 DUQ. L. REV. 489, 492 (2002); *see also* Adam Todd, *Neither Dead Nor Dangerous: Postmodernism and the Teaching of Legal Writing*, 58 BAYLOR L. REV. 893, 919–20 (2006).

17. *See generally* Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93 (2005) (commenting on the development of legal writing curriculum from an emphasis on the product of writing to the process of writing); Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719 (1997) (discussing the process approach as the newest method in legal writing theory); Laurie C. Kadoch, *The Third Paradigm: Bringing Legal Writing "Out of the Box" and Into the Mainstream: A Marriage of Doctrinal Subject Matter and Legal Writing Doctrine*, 13 J. LEGAL WRITING INST. 55, 62 (2007) (describing the early transition from product focused results to the new emerging paradigm shifting the emphasis to process); Cara Cunningham & Michelle Streicher, *The Methodology of Persuasian: A Process-Based Approach to Persuasive Writing*, 13 J. LEGAL WRITING INST. 159, 163 (2007) (showing the relationship between persuasion and process).

18. The Legal Writing Institute administers annual surveys to document critical data in legal writing curriculum. From these surveys, in the years 2000–2009, there was a

techniques and a variety of approaches to designing and building legal documents.

The adaptation of the social view was steady and strong. Seen at first as the simple recognition that students are becoming members of a profession[19] in which legal thinking and legal writing are inseparable,[20] some proponents suggested that the legal writing classroom should be small,[21] focused on individual instruction,[22] postmodern,[23] and generative.[24] But those modest suggestions, sometimes stated in the context of arguing for a vast change in legal education, evolved into a more holistic view of how to teach legal writing.

The holistic view requires that all legal writing be put in a larger context and that students be taught not just the nuts and bolts of legal language, or a healthy approach to producing a document, but a strong sense of rhetorical setting. The community is not monolithic but, instead, specific.[25] And the specific characteristics are available to all those entering the community—whether for analysis, discussion, criticism, acceptance, or rejection. Any nonlawyer recognizes that lawyers have their own discourse; any student entering the community is expected to, and expects to, learn about that discourse.

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fourteen percent increase in schools requiring rewrites for all major assignments. *See* Legal Writing Institute Surveys, *available at* http://www.lwionline.org/surveys.html (last visited Apr. 20, 2010).

19. John F. Nivala, *The Architecture of a Lawyer's Operation*, 20 J. LEGAL PROF. 99, 100, 117 (1996); Matthew J. Arnold, Comment, *The Lack of Basic Writing Skills and Its Impact on the Legal Profession*, 24 CAP. U. L. REV. 227, 229 (1995). *See generally* Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law School Into Practice*, 29 STETSON L. REV. 1193 (2000); Kathleen Elliot Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 TOURO L. REV. 507 (2005).

20. Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245, 254–55 (1996).

21. Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213, 213, 234 (1998); *see also* Julie A. Oseid, *It Happened To Me: Sharing Personal Value Dilemmas To Teach Professionalism and Ethics*, 12 J. LEGAL WRITING INST. 105, 115 (2006); Dionne L. Koller, *Legal Writing and Academic Support: Timing Is Everything*, 53 CLEV. ST. L. REV. 51, 62 (2006).

22. *See* Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 481–82 (1996); *see also* Evensen, *supra* note 10, at 353–54; Robin S. Wellford-Slocum, *The Law School Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 255, 262–71 (2004).

23. Adam Todd, *Neither Dead nor Dangerous: Postmodernism and the Teaching of Legal Writing*, 58 BAYLOR L. REV. 893, 911, 915–17, 920, 945 (2006).

24. *See, e.g.*, Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 U. CIN. L. REV. 137, 156 (2001).

25. DeJarnatt, *supra* note 16, at 492.

Seeing the social view in the broader context for legal education, legal writing professors have inevitably embraced conventions, restrictions, rules, and directions, exhorting the need to conform to the community, follow traditions, and fit within restrictive notions of how law does, or should, work.[26] This has had an impact, at times, that was unintended by our previous article.

The trouble is the professor's stance. If the professor uses the social view as a tool for indoctrination only,[27] for acculturation only, or for a thinly guised return to formalism, the subtleties and strengths of the view are lost. One commentator observed these unintended consequences by suggesting that the social view was, in fact, elitist,[28] which it certainly could be if misunderstood or wrongly applied. Unwittingly, enthusiasts of the social view may have created an "us versus them" perspective that looks more like the current traditional paradigm than a generative one: more static, less fluid; more exclusive, less inclusive; more permanent, and less negotiable.[29] While the social view helps legal writing teachers understand why "experienced writers who have done well in other discourse communities can be so terribly disconcerted when they shift into the discourse community of legal writing with its new rules, conventions, purposes, and audiences,"[30] that view can also suggest an "expert-novice divide, the initiation rituals that reinforce that divide, and the idea of fully realized, merely to-be-learned conventions."[31] The fact is, "discourse communities are built and maintained by power structures,"[32] and the ideas of "initiating" rather than "inviting" and having "experts" train novices are by definition "more ominous and more hierarchical"[33] than generative and productive.

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26. *See generally* Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105, 112–13, 118, 120–21, 123, 126–27, 130, 133–34, 136–39 (1998); Marie A. Monahan, *Towards a Theory of Assimilating Law Students into the Culture of the Legal Profession*, 51 CATH. U. L. REV. 215, 216–17 (2001); Stephen P. Witte, *Context, Text, Intertext: Toward a Constructivist Semiotic of Writing*, 9 WRITTEN COMM. 237, 246, 252–53, 263, 271, 283, 290–92 (1992).

27. *See* Brook K. Baker, *Language Acculturation Processes and Resistance to In"doctrine"ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz's Critical Anthropology of the Socratic, Doctrinal Classroom*, 34 J. MARSHALL L. REV. 131, 131–32, 139 (2000).

28. *See* Jessie C. Grearson, *Teaching the Transitions*, 4 J. LEGAL WRITING INST. 57, 67–68 (1998).

29. *See id.* at 59–60.

30. *Id.* at 69.

31. *Id.* at 70.

32. *Id.* at 71.

33. *See id.* at 70–71.

Taken too far, the social view can do more harm than good, both to writers' identities and to their openness to learning. Used improperly, the social view can be a kind of educational hypocrisy:

> We cannot simply mention in passing that students come to legal writing with their own expertise, and then treat this expertise as a stumbling block, an explanation for students' incompetence at and discomfort with legal writing. To do so not only frustrates students but it ignores a real possibility: students as potential agents for review and possible reform of legal writing conventions.[34]

Instead, the social view can liberate the classroom and the writer by helping both professor and student discover their places in a complex discourse. Indeed, two commentators have championed the social view as a helpful stage in the legal classroom's evolution.[35] According to them, the work of the New Rhetoricians and the social constructivists has opened the law classroom in general, and the legal writing classroom in particular, to a broader context for learners, a greater range of rhetorical awareness, and an increased repertoire of approaches and techniques suited to legal writing, whether academic or practical.[36]

Seeing "writing [as] a process for constructing thought, not just [as] the 'skin' that covers thought,"[37] New Rhetoricians saw writing as a series of choices within the context of legal problem solving.[38] Thus writing is a "knowledge-shaping process," an interaction among "reader, writer, and text, all of which are embedded in context and language."[39] "[N]o longer viewed as the mere transcription of thought"—something predetermined and resolved—writing is an "active way of making meaning,"[40] a "process of coming to know."[41]

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34. *Id.* at 72.

35. Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155, 155 (1999); DeJarnatt, *supra* note 16, at 489.

36. Berger, *supra* note 35, at 164–65; DeJarnatt, *supra* note 16, at 489, 503.

37. Berger, supra note 35, at 155 (citing ANN E. BERTHOFF, THE MAKING OF MEANING: METAPHORS, MODELS, AND MAXIMS FOR WRITING TEACHERS 69 (1981)).

38. *Id.* (citing JANET EMIG, THE WEB OF MEANING: ESSAYS ON WRITING, TEACHING, LEARNING AND THINKING 4 (Dixie Goswami & Maureen Butler eds., 1983); LINDA FLOWER, THE CONSTRUCTION OF NEGOTIATED MEANING: A SOCIAL COGNITIVE THEORY OF WRITING 2 (1994); Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. COMPOSITION & COMM. 76, 85 (1982)).

39. *Id.* at 157.

40. DeJarnatt, *supra* note 16, at 495.

41. *Id.* at 494 (citing C.H. KNOBLAUCH & LIL BRANNON, RHETORICAL TRADITIONS AND THE TEACHING OF WRITING 51 (1984)).

Professors learned to ask the right questions. Students, in turn, learned how to ask similar questions in the context of any legal writing experience: Who are the audiences for this document? Who will use it? What are their needs and expectations? What is the document's overriding purpose? What are its subsidiary purposes? What is the appropriate scope for achieving these purposes and reaching these audiences? What is the appropriate balance among these rhetorical elements? And from what point of view are these purposes best achieved? Like an architectural puzzle, legal writing can be seen as best designed when it fits into the intellectual and practical landscapes where it will be used.[42]

Seen by some as an inner-directed process so fundamental as to be universal,[43] some who adopted the social view helped individual writers discover their most comfortable place within the discourse community, to negotiate into the community from their particular points of view, and to develop techniques and methods most useful to their specific points of progress into the community. Seen by others as outer-directed, some who adopted the social view believed that "'thinking and language use can never occur free of a social context that conditions them'"[44] and that knowledge is therefore a "'social construction.'"[45] While this notion in itself does not have to trap its adherents, it could create an undue enthusiasm for the community's demands at the cost of the individual's writing process, knowledge, or point of view. Misunderstood or taken too far, the social view could rank legal discourse as "superior to the student's personal voice"[46] or could overemphasize "the community as exclusive, making the teacher once again the gatekeeper with

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42. For a more detailed exploration of how this intellectual architecture can work, see Jill J. Ramsfield, THE LAW AS ARCHITECTURE: BUILDING LEGAL DOCUMENTS (2000).

43. Berger, *supra* note 35, at 158 (quoting Patricia Bizzell, *Cognition, Convention, and Certainty: What We Need to Know About Writing*, 3 PRE/TEXT 213, 215 (1982)).

44. *Id.* (quoting Bizzell, *supra* note 43, at 217).

45. *Id.* (quoting JAMES A. BERLIN, RHETORIC AND REALITY: WRITING INSTRUCTION IN AMERICAN COLLEGES, 1900–1985, at 175 (1987)). Berger also writes as follows:

> Rather than an outgrowth of New Rhetoric, social construction can be viewed as a countertheory. One author describes the beginning of New Rhetoric research in the early 1970s as a turning point in composition theory. At that point, the field turned away from "questions of value and the figure of the writer in a social context of writing to questions of process and the figure of the writer as an individual psychology." . . . The "displacement of the social and . . . celebration of the individual" . . . runs through all the subsequent strains of composition theory, research, and curriculum development.

Id. at 158 n.23 (second alteration in original) (quoting David Bartholomae, *Writing with Teachers: A Conversation with Peter Elbow*, 46 C. COMPOSITION & COMM. 62, 68 (1995)).

46. *See* DeJarnatt, *supra* note 16, at 503.

power to exclude."[47] This "once again" approach returns law professors to the current traditional paradigm where texts are "univocal and autonomous, standing alone and meaningful independent of the text's context or of its writer's intent or background."[48] Students are empty vessels, and teachers fill them up. Power points are memorized and regurgitated, forms are learned and aped, and writing is mechanical and divorced from process or personal choice.

Some theorists found room in the social view for both inner-directed and outer-directed activity, an epistemological approach that liberated both teacher and learner. For example, Linda Flower has suggested a "pedagogy of literate action" that would bring together the social, cognitive, and rhetorical strands and focus on the writer "as an agent within a social and rhetorical context."[49] Flower writes that a literate action is "a socially embedded, socially shaped practice," and at the same time, "an individual constructive act that embeds practices and conventions within its own personally meaningful, goal-directed use of literacy," and because it is both social and individual, "a site of conflict among multiple goals, alternative goods, and opposing shoulds [that] calls for negotiation among unavoidable constraints, options, and alternatives."[50] This approach recognizes the power and place of negotiating meaning between individuals and the community and between novices and experts.

The trouble is that the learner may have gotten lost. Using the social view, professors may have let community trump critical thinking, discourse drum out dialogue, and context coerce creativity.

C. A Revised View of the Writer

We never intended such a result. In fact, we warned that legal writers needed to negotiate several social settings, be aware of ever-changing circumstances, and understand the points of view derived from a variety of backgrounds, each of which might determine a specific path into the community.

> The social perspective allows for other writing difficulties that law students and lawyers may encounter as well. For example, they are situated in several social settings at once. They are working within the

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47. *See id.* at 505.

48. *Id.* at 499 (citing Martin Nystrand et al., *Where Did Composition Studies Come From?*, 10 WRITTEN COMM. 267, 275, 277–78 (1993)); *see* Rideout & Ramsfield, *supra* note 7, at 49–50.

49. Linda Flower, *Literate Action*, *in* COMPOSITION IN THE TWENTY-FIRST CENTURY: CRISIS AND CHANGE 249, 249 (Lynn Z. Bloom et al. eds., 1996).

50. *Id.*

> law office and law school communities, whose members are making various and changing demands on the writer. They are usually also working within the larger legal community, whose members have set ethical and practice standards. And they come from different gender, race, and ethnic communities that may generate different learning styles and perspectives.[51]

The social perspective reveals common matters members have as part of the community, which can ostensibly erase the individual characteristics or psychology of each member. The constraints and demands of the community are shaping her as she learns and attempts to negotiate her way into the community. By definition, such a negotiation will be met with resistance, confusion, rebellion, and perhaps despair. The social perspective taught us to look at the larger context within which writers performed and negotiated meaning to see that writing is a social act. But is the social view getting us far enough as thus explored, used, and explained? Evidently not.

We need to see the view from within: the clashes within the legal discourse community reveal unresolved approaches to teaching; the clashes within individual writers reveal unexplored possibilities. Our students arrive at law school talented, smart, and wise in many ways. They bring with them analytical and creative tools more than adequate to meet the needs of modern legal academia and practice. In a way, they are like gifted athletes—adept at basketball, football, soccer, or track. They are asked to switch to an individual sport, for example tennis, to develop athleticism in a personal performance against one adversary, which sometimes occurs on a grander, more public stage. We as teachers put them on the courts, tell them the rules, and expect them (usually in one year) to be virtuosi tennis stars. Funny, they aren't. Yet we rail against them, not against ourselves. "We've told you to stop playing basketball. Why haven't you? Play tennis!" But they cannot adjust immediately because this is a different way of being. Now we need to look at how that different way of being is actually experienced by the writers. By doing so, we may be able to discover a more balanced approach, not just to the legal writing classroom, but also to all law classrooms. We need a way of analyzing what happens to these students when they try to become insiders, a way of remodeling the classroom to suit those experiences.

Most law professors would probably like such a remodeling. The literature is rife with complaints about legal education and theories

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51. Rideout & Ramsfield, *supra* note 7, at 61.

about why students cannot perform better than they do. And those complaints are not limited to law schools:

> Institutions of higher education are full of complaints about student writing. The mismatch between students' writing and institutional expectations is frequently attributed to a literacy deficit on the part of the students. The most common response is to set up some sort of 'fix-it' study skills provision with the aim of remedying this irritating literacy deficit as quickly and cheaply as possible. My research has led me to see this mismatch in a quite different light, and to propose that academic institutions, in addition to providing the sort of support recommended in the previous section, ought themselves to be examining and remedying their own practices.[52]

Legal writing literature abounds in similar frustrations: the Socratic method is outmoded and students respond poorly;[53] students do not interact well in class;[54] the law classroom is anti-feminist[55] and largely immune from efforts to make it more class conscious,[56] race conscious,[57] culture conscious,[58] or international.[59] Students are unpre-

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52. IVANIČ, *supra* note 1, at 343.

53. Cynthia G. Hawkins-León, *The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues*, 1998 BYU EDUC. & L.J. 1, 16–17; *see* Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 114–16, 118, 120–22, 127 (1999); Stropus, *supra* note 22, at 456–65; James B. Levy, *As a Last Resort, Ask the Students: What They Say Makes Someone an Effective Law Teacher*, 58 ME. L. REV. 49, 54 (2006); *see also* Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method A Proper Tool for Legal Writing Courses?*, 43 CAL. W. L. REV. 267 (2007).

54. *See* Evenson, *supra* note 10, at 378–79.

55. *See* Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 16–22 (1998); Cheryl M. Herden, *Women in Legal Education: A Feminist Analysis of Law School*, 63 REV. JUR. U.P.R. 551 (1994); Tanisha Makeba Bailey, *The Master's Tools: Deconstructing The Socratic Method and It's Disparate Impact On Women Through The Prism of Equal Protection Doctrine*, 3 MD. L.J. RACE, RELIGION, GENDER & CLASS 125 (2003); Felice Batlan et al., *Not Our Mother's Law School?: A Third-Wave Feminist Study of Women's Experiences in Law School*, 39 U. BALT. L.F. 124 (2009); *but see* Kenneth Lasson, *Feminism Awry: Excesses in The Pursuit of Rights and Trifles*, 42 J. LEGAL EDUC. 1, 2 (1992).

56. *See* Baker, *supra* note 27, at 135; Brook K. Baker, *Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice*, 23 WM. MITCHELL L. REV. 491, 561 (1997); Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155 (2008).

57. *See* Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33, 39 (1994).

58. While much of the critical race and feminist literature brings the stories of individuals into the legal discourse community, this literature often focuses on individuals as outsiders to the dominant community rather than travelers moving successfully from one community to another. *See* Baker, *supra* note 27, at 315; Baker, *supra* note 56, at 561;

pared[60] and alienated and more preoccupied with getting the grades than learning the law.[61] Lawyers, in turn, find students unprepared for the practice of law and generally more mercenary than motivated.[62] And despite these complaints, no literature, including the discussions on novices and experts,[63] has solved this alienation problem. Some literature frames the situation in somewhat helpful but perhaps overly simplistic ways: as a series of lesson plans, including peer work and reflective reading[64] or an exhortation to use study groups more consciously.[65] On the other hand, some suggest a complete revamping of the case method approach and Socratic teaching,[66] while others stand

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Crenshaw, *supra* note 57, at 39.

59. *See* Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. LEGAL EDUC. 157, 157–58 (1997).

60. Cathaleen A. Roach, *Is the Sky Falling? Ruminations on Incoming Law Student Preparedness (and Implications for the Profession) in the Wake of Recent National and Other Reports*, 11 J. LEGAL WRITING INST. 295, 295–96, 300 (2005); Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, The Public, and the Legal Profession*, 44 CAL. W. L. REV. 219, 236–38 (2007); Benjamin V. Madison III, *The Elephant in Law School Classrooms: Overuse of the Socratic Method As An Obstacle To Teaching Modern Law Students*, 85 U. DET. MERCY L. REV. 293, 298 (2008).

61. *See* Ann Althouse, *A Skull Full of Mush*, N.Y. TIMES, Feb. 20, 2007, at A19, *available at* http://select.nytimes.com/2007/02/20/opinion/20althose.html?_r=1; *see also* Evensen, *supra* note 10, at 367–68, 371; Barbara Glesner Fines, *Competition and the Curve*, 65 UMKC L. REV. 879 (1997).

62. *See* Debra Cassens Weiss, *Summer Associates Advised to Lose the Sense of Entitlement*, A.B.A. J., Apr. 28, 2009, http://www.abajournal.com/news/article/summer_associates_advised_to_lose_the_sense_of_entitlement/; *see also* Dolin, *supra* note 60, at 236–38.

63. The novice–expert literature describes novices and experts but fails to connect one to the other, particularly in terms of teaching methodology and individual progress. *See, e.g.*, Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 314–16 (1995).

64. Berger, *supra* note 35, at 177–81 (offering tips for reflective reading through individual and group stages of review).

65. Evenson, *supra* note 10, at 419.

66. *See, e.g.*, Tanisha Makeba Bailey, *The Master's Tools: Deconstructing the Socratic Method and Its Disparate Impact on Women Through the Prism of the Equal Protection Doctrine*, 3 MARGINS 125, 163 (2003) (arguing against the Socratic method based on equal protection); David D. Garner, *Socratic Misogyny?—Analyzing Feminist Criticisms of Socratic Teaching in Legal Education*, 2000 BYU L. REV. 1597, 1634–48 (providing a modification of the Socratic method to accommodate feminist criticisms while maintaining the method's benefits); Hawkins-León, *supra* note 53, at 2 (arguing for a combined Socratic and Problem method, with focus given to the Problem method); Kerr, *supra* note 53, at 114 (concluding the traditional Socratic-method style is no longer the norm in legal education); *see also* Boyle & Dunn, *supra* note 21, at 219–20; Kara Abramson, *"Art For A Better Life:" A New Image of American Legal Education*, 2006 B.Y.U. EDUC. & L.J. 227 (2006); John O. Sonsteng, et al., *A Legal Education Renaissance: A Practical Approach For the Twenty-First*

firm on current methodology, from Socratic method to a ban on laptops.[67]

No singular panacea will remedy legal education, but we may find part of the solution closer than our hands and feet: within the learners themselves. What we have discovered since we wrote our earlier article is that a whole other group has looked at the social perspective view through the idea of "literacies," taking academic education a step further by looking not only at what the writer does, but also at who the writer is. Similarly, we suspect that one key to improving our practices in legal education is to understand who the writer is in the law classroom, how the legal writer is positioned in the legal discourse community, and what the legal writer's possibilities are for constructing an identity within that discourse. That is, we encourage taking the view from within—a view of the self of a legal writer. But getting there requires starting from the outside—from the social perspective and its linkage with academic literacy.

II. LEGAL WRITING AND IDENTITY

A. *Academic Literacies*

Our additional thinking emerges from what is called "new literacy studies,"[68] a movement that is centered in the United Kingdom, although American researchers have also made contributions.[69] Its

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Century, 34 WM. MITCHELL L. REV. 303 (2007).

67. David Cole, *Laptops vs. Learning*, WASH. POST, Apr. 7, 2007, at A3, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/04/06/AR2007040601544.html (citing a Georgetown University law professor's prohibition of laptops in class because students were less engaged and transcribed lectures without processing the information); *see also* Kathy Matheson, *More Professors Ban Laptops in Class*, ASSOC. PRESS, May 3, 2006, *available at* http://www.msnbc.msn.com/id/12609580 (reporting on the banning of laptops because of the distraction they cause); *see also* Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character In Literature*, 33 HOFSTSRA L. REV. 955 (2005) (arguing that the Socratic method forces students to engage in legal analysis and compels students to overcome the fear necessary to becoming an effective lawyer); Jana R. McCreary, *The Laptop-Free Zone*, 43 VAL. U. L. REV. 989 (2009) (examining the question of whether students should be permitted to use laptops in class).

68. *See, e.g.*, SITUATED LITERACIES: READING AND WRITING IN CONTEXT 1–2, 5–6 (David Barton et al. eds., 2000); *see also* DAVID BARTON, LITERACY: AN INTRODUCTION TO THE ECOLOGY OF WRITTEN LANGUAGE (1994); MIKE BAYNHAM, LITERACY PRACTICES 1, 265 (1995); BRIAN V. STREET, LITERACY IN THEORY AND PRACTICE (1984); BRIAN V. STREET, SOCIAL LITERACIES: CRITICAL APPROACHES TO LITERACY IN DEVELOPMENT, ETHNOGRAPHY AND EDUCATION 1 (1995).

69. *See, e.g.*, JAMES PAUL GEE, SOCIAL LINGUISTICS AND LITERACIES: IDEOLOGY IN DISCOURSES (2d ed. 1996); JAMES PAUL GEE, THE SOCIAL MIND: LANGUAGE, IDEOLOGY, AND

primary feature is to look at literacy as a social practice.[70] In doing so, new literacy researchers examine the link between the activities of reading and writing, on the one hand, and the contexts and social structures in which those activities are embedded and which, in turn, shape those activities, on the other.[71] For this reason, these researchers commonly call the literacies that they study "situated literacies."[72]

By looking at literacy as a social practice, these researchers inevitably examine the ways in which reading and writing practices are structured and sustained by the institutions that are part of the social context within which they take place; thus, these researchers in turn focus as well on the power relationships embedded within those institutions.[73] Because some of the institutions that structure various literacy practices are more powerful socially or culturally, it follows that some literacy practices are more "dominant, visible and influential than others."[74] In the view of most new literacy researchers, one of the more powerful social institutions is that of education, and so not surprisingly, literacy as it is taught in schools is one primary area of research.[75]

Mary Lea and Brian Street have extended this inquiry into higher education, giving the label "academic literacies" to the kinds of writing and reading in which students engage in various disciplines.[76] Lea and Street characterize learning in higher education as a matter of "adapting to new ways of knowing."[77] This perspective sounds similar to what is often considered "learning the conventions of a new discipline,"[78] or

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SOCIAL PRACTICE (1992).

70. *See* David Barton & Mary Hamilton, *Literacy Practices*, *in* SITUATED LITERACIES, *supra* note 68, at 7, 7.

71. *Id.*

72. *See id.* at 8.

73. *See id.*

74. *Id.* at 12 (emphasis omitted).

75. But this is not the exclusive area of research. Various authors investigate literacy practices in other contexts. *See* Mary Hamilton, *Expanding the New Literacy Studies*, *in* SITUATED LITERACIES, *supra* note 68, at 16, 16 (visual data in social research); Kathryn Jones, *Becoming Just Another Alphanumeric Code, in* SITUATED LITERACIES, *supra* note 68, at 70, 70–71 (Welsh farming communities); Karin Tusting, *The New Literacy Studies*, *in* SITUATED LITERACIES, *supra* note 68, at 35, 43 (religious practice of communion); Anita Wilson, *There is No Escape from Third-Space Theory, in* SITUATED LITERACIES, *supra* note 68, at 54, 56, 59–65 (prisons).

76. Mary R. Lea & Brian V. Street, *Student Writing in Higher Education: An Academic Literacies Approach*, 23 STUD. HIGHER EDUC. 157 (1998).

77. *Id.* at 158.

78. *See* Berger, *supra* note 35, at 158; DeJarnatt, *supra* note 16, at 503.

sounds like it is related to previous work on helping students move from novice to expert.[79]

Lea and Street add a twist, however. Too commonly, academic literacy practices are seen as one-sided because the students acquire the "codes and conventions" of an academic discipline with those codes and conventions being a given.[80] However, Lea and Street view academic literacy practices from both sides, including the students and their literacy practices in the model.[81] In doing so, they offer what they hope is a more complex model of academic literacy practices and one that shows academic literacy—learning to read and write in a given discipline—as a matter of contest and struggle, rather than a simple matter of acquiring a set of skills.[82] To that end, they outline what they call three main perspectives on, or models for, teaching students literacy practices and, more specifically, teaching students to read and write: (1) study skills, (2) academic socialization, and (3) academic literacies.[83]

The first perspective, study skills, is what most people think of when they think of literacy. Under this perspective, literacy involves a set of discrete skills.[84] Lea and Street call these skills "technical and instrumental,"[85] and they note that this model of literacy leads to a focus on student deficits: students who possess these skills are well on their ways to being successful writers, and students who lack them are not.[86] These skills, once acquired, are transferable to other contexts; thus, the skills themselves are acontextual, or according to Lea and Street, "atomised."[87] They also note that because this model can be crude in its application, writing teachers have tried to enlarge their

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79. *See* Blasi, *supra* note 63, at 386–89. This notion is not entirely new. James Boyd White describes legal literacy as follows:

> [L]iteracy is not merely the capacity to understand the conceptual content of writings and utterances, but the ability to participate fully in a set of social and intellectual practices. It is not passive but active; not imitative but creative, for participation in the speaking and writing of language is participation in the activities it makes possible. Indeed literacy involves a perpetual remaking both of language and of practice.

JAMES BOYD WHITE, *The Invisible Discourse of the Law, in* HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 60, 72 (1985).

80. Lea & Street, *supra* note 76, at 158.

81. *Id.*

82. *Id.*

83. *Id.* at 158, 172.

84. *Id.* at 158–59.

85. *Id.* at 159.

86. *See id.* at 172.

87. *Id.* at 158.

focus to include "broader issues of learning and social context,"[88] and these efforts at a broader perspective have led to the second perspective, which they call the "academic socialisation" approach.[89]

This second perspective, academic socialization, is also reasonably familiar to professors in the legal writing community, at least since the mid-1990s.[90] It is broader than the first perspective. Within this perspective, literacy becomes not only a matter of skills but also the social contexts within which those skills are employed. Thus, the academic socialization perspective entails not only texts, but also contexts and, in so doing, accounts more fully for what students must learn as they enter a new discourse domain such as law. Another literacy researcher, Roz Ivanič, distinguishes between the earlier skills view of literacy, which she calls literacy "literacy (a)," and the academic socialization view, which she calls literacy "literacy (b)."[91] Noting that the latter is more powerful, she states that "[l]iteracy . . . is not a technology made up of a set of transferable cognitive skills, but a constellation of practices which differ from one social setting to another."[92]

In their discussion of the three models of literacy, Lea and Street point out that these models are not exclusive or independent of each other, nor do they exist in a linear frame of time—students acquire skills first, then become socialized into a discourse.[93] Rather, the broader second view "encapsulates" the first view "so that the academic socialisation perspective takes account of study skills but includes them in the broader context of . . . acculturation processes."[94]

Although Lea and Street embrace a broader model of literacy, they nevertheless note some shortcomings of the academic socialization model. Of these, they see its incompleteness as its most important shortcoming.[95] In their view, learning to read and write in a specific discourse entails more than matters of skill or socialization; rather, reading and writing involve much deeper issues of language, discourse, epistemology,

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88. *Id.* at 159.

89. *Id.* This was part of our effort in our earlier article. *See* Rideout & Ramsfield, *supra* note 7, at 66.

90. *See* Rideout & Ramsfield, *supra* note 7, at 39 (citing Williams, *supra* note 12, at 1).

91. IVANIČ, *supra* note 1, at 57–59.

92. *Id.* at 65.

93. Lea & Street, *supra* note 76, at 158.

94. *Id.*

95. *Id.* at 158–59.

and identity.[96] To that end, they posit a third perspective on literacy—what they call "academic literacy."[97]

Within the academic literacy perspective, literacy is seen as a social practice, as we suggested earlier in our discussion of the new literacy studies.[98] Viewed as a social practice, academic literacy thus reaches the deeper issues mentioned above. Lea and Street describe this more fully:

> [Academic literacy] views student writing and learning as issues at the level of epistemology and identities rather than skill or socialisation. An academic literacies approach views the institutions in which academic practices take place as constituted in, and as sites of, discourse and power. It sees the literacy demands of the curriculum as involving a variety of communicative practices, including genres, fields and disciplines. From the student point of view a dominant feature of academic literacy practices is the requirement to switch practices between one setting and another, to deploy a repertoire of linguistic practices appropriate to each setting, and to handle the social meanings and identities that each evokes.[99]

We agree with Lea and Street that our view of students' literacy—in our case, how law students learn to read and write—should be equally broad and deep. When we ask a student to learn to "write like a lawyer," we are requesting an enormously complex undertaking. This undertaking not only requires a full set of skills—whether linguistic or cognitive—but also requires that students employ those skills in a discourse that, to most of them, is wholly new and unfamiliar.

Furthermore, embedded within that discourse are complex practices that emerge from the social and institutional context that we can casually call "the law." These practices contain relationships of epistemology, power, and authority that both guide and constrain what students can say and write—whether they are making a simple statement about what the relevant law is or whether they are applying that statement of the law to make a legal argument. For legal writers to do so, they must adopt not only a set of discourse practices specific to the law, but also an epistemology and an identity specific to the law.

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96. *Id.* at 159.
97. *Id.* at 158–59.
98. *See supra* text accompanying notes 68–75.
99. Lea & Street, *supra* note 76, at 159.

B. *Literacy and Identity*

Of particular interest to us, then, is Lea and Street's observation that the third perspective, academic literacy, involves questions about a writer's identity. They explain:

> This emphasis on identities and social meanings draws attention to deep affective and ideological conflicts in such switching and use of the linguistic repertoire. A student's personal identity—who am 'I'—may be challenged by the forms of writing required in different disciplines . . . and students may feel threatened and resistant.[100]

We intend to return to this issue of student identity shortly.

As mentioned earlier,[101] Roz Ivanič distinguishes between literacy as skills, literacy (a), and literacy as socialization, literacy (b).[102] In discussing literacy (b), Ivanič talks about literacy practices in the plural because, like Lea and Street, she sees literacy as embedded in social contexts.[103] As she puts it, literacy practices are a subset of social practices, and like social practices more generally, literacy practices vary among the numerous social contexts in which we find ourselves.[104] Furthermore, these social contexts shape our literacy practices through the values, beliefs, and power relations embedded within those contexts.[105] And because we find ourselves situated within multiple social contexts that are not "hermetically sealed,"[106] we often find ourselves engaged in multiple literacy practices, some which can even conflict with each other.

Because the new literacy researchers emphasize that literacy practices are shaped by the values, beliefs, and power relations in which they are situated, researchers are able to make an important connection between the literacy practices in which a writer engages and that writer's identity. As Ivanič states, becoming "more literate"—by which she means extending one's literacy practices to a new context—is "in itself an issue of identity."[107] In moving beyond a "skills" view of literacy to a more contextualized view, one in which literacy is seen less as something to be acquired and more as a practice to be engaged in,[108]

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100. *Id.*
101. *See supra* text accompanying notes 91–92.
102. *See* IVANIČ, *supra* note 1, at 57–59.
103. *Id.* at 65.
104. *Id.*
105. *Id.* at 66.
106. *Id.*
107. *Id.* at 70.
108. *Id.* at 69.

these researchers are able to investigate the ways in which the embedded values and beliefs of a discourse shape the identity of the writer. This can happen when writers incorporate some of the values and epistemologies of a new discourse into their own literacy practices, or it can even happen when writers resist or struggle with some of the values and epistemologies of a new discourse—an interesting phenomenon that we intend to look at later. In their own investigations of writers' identities, which are primarily in the context of academic literacies, the new literacy researchers find both assimilation and resistance.

In our view, this "view from within," law students present an excellent example of writers who are caught between multiple literacy practices, complete with the contest and struggle that Lea and Street describe when explaining academic literacy.[109] Further, we believe that the process of being socialized into legal discourse has important implications for the identity of a legal writer, as Ivanič notes.[110] This identity, initially forged in law school and then extending throughout a legal writer's entire legal career, is an important part of what it means to become literate in the law.

Furthermore, we believe most legal writing professors see signs of their students struggling to acquire this discoursal identity. But finding a way to analyze and understand this struggle is difficult. And in the literature on legal writing as acquisition of skills—albeit complex and sophisticated skills—questions of the writer's identity are necessarily ignored. Before we turn to the identity of a legal writer, however, we need to further examine the context in which legal writers write—the language of the law and, in particular, some of the embedded values and epistemologies legal language draws from its social context.

C. Language, Legal Epistemology, and Legal Persons

Although a number of researchers have approached law from the perspective of language, the one who comes closest to the approach that interests us is Elizabeth Mertz, who has assembled her ongoing research into a treatise entitled *The Language of Law School: Learning to "Think Like a Lawyer*."[111] For Mertz, language is central to any study of legal reasoning.[112] She cites a long line of legal theorists who have agreed with this premise, ranging from Edward Levi and John Austin to Ronald

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109. *See* Lea & Street, *supra* note 76, at 159.
110. *See* IVANIČ, *supra* note 1, at 66.
111. MERTZ, *supra* note 2.
112. *See id.* at 3, 26.

Dworkin, James Boyd White, Duncan Kennedy, and Patricia Williams.[113] Mertz centers her own research on the ways language operates in the law and in law school,[114] and like the new literacy theorists, she eschews structural views of language for a more sociolinguistic model, insisting that language use be studied in particular social contexts.[115] Studying legal language in relation to its social contexts and the values embedded within those contexts allows Mertz to look at the values, power relations, and epistemologies embedded within legal language and at the process of socialization that law students undergo as they incorporate legal discourse into their own literacy practices.[116]

Mertz seems particularly interested in what lies behind the common catchphrase, "thinking like a lawyer." She notes that although the phrase is often used as a simple stand-in for a set of cognitive skills common to lawyers and sought by law students, when viewed sociolinguistically, the phrase yields deeper meanings.[117]

> ["Thinking like a lawyer"] has long been an established catchphrase used by the legal profession (and those studying or writing about it) to describe the essence of law school training. It represents, in a sense, a distillation of indigenous ideology, a summary of how the process is viewed from within. However, to unpack or analyze this ideology, we find that we have to understand more than a mere acontextual outline of cognitive processes. Instead, we must examine what it means to read or talk like a lawyer, and this means that we are analyzing metalinguistic norms and ideologies: we are looking at a new relationship with language that is created for lawyers. . . . [E]mbedded in this new relationship is a hidden epistemology.[118]

Mertz uses the phrase "metalinguistic norms and ideologies" to refer to the values, beliefs, and power relations described by the new literacy researchers mentioned earlier, but of particular interest is her description of the legal epistemology that underlies legal language.

Mertz describes this legal epistemology in considerable detail as she discusses the socialization of law students into legal discourse. She finds that legal language and its underlying epistemology translates the social

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113. *Id.* at 26.
114. *Id.* at 12.
115. *Id.* at 17.
116. *Id.* at 12.
117. *Id.* at 97–98.
118. *Id.* To her phrase *we must examine what it means to read or talk like a lawyer*, we would quickly add *or to write like a lawyer*. Mertz concentrates on the traditional Socratic classroom in her study and, thus, largely ignores the practice of legal writing. *See id.* at 44–45.

situations into more abstract terms.[119] The people in these social situations are translated into roles—the most basic are the roles of plaintiff and defendant—and their actions are translated into abstract legal categories—for example, the categories of tort or breach of contract.[120] The stories of these situations point toward fairly constrained results—of either guilty or not guilty, or of affirmed or denied.[121] And the complex social dramas of these stories are translated into the regimentation of legal institutions—the courts, legal documents, and lawyers' talk.[122]

> A key presupposition of the legitimacy of those results is the untying of the drama as legally translated from its usual social moorings, the putative objectivity of the story once told in the apparently dispassionate language of the law. As the people in the cases become parties (i.e., strategic actors on either side of a legal argument), they are stripped of social position and specific context, located in a geography of legal discourse and authority. Their gender, race, class, occupational, and other identities become secondary to their ability to argue that they have met various aspects of legal tests.[123]

At the same time, Mertz finds a specificity to legal epistemology that, somewhat incongruously, rests side-by-side with its abstraction.[124] This specificity is equally tied to the dictates of legal process, however, so its effect is also to translate any commonsense, everyday understanding of a social situation into the medium of legal language.[125]

> To connect each new conflict story with legal precedent, students must focus on detailed aspects of the stories, if they are to categorize the new facts as instances of general, legally specified types. For example, a student might argue that a particular act or event in this new conflict story constitutes a breach of contract because it is arguably the "same" as an action or an event in a previous case where the courts found a breach. Yet, this apparent concern for specificity wrenches detail from its particular social and (nonlegal) narrative contexts in ways that can obscure or erase the features of the story to which laypeople look when reaching moral judgments.[126]

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119. *Id.* at 131.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 133.
125. *Id.*
126. *Id.*

Mertz thus finds that legal language and its underlying epistemology have a double edge.[127] On the one hand, the fact that legal language translates human conflict into abstract and objective categories has the potential to, for example, erase some forms of prejudice.[128] When context-rich social situations are translated into abstract legal categories, certain differences disappear, and justice will demand similar outcomes for similarly situated social actors.[129] On the other hand, this erasing of social particulars can conceal additional underlying moral dimensions, ones that may be important for the larger meaning of the social conflict under consideration but not for its legal meaning.[130] In addition, the double-edged move back and forth from legally abstract to legally concrete may not in itself be ideologically neutral and may mask hidden and damaging cultural assumptions.[131]

Mertz pays particular attention to the act of legal reading, finding that legal language exerts an early but powerful effect on law students by reorienting their relationship to language and the ways it represents social reality.[132] She finds they are retrained as readers so that when encountering stories of conflict in legal cases, they replace older strategies of interpretation and understanding—for example, plot, character, or underlying theme—with new ones.[133] In this retraining, students are pulled away from referential approaches to meaning, "which treat the text as transparent and view its core meaning as its referential content," and into approaches that focus on the relationship between textual and legal authority.[134] This layering of pragmatic approaches creates a new lineage for understanding legal texts: "[T]he line of previous cases and other legal texts that a court (or lawyers, or law students) can cite as authorities in deciding the case at hand, and the procedural lineage of the case, traceable through opinions of lower courts, the record in the case, and so forth."[135] In the process of mastering legal reading, law students also master an underlying epistemology that constrains their understanding of language and text, focusing on proofs that rely upon intricate layers of intertextual

127. *Id.*
128. *Id.* at 213.
129. *Id.*
130. *Id.*
131. *Id.* at 213–14.
132. *See id*. at 43–44.
133. *See id.*
134. *Id.* at 94.
135. *Id.*

authority and learning to blind themselves to other more "natural" social, cultural, and political interpretations of the underlying conflict.

The effect of this legal epistemology on law students, as they are socialized into it, can be alienating. Mertz notes that "[t]o successfully master this discourse, students must be able to speak in an 'I' that is not their own self, to adapt their position to the exigencies of legal language."[136] The experience can be decentering. Mertz describes it as an "unmooring of the self from its usual coordinates"[137] and notes that this unmooring results in a different speaking "I," a new persona "carved and crafted by the demands of legal discourse."[138]

Mertz's research offers, in our view, the most comprehensive study to date of the relationship between legal language and its embedded values, epistemologies, and power relations—the relationship that the new literacy researchers have examined more generally in academic contexts. We are especially drawn to her focus on the process of "becoming a legal person"[139] and her notion of the decentering or unmooring that can accompany the development of a new persona.[140]

While Mertz concentrates on the acts of reading and talking,[141] we would like to concentrate on the act of writing in the law. As mentioned earlier, we believe most legal writing professors encounter some form of this decentering in their classes, and in our view, the development of a legal writer's identity is an important part of the education of a law student.[142]

Mertz observes that in entering the world of legal discourse, law students must learn to "speak in an 'I' that is not their own self."[143] In entering the world of written legal discourse, a student must also acquire a new identity, a legal writer's self. But the concept of a writer's self is, as we have discovered, a complex one. To unpack this, we turn again to the work of Roz Ivanič, one of the new literacy researchers.

D. Writing and Identity

For Ivanič, working with writers who are entering a new discourse means working with issues of identity.[144] She explains that her

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136. *Id.* at 135.
137. *Id.* at 137.
138. *Id.* at 136.
139. See *id*. at 97.
140. *Id.* at 136–37.
141. *See, e.g.*, *id.* at 97.
142. *See supra* notes 26–48 and accompanying text.
143. Mertz, *supra* note 2, at 135.
144. *See* IVANIČ, *supra* note 1, at 5.

interest in writing and identity arose out of practical experience, not theoretical concerns.[145] In her own teaching, she began working with "mature" writers—that is, writers who were returning to higher education after the age of twenty-five.[146] She noticed that, although many of these students had regular qualifications for higher education and had simply postponed entering the university, when they returned to school and began to undertake academic writing assignments, the writing did not seem to "come naturally" to them.[147] The experience of these students contrasted sharply with that of traditional undergraduates who, at the age of eighteen, had simply gone on to university life and continued writing academic essays.[148]

As Ivanič began to examine the experiences of her students more closely, she noted that traditional undergraduates had never left the world of academic literacy, but rather had experienced a steady apprenticeship that continued unbroken from secondary schooling into the university.[149] The path of the "mature" writers, however, had been broken.[150] The question was: what was it about this disruption that made the reentry of these students into academic writing difficult? In speaking with them, Ivanič found that these writers repeatedly brought up issues of identity.[151]

Despite the practical bent of Ivanič's initial interest in a writer's identity, her interest also develops logically out of her work as a new literacy researcher. Under a definition of literacy as skills—literacy (a), defined above[152]—her target group of "mature" writers would be seen as deficient in skills and thus would need assistance in remedying these deficiencies by acquiring the missing skills. However, this kind of assistance would not fully address the discomfort of these students. Alternatively, literacy (b)—literacy as socialization—seemed to address these discomforts. These students were writing in a context that, if not wholly new, was sufficiently unfamiliar to them so that they had

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145. *Id.*

146. *Id.*

147. *Id.* at 5–6. Some of these returning students had more marginal qualifications and had even been labeled deficient in literacy skills, but most proved these "skills" labels mistaken as they gradually entered into academic literacy. *Id.* Their struggles to enter academic literacy would, however, be similar to those of the more qualified students. *Id.*

148. *See id.*

149. *Id.*

150. *Id.*

151. *Id.* at 6. In looking at additional research with this group of "mature" writers, Ivanič discovered other researchers had also found that issues of identity were important for these writers. *See id.* at 6–8.

152. *See supra* text accompanying note 91.

difficulty adjusting to it. And those difficulties went beyond mere skills to something much deeper. As Ivanič found when formally interviewing them, for many of these students, writing in a new context—that is, engaging in a new literacy practice—was difficult and to some extent alienating.[153] To the extent that the "self" with which these writers wrote was a product of a specific context, writing in a new context required a different sense of self.

Most law students, in our view, experience similar issues of identity. Some law students enter law school straight from undergraduate studies, and some enter after doing something else—sometimes after pursuing a whole career. However, all students seem like they must make an adjustment to the writing tasks they face in law school and beyond. Most legal writing programs make efforts to assist with that adjustment, but usually those efforts take the form of helping law students acquire the essential skills that they will need to be successful legal writers (and readers). The focus is at the level of literacy (a). The deeper issues are more difficult to address, even though the literature on legal writing has acknowledged for some time that becoming a legal writer is a process of socialization, as well as a process of acquiring new skills.[154] Like Ivanič, we assert that the process of being socialized into legal writing entails issues of identity. But how do we approach such a seemingly nebulous concept? Ivanič suggests that the best way is to look at the identity of the writer as a social identity.[155]

Ivanič is not the first to view writing in social terms. In American composition studies in the 1980s, Kenneth Bruffee used the metaphor of writing as "conversation" to develop a social view of writing,[156] and Lester Faigley built a theory of writing around a social view.[157] Additionally, we suggested a social view to the legal writing community a few years later.[158] But Ivanič specifically built a model of the writer's identity around social models, drawing upon recent work in social science and social identity theory.[159] These researchers focused

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153. IVANIČ, *supra* note 1, at 5.

154. Williams, *supra* note 12, at 2, 9–13. Williams's article was perhaps the beginning of this recognition.

155. IVANIČ, *supra* note 1, at 11–12.

156. Kenneth A. Bruffee, *Social Construction, Language, and the Authority of Knowledge: A Bibliographical Essay*, 48 C. ENG. 773, 777 (1986).

157. Lester Faigley, *Competing Theories of Process: A Critique and a Proposal*, 48 C. ENG. 527, 528, 534–39 (1986).

158. Rideout & Ramsfield, *supra* note 7, at 56–61.

159. IVANIČ, *supra* note 1, at 11–12.

on the ways individuals define themselves socially, in reference to their positions in social situations.[160]

Somewhat paradoxically, taking the "view from within" requires a social perspective. Because individuals are generally situated in several social settings at any given time, these researchers postulate not a unitary self, but a multiplicity of selves forged through an interaction with the multiple settings and roles of modern life.[161] In addition, because these situations can change, these researchers uniformly dismiss the notion of a fixed self, instead positing a self that changes.[162] Anthony Giddens calls this the "'reflexive project of the self.'"[163] Ivanič summarizes the characteristics of a social view of identity as one that is "multiple, historically situated, negotiable, and changing over the lifespan."[164]

In addition, she notes that more recent researchers on social identity have turned to discourse as the medium lying between socially constructed identities and the contexts that exert shaping influences on those identities.[165] This mediating link is important because, to the extent that discourses are shaped culturally and ideologically (and for most social scientists and new literacy researchers, discourses are), this link offers a model for understanding the ways in which the identities people take on are also shaped culturally and ideologically. This link is also valuable for understanding what happens when people enter into new discourses—for example, the law. In doing so, they also enter into new identities.

Finally, Ivanič finishes her model of a writer's identity by turning to the work of the social theorist Erving Goffman,[166] who developed a dramaturgical model for social identity.[167] Ivanič notes that Goffman looked at the relationship between identity and language and, in so doing, developed a model in which identity could be discussed in terms of its several different aspects.[168] Furthermore, Goffman's model denied an essentialist view of the self; under his dramaturgical model,

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160. *Id.* at 14–15.
161. *See*, *e.g.*, *id.* at 12.
162. *Id.*
163. *Id.* at 16 (quoting ANTHONY GIDDENS, MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE 9 (1991)).
164. *Id.* at 19.
165. *Id.* at 17.
166. *Id.* at 19.
167. *See* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1973).
168. IVANIČ, *supra* note 1, at 21.

identity is a matter of performance, resulting in a status or position—or "character," metaphorically speaking—but not a material thing.[169]

Although she notes some shortcomings of Goffman's model, Ivanič nevertheless finds it useful and adaptable to her own model of a writer's identity.[170] Important to Ivanič are Goffman's notions of social identity having different aspects, and those aspects being tied to language use.[171] Mapping Goffman's model onto writing, Ivanič finds that the identity of any individual writer comprises three aspects, plus a fourth aspect that lies beyond the identities of any individual writer.[172] She finds that when people talk about identity and writing, they refer to one of these four aspects.[173]

The three aspects of an individual writer's identity are as follows: (1) the autobiographical self, (2) the discoursal self, and (3) the self as author.[174] These are aspects of the social identity of real writers writing particular texts.[175] In addition, Ivanič notes that people talk about a fourth identity, possibilities for self-hood, which is not an aspect of any individual writer's identity, but rather the set of positions or possibilities available to any writer in a given social context.[176] The first three aspects of a writer's self do not, of course, have any material or cognitive presence; they are ways of thinking and talking about a writer's identity.[177] But in Ivanič's view, they are valuable and useful ways of talking about writers, especially writers who are acquiring new literacy practices.[178] These aspects of a writer's self are also not wholly discrete or distinct from each other; rather, they interact with each other.[179] And most importantly, they also interact with the fourth aspect, possibilities for self-hood, in a reciprocal fashion so that the three aspects of an individual writer's identity are both shaped by, and in turn shape, the possibilities for self-hood.[180] Each aspect deserves further discussion.

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169. *Id.* (citing GOFFMAN, *supra* note 167, at 65–66).

170. *Id.* at 22–23. For a discussion of Voice in legal writing that is based on this model, see J. Christopher Rideout, *Voice, Self, and Persona in Legal Writing*, 15 J. LEGAL WRITING INST. 67 (2009).

171. IVANIČ, *supra* note 1, at 23–24.

172. *Id.* at 24.

173. *Id.*

174. *Id.* at 23.

175. *Id.*

176. *Id.* at 23, 27.

177. *See id.* at 24.

178. *See id.*

179. *Id.*

180. *Id.*

The autobiographical self is the commonsensical notion of the self—the self that people think they just "have."[181] It feels like it is a priori to any act of writing: the self that a writer brings to the writing task from other life experiences or the self that sets out to produce the writing.[182] It is, however, a constructed self and not an essential or fixed self.[183] Although it sounds like a "self," it is actually a "self-portrait," composed from (or "representing") the sum total of a person's life experiences.[184] Ivanič notes that

> [t]he term "autobiographical self" emphasizes the fact that this aspect of identity is associated with a writer's sense of their roots, of where they are coming from, and that this identity they bring with them to writing is itself socially constructed and constantly changing as a consequence of their developing life-history.[185]

For most people, the autobiographical self is unproblematic—a given. Thus, it can feel like a "centering" aspect of the self for writers who are struggling. The autobiographical self is the self that we "feel" we are. But it is a construct.

Perhaps the idea of co-authorship offers a good illustration of the constructed nature of the autobiographical self. We (the Authors) feel that we have brought our "selves" to the task of writing this Article, as the "Authors" (a seemingly unitary authorial concept), but we can attest that in the other ways in which we represent ourselves socially, we are very different persons.

The discoursal self is the "self" in the text—or, rather, the impression of the self that any given text conveys.[186] When we read a text, we get an impression of a self that is the writer in the text. In Ivanič's terms, this aspect of a writer's identity is clearly a construct shaped by the context or discourse within which the writer is writing, producing a specific text.[187] She calls this aspect of the writer's self "discoursal" because "it is constructed through the discourse characteristics of a text, which relate to values, beliefs, and power relations in the social context in which they were written."[188]

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181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* at 25.
187. *Id.*
188. *Id.*

This discoursal self lacks the seeming permanence of the autobiographical self because it is tied to the text.[189] It vanishes in the absence of the text, except insofar as the production of any text and the accompanying discoursal self in that text become part of a writer's life history and, thus, a piece of the autobiographical self. In our view, the successful construction of a convincing discoursal self is one of the primary challenges for writers entering a new discourse or adopting a new literacy practice. Thus, one of the great challenges for emerging legal writers is to successfully construct this legal discoursal self. Learning to "write like a lawyer" means learning how to remake part of one's discoursal self into a self shaped, in part, by the discoursal conventions of the law.

The "self as author" seems to be a more constrained aspect of a writer's identity, something close to the authorial presence that an author has. Ivanič uses the concept of the self as author to illustrate how the different aspects of a writer's identity are interrelated.[190] For example, the self as author is related to the autobiographical self to the extent that the writer has something to say and the confidence to say it.[191] The self as author is related to the discoursal self insofar as the self in the text seems authoritative as an author.[192] The self as author contributes to a writer's "voice" as the part of a writer's voice that has a position to assert, or as values and beliefs that inform the voice.[193] As an example of the self as author, we have regularly asserted in this Article things that we believe are accurate statements about the nature of writing and legal writing. In doing so, we have stepped forward with a direct authorial presence.[194] That is one example of the self as author.

As we mentioned above,[195] the fourth aspect, the possibilities for self-hood, is not a part of the identity of a writer, but rather lies "outside" the writer in the social context within which the writer is writing.[196] The possibilities for self-hood are potential discoursal identities available to writers in given social contexts and, thus, constrained by those social contexts and the given epistemologies and values of those contexts.[197]

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189. *Id.*
190. *Id.* at 26.
191. *Id.*
192. *Id.*
193. *Id.*
194. Authorial presence emerges in other ways as well, such as the successful observance of important formal conventions for writing a particular type of text.
195. *See supra* text accompanying note 126.
196. IVANIČ, *supra* note 1, at 27.
197. *Id.*

They do not just "belong" to particular individuals.[198] Part of what a legal writing classroom (and law school more generally) does, in terms of literacy and writers' identities, is move students toward the potential positions they can occupy as legal writers—positions that the discourse of law privileges as being "legal." Some classrooms, of course, move students toward these positions more successfully than others, and individual students position themselves discoursally within these possibilities with greater or lesser amounts of ease or resistance.

We should note that Ivanič uses the term *possibilities for self-hood* quite deliberately and as a compromise between other terms.[199] She avoids the more common term *subject positions*, a term that in her view suggests overly unitary and coherent social identities.[200] Nevertheless, the term *possibilities* also makes her uneasy because it implies an overly optimistic and unlimited set of discoursal positions when, in fact, those positions are socially constrained.[201] After some discussion about this key term, we have decided on our own compromise term, *positions and possibilities*, finding it important to include the constraining sense of the word *positions*. For the remainder of the Article, we will substitute for Ivanič's *possibilities for self-hood* the phrase *positions and possibilities*.

To summarize, a writer's identity comprises these aspects:

"Inside" the writer:

Autobiographical Self—

> What a writer regards as "my identity," although untraceable in the piece of writing; the life history that stands prior to the act of writing.

Discoursal Self—

> That part of a writer's identity for which the piece of writing does offer evidence, although the writing itself "constructs" this aspect of the writer's self.

Self as Author—

> The authorial presence in a piece of writing, evidenced by the writer's stance both toward content and toward form.

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198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 28.

"Outside" the writer:

Positions and Possibilities—

> The prototypical positions available within any given context for writing; these positions are in turn inscribed by the values, epistemologies, and power relations of that context.

III. THE VIEW FROM WITHIN: LEGAL WRITING AND IDENTITY

This model for the discoursal identity of a writer, when mapped onto legal writing, raises several important questions. First, what does it mean, in terms of a legal writer's identity, to say a writer is being socialized into legal discourse, and how is it useful to think of this process in terms of the identity of a legal writer? Second, what does this mean for our pedagogical practices as teachers of legal writing, and can it help us better understand some of the issues we face when we teach? Finally, what about the issue of change and reform? If we view a legal writer's self as discoursally constructed—as to some extent a product of the positions and possibilities available through legal discourse—must that self always remain passive, always positioned in the same way by legal discourse? Can that positioning, and the form and style of legal writing it produces, never change?

A. *Writing Like a Lawyer: The Discoursal Self*

At the beginning of this Article, we used the phrase *writing like a lawyer*, a phrase that, to us, is more telling than it appears to be. For indeed, when any of us writes a document for a legal setting, and especially if we are novices to that setting, we are writing "like" a lawyer, constructing an identity out of the positions and possibilities available to lawyers as they write. That is, when we write like a lawyer, we are not only adopting the conventions of legal prose—conventions that range from IRAC in its various forms to Bluebook or ALWD formats for citation—but we are also constructing a legal self.

Writing legal prose entails a good deal of insider knowledge about legal discourse, about the analytic structures for legal reasoning, about the analogical relationship between the existing body of law and the fact situations of new cases, about how to construct legal arguments and what constitutes valid methodologies of proof in those arguments. This insider knowledge is complex, detailed, both context- and content-specific, and almost impossible to impart successfully in a decontextualized and generic form. To know it is to acquire membership in the discourse community that we speak of, loosely, as legal. And to have membership in that discourse community is to have an identity in it.

That is part of what it means to be a legal writer, and that identity is, in our view, best described as discoursal. Writing like a lawyer means constructing the discoursal self of a lawyer.

For this reason, of the four aspects of a writer's identity that Ivanič offers, we suggest teachers of legal writing primarily focus on the discoursal self—that part of a legal writer's identity "constructed" by legal writing itself. It is most directly in terms of the discoursal self that a writer is socialized into legal writing. And in our view, it is in terms of the discoursal self that most people experience the sometimes profound change—not only in how they think, but in who they are—that seems to occur when they learn to write like a lawyer.

We summarized some of the features of legal discourse above when discussing Mertz's work.[202] These features map onto the identity of a legal writer. Learning legal writing is learning a new epistemology—a new way of looking at the world. That epistemology can be alien to novice legal writers. It can strip storytelling of some of its familiar features, eliminating some concrete details as irrelevant and substituting legal categories and goals for other, more traditional narrative structures. It can marginalize conventional moral or social moorings and bury or render invisible ideological considerations. And most curiously, it can render ways of looking at the world as both abstract and concrete, but in a double-edged combination that defies ordinary understandings of the world and reduces human beings to legal actors situated within narrow frameworks of legal argument. These features become not only part of the legal writing, but also part of the legal writer.

The notion of a discoursal self is important, in our view, because it is through the discoursal self that we can best understand how the features of legal discourse, mentioned briefly above, get inscribed onto the identity of a legal writer. Learning to write like a lawyer is much more than simply taking on a role. It is taking on a different identity, one inscribed with ways of understanding the world that are constrained by the positions and possibilities available within the discourse of the law. Given the specialized nature of this discourse, law students feel that to become legal writers, they must learn new ways of thinking, new ways of seeing the world, and new ways of talking and writing about it. They feel like they are changing as a person. And they are right.

Learning to write like a lawyer means also learning a new literacy practice—the complex and specialized literacy practice of lawyers. But learning this new literacy practice of legal writing entails learning the discourse practices and conventions of the law, and those practices, in

202. *See supra* text accompanying notes 111–43.

turn, form the identity of a legal writer. Legal writing as a discipline, like other writing disciplines, focuses primarily on legal texts—legal memoranda, briefs, pleadings, and other similar documents. And to a lesser extent, it focuses on the production of legal texts—the processes a legal writer undertakes. We suggest that in future research, legal writing also include considerations of a legal writer's identity, partly because this is an important part of the psychology of constructing one's self as a legal writer and partly because, in the ways suggested above, it is through the construction of the discoursal self of a legal writer that we as legal writing professors can understand more practically what it means for legal writers to socialize into legal discourse. To our knowledge, this aspect of legal writing has been largely ignored. We regard it as an important part of what we teach, especially when we are teaching first-year law students.

B. Writing Like a Lawyer: Other Aspects of a Legal Writer's Identity

Although we suggest that the discoursal self of a legal writer and its construction may be of most interest in understanding what it means to become a legal writer, the other aspects of a writer's identity are important to legal writing as well. The authoritativeness of the legal writer—the self as author, for example—is something built into most legal writing programs. Law students are taught to write objectively[203] and to avoid forms of personal expression in their legal writing. They learn other forms of authoritativeness in legal prose, ranging from carefully employing highly codified forms of legal citation to learning how to back up any statement with legal authority, thus avoiding being conclusory. At the level of legal style, some research, but not enough, has been done on the ways in which the demand for an objective voice and its anonymous authority translate into stylistic forms in legal prose, including the overuse of nominalizations or passive voice.[204] Most legal writing programs caution students about the stylistic effects of overusing these constructions, but seldom is the advice given in the context of discussing how to find an authoritative voice as a legal writer.

In moving students toward adopting a more objective, authoritative legal persona for their writing, most legal writing programs also seem to overlook the autobiographical self of the writer. Other, expressivist-based forms of writing instruction lend themselves more readily to an expressive form of writing that gives greater voice and prominence to the

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203. In most legal writing programs, the first form of writing taught is objective writing, usually in the form of a legal memorandum.

204. *See* JOSEPH M. WILLIAMS, STYLE: LESSONS IN CLARITY AND GRACE, 38–43, 60–73 (2007).

autobiographical self,[205] but this form of writing is largely inappropriate for formal legal writing.[206] Nevertheless, the autobiographical self is very much part of the discoursal identity of any legal writer, whether law student or legal practitioner. Although legal writers assume a legal persona when they "write like a lawyer," this persona is not their only identity, nor is it by any means the sum total of the life history of any individual who writes for the law. Everyone has a sense of self that stands a priori to the self that sits down to a writing task. When legal writing teachers talk with students in class or sit down with students in a writing conference, they encounter to varying degrees this autobiographical self that stands "behind" the writing.

It is, in our view, precisely this a priori nature of the autobiographical self that can lead to conflict in legal writing, especially for first- or second-year students who are learning to write like lawyers. In constructing a discoursal self—the self that writes (and sounds) like a lawyer—law students must largely choose from the positions and possibilities available to them in legal discourse, but almost never are those available positions and possibilities ones that match law students' autobiographical identities.[207] This accommodation of the autobiographical self to the demands of the discourse of the law can be difficult and even alienating. Novice legal writers in particular may feel that it is not "them" writing for the law, or even that "they" are not capable of doing it. When we speak to our students on a more personal level, usually in writing conferences, we often hear this discomfort in the way law students talk about themselves. They have a sense of their "real" self that is trying to accommodate a new way of thinking and writing about the world through the law. In other words, their autobiographical self is trying to position itself within legal discourse.

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205. *See* PETER ELBOW, WRITING WITH POWER: TECHNIQUES FOR MASTERING THE WRITING PROCESS 283–85 (1981).

206. Some, however, have argued for more expressive writing in law school. *See, e.g.*, James R. Elkins, *Writing Our Lives: Making Introspective Writing a Part of Legal Education*, 29 WILLAMETTE L. REV. 45 (1993); Andrea McArdle, *Teaching Writing in Clinical, Lawyering, and Legal Writing Courses: Negotiating Professional and Personal Voice*, 12 CLINICAL L. REV. 501 (2006).

207. Nor are these discoursal selves, we would submit, matches for more experienced legal writers who are simply more comfortable with the construction of a discoursal identity in the law. For more experienced writers, what began as a constructed discoursal self for legal writing has become, over time, more a part of their autobiographical self as well to some extent.

C. Writing Like a Lawyer: The Discoursal View and Teaching

Ivanič notes that when students learn academic writing, at least at the university level, they often experience resistance to the discourse they are asked to adopt.[208] Thus, their construction of a writer's identity, in academic contexts, is a process of struggle and negotiation with the dominant discourses of the university and with the epistemologies and ideologies embedded within those discourses.[209] In our view, the same is true of students when they learn legal writing. Learning to write like a lawyer is not only a matter of acquiring new skills for putting arguments into the forms and conventions of legal discourse. It is also a process of constructing a discoursal identity, and this process entails not only accommodation, but also resistance, struggle, and negotiation. We sense this when we show our students a basic key discourse move in legal prose—for example, avoiding writing a conclusory legal statement. The move seems simple and basic to us, and as teachers we usually have pedagogical strategies for illustrating it, but we nevertheless often see our students struggle with it at first. Their struggle is partly with the textual form of the discourse move, but it is also partly with the shift in identity the move requires—a new way of viewing the story behind any legal case and a view that may contradict older, more familiar ways the student, in his or her autobiographical sense, would have understood that story. Learning to write like a lawyer is a challenge not only to the repertoire of a student's discourse moves, but also to a student's identity. The struggle of the autobiographical self to accommodate new positions and possibilities is the site for this challenge.

In part, legal writers may experience this accommodation and struggle through their mental encounter with a legal reader.[210] In trying to adapt to and accommodate legal conventions, or in the struggle with these conventions, legal writers may primarily have in mind the expectations of their legal readers. These expectations are probably doubled in the case of law students enrolled in legal writing courses. As teachers, we helpfully (or so we think) advise students to write for their audience, usually a fictive law partner or judge. In doing so, we force them to confront a reader situated directly within legal discourse and to make countless decisions about how to write in a way that will persuade and move that reader. At the same time, they write to us in our

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208. IVANIČ, *supra* note 1, at 13.
209. *Id.*
210. *See id*. at 244–45.

capacities as teachers and evaluators, readers who will probably evaluate their writing even more carefully and strictly for its ability to successfully present itself as convincing legal prose.

This situation is complex. As legal writing teachers, we would do well to remember that, among other things, when we put our students into this discoursal community, we ask them to construct an identity that requires accommodation of the available positions and possibilities and, in most cases, negotiation between who students feel they "really" are and who they must become, or construct, as legal writers. And because our role as teachers and evaluators may intensify the demands students feel as they undertake this negotiation, we should remember that when we ask them to write for their audience, we ask them to undertake a very complex social process of negotiating an identity from among the various aspects of their self as a writer. This can too easily be glossed over, especially when we give our students a writing assignment with a well-specified rhetorical setting and audience. However helpful in other ways, this in itself can heighten their struggle to forge a legal identity out of which they can complete the writing assignment.

Legal writing teachers can use the concept of a discoursal identity to understand and help their students in other ways. For example, Elizabeth Mertz mentions the abstractness of legal discourse and the way it unmoors stories from their more familiar underpinnings.[211] Legal writing teachers are in an excellent pedagogical position to help students adjust to this feature of legal discourse by providing rich contexts for the legal problems they assign and by looking for opportunities to mitigate the ways broader social or moral questions can become marginalized. One way would be to assign different types of writing tasks that lead to the construction of different discoursal identities. In doing so, students could develop more self-awareness about what they are undergoing as they learn to write like a lawyer and learn more about themselves as writers.[212] Elizabeth Fajans and Mary R. Falk similarly advise that we teach our students to think more critically about the law.[213] Their advice about teaching law students legal reading applies equally well to legal writing and the construction of identity.

If we view legal writing in terms of discoursal identities, we might also better understand writers who are struggling or even "failing." Too often we view these writers in terms of the skills they lack or are failing to

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211. MERTZ, *supra* note 2, at 137.

212. We have, for example, sometimes asked beginning law students to write about a fact situation as a journalist first and then as a legal practitioner.

213. Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 193 (1993).

acquire. But those skills (legal literacy (a)) are part of a very complex set of practices of legal literacy (legal literacy (b)), and acquiring the identity of a legal writer—that is, finding ways the literacy practices of the law can be inscribed on the discoursal self—is a key to acquiring full legal literacy and, thus, mastering those skills. If we focus only on the skills, our efforts may be incomplete, and we may fail to understand the complex negotiation of identity that accompanies any effort to successfully acquire the skills. Even worse, in focusing on the skills alone, we may fail to see that when law students fail as legal writers, part of their failure may result from our own failure to help them position themselves properly within the discourse of the law. If acquiring the identity of a legal writer entails negotiation and struggle between these aspects of the writer's self, then we would be better teachers if we looked for ways to help our students through that negotiation.

D. Writing Like a Lawyer: The Discoursal View and Change

Finally, viewing legal writing in terms of discoursal identities raises the question of change, which is important but difficult. We agree with the view that learning to write like a lawyer involves construction of a discoursal identity. The discoursal identity is constructed from among the positions and possibilities available within the discourse of the law, and the construction entails accommodation and, to greater or lesser extents, negotiation and perhaps resistance on the part of the writer. Viewing the identity of a legal writer as comprising different aspects—the autobiographical self, the discoursal self, and the self as author—is a model we find very helpful in understanding this process.

Such a model may also sound overly deterministic, but Roz Ivanič emphasizes that it is not, noting its constructionist nature.[214] "[I]dentity is not socially *determined* but socially *constructed*. This means that the possibilities for the self are not fixed, but open to contestation and change."[215] Ivanič does not make this statement naively, and she acknowledges that dominant or privileged discourses like the law are powerful and emerge from privileged ideological positions that can exert great influence over discoursal representations of the self.[216] She also acknowledges that individuals may not be positioned to exert change in a discourse's practices.[217] Nevertheless, she points to the fact that change in discourses and their available positions and possibilities does

214. IVANIČ, *supra* note 1, at 12.
215. *Id.*
216. *Id.* at 13.
217. *Id.* at 28.

occur and is motivated by "[c]lashes between writers' autobiographical identities and institutionally supported subject positions."[218]

We, for example, as the two individuals writing this Article, have had considerable discussion about the place of "change" in legal discourse and its relationship to a legal writer's discoursal identity. We both agree that the concept is important to considerations of any writer's identity, including a legal writer's. But we may have slightly different views of its efficacy.

Certainly, to be a successful legal writer, one must sound like a legal writer and write like one. In a discourse as heavily conventionalized as the law, this is crucial. To do otherwise is to be something other than a legal writer. Thus, our job as teachers of legal writing is to guide our students toward acquiring the conventions and practices we call legal writing. We argue in this Article, and believe, that doing so entails constructing the identity of a legal writer as well.

At the same time, we do not deny the role of negotiation and resistance in the model of discoursal identity. We see it in our own students every semester and believe that, over time, those individual acts of resistance may credibly add up to larger changes within legal discourse. Sometimes those larger changes are incremental and track other social changes in the culture at large, and sometimes they are politically motivated and more overt. The possibilities are intriguing.

Although we can disagree over some of the finer points regarding change and legal discourse, we can easily point to two examples of it in recent years. The first is the increasing acceptance of what is usually called the plain language movement.[219] Thirty years ago, despite Carl Felsenfeld and Alan Siegel's early treatise,[220] the movement had had little influence on legal discourse and was not taught in law schools. Plain language drafting was rarely seen before 1980.[221] Today it is widely taught and practiced. Although the movement had its origins as a consumer movement,[222] we think it also was motivated by social and demographic changes within the legal profession. As the legal profession grew and as the demographic character of those in it changed, so did its language. Those changes, at the individual level, no doubt occurred as

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218. *Id.*

219. *See, e.g.*, Joseph Kimble, *Writing for Dollars, Writing to Please*, 6 SCRIBES J. LEGAL WRITING 1 (1996–1997); Wayne Schiess, *What Plain English Really Is*, 9 SCRIBES J. LEGAL WRITING 43 (2003–2004).

220. CARL FELSENFELD & ALAN SIEGEL, WRITING CONTRACTS IN PLAIN ENGLISH (1981).

221. For a possible turning point, see Irwin Alterman, *Plain and Accurate Style in Lawsuit Papers*, 2 T.M. COOLEY L. REV. 243, 246–49 (1984).

222. *See* FELSENFELD & SIEGEL, *supra* note 220, at 230–31.

legal writers began to "write like lawyers"—that is, began to construct discoursal identities—but felt some resistance to, for example, adopting archaic legalisms in their writing.

Another example of change, somewhat more recent, is the movement toward narrative legal scholarship.[223] Again, we can see how this change had its origins at the individual level, as an act of resistance against the dominant discourse of legal scholarship. To get their voices heard, some scholars had to find a way around traditional modes of scholarly writing. In this case, the change occurred as a way of more directly accommodating the expression of the "real" self or what we would call the autobiographical self. It resulted in a conscious and deliberate shift in the discoursal identity of its authors.

IV. CONCLUSION

We argued in an earlier article for a social view of legal writing,[224] and now we have extended that view to include identity. For us, this inclusion is important. Learning to write like a lawyer means acquiring a new discoursal identity—one positioned within legal contexts and, in many ways, shaped by those contexts. In our view, this takes legal writing well beyond questions of legal skills. And to the extent that learning to write like a lawyer means mastering the conventions of legal discourse, we argue that those conventions become not only part of the text, but also part of the writer.

This means legal writing classrooms, as we have long known, are an important part of legal education in that the transformation of new law students into lawyers—insofar as it is a discoursal transformation—takes place as much in legal writing classrooms as it does in other law school classrooms, but perhaps more explicitly so. It also means that legal writing professors need to be aware of what they ask of their students when they ask them to write like a lawyer—the construction of a new identity—and they should understand that some of the struggle or resistance they see in their students is part of the process of becoming a lawyer. We hope the discoursal model for identity offered in this Article helps with that understanding and presents to others a way of talking about the relationship between legal writers and the contexts within which we ask them to write.

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223. *See, e.g.*, PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 3 (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2415 (1989) (describing narrative legal scholarship as a structure which can offer "respite from the linear, coercive discourse" of legal writing).

224. Rideout & Ramsfield, *supra* note 7.

Finally, we hope this Article can trigger a conversation about the question of change in legal discourse. As teachers of legal writing, we are all positioned somewhere between the conventions of legal discourse, which we are obligated to teach, and our reformist sense of what lies both behind and beyond those conventions. Perhaps, as we look within, that conversation will change not only some of the conventions of the discourse and our practices in teaching it, but who we are as well.