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# EXPLORING THE LAW OF LAW TEACHING: A FEMINIST PROCESS

KATHRYN M. STANCHI\*

## INTRODUCTION

The question that Jane Baron poses, “what is law?,” is an interesting one for legal scholars and a challenging one for practicing lawyers, but a critical one for law teachers. Professor Baron argues that many “law and” scholars describe law as purely doctrinal, rigid, narrow, and unemotional, in part to set up “law” as a foil to the discipline that follows the “and.”<sup>1</sup> The question Professor Baron poses for us is not so much whether law can be doctrinal, rigid, and devoid of feeling (because law certainly can be all these things), but whether this is the sum of law—is this *all* law is?

This essay gives a perspective on Professor Baron’s question that is informed by my experiences as a legal writing professor. A primary goal of legal writing is to teach students to think, write and speak like (good) lawyers. In this way, we share the goal of most doctrinal courses to teach students how to “think like a lawyer,” but we also teach how to research, write, analyze facts, and problem-solve like a lawyer. Although legal writing professors teach doctrine,<sup>2</sup> we must always go beyond doctrine because in legal writing the law never exists separately from its human players and context.<sup>3</sup>

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\* Associate Professor of Law, Temple University School of Law. Many thanks to the John Marshall Law School for hosting this conference, and to the coordinators of the conference for their hard work in putting it together. Thanks to Jan Levine, Susan DeJarnatt, Ellie Margolis, and Jo Anne Durako for their help and advice on earlier drafts of this piece. Thanks also to Jane Baron for asking me to comment on her provocative piece and for her advice and support.

1. Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 *YALE L.J.* 1059, 1080-82 (1999).

2. It is useful here to define what I mean when I say “doctrine.” As I understand the term generally and as it is used in Professor Baron’s article, it refers to rules, or what is sometimes called the “black letter law” such as the holdings of cases, the prohibitions or requirements of statutes, or the words actually written in the Rules of Evidence or Rules of Civil Procedure.

3. See JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 64-66 (1985). Professor Boyd White notes that once we take the doctrine and try to apply to anything but the most simplistic fact

Our methods of teaching are also quite different from most doctrinal courses. We do not use the case method of law teaching. In legal writing, students do not learn law solely by reading law; students learn by doing law. That is, students read and analyze (hypothetical) client facts, thoroughly research and analyze the relevant law, reach a conclusion, and communicate that conclusion and analysis orally and in writing.<sup>4</sup> Because of this difference in method, legal writing teachers, in our scholarship and in our classrooms, are at the forefront of thinking about law pedagogy and seeking more effective alternatives to the traditional Socratic and Langdellian orthodoxy of law school teaching.<sup>5</sup> Thus, it seems fitting that a legal writing professor should ask: how can an exploration of the question “what is law?” help us teach?

Professor Baron’s question is germane to law pedagogy because the principal goal of law schools—to teach students to “think like a lawyer”—means that professors are teaching students what law is (and is not). Scholars construct law when they write about what law is and practitioners construct law when they practice law a certain way.<sup>6</sup> Professors are also influential constructors of law because we have a largely captive, eager and uninformed audience. We tell our students what law is and they leave our classrooms and construct law by practicing and writing about law. So, if we define “thinking like a lawyer” narrowly or rigidly—as completely and always separate and different from the “thinking” the students did as non-lawyers—that is what our students will think law is, and that will influence how they practice (and therefore construct) law. Thus, Professor Baron’s question should inspire us, legal writing and doctrinal teachers alike, to think about what we mean when we say we teach law or “thinking like a lawyer.”

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pattern, we must look beyond doctrine to reasons, policy, and facts. *Id.* That is the primary skill taught in legal writing courses.

4. See, e.g., RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY AND STYLE* 53-54 (1990). See also Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719, 726 (1997).

5. See, e.g., Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993); Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to “Think Like Lawyers:” Integrating Socratic Methods with the Writing Process*, 64 TEMP. L. REV. 885 (1991); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 S.W.L.J. 1089 (1986); Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994).

6. See BOYD WHITE, *supra* note 3, at xii. Lawyers construct law every time we speak or write using legal language. For example, when a scholar writes an article that defines law in a certain way, she adds that layer of definition to the conceptions of law that already exist. When lawyers write briefs, argue or advise clients, they add that layer of definition to the conceptions of law as practiced.

Professor Baron's question is similarly an important one for feminist law professors because of the danger that in our teaching, we are reinforcing the patriarchal aspects of law that we critique in our scholarship. What is the law that we teach? Who is the lawyer in the phrase "thinking like a lawyer?" Is he a stereotype, whose story, like the stories of the characters in *Counsel for Oedipus*,<sup>7</sup> can create dangerous misperceptions about law?<sup>8</sup> Are biases embedded in either definition? Are we teaching the entire picture of law, or a more narrow, less complete picture?

To begin the dialogue, I examine in this essay how legal writing treats the teaching of narrative and emotion in law. These are two topics that scholars, notably feminist scholars, frequently view as "outside" law.<sup>9</sup> I conclude that legal writing teaches more about narrative and emotion in law than most traditional courses. However, its tendency to treat the conservative, mainstream bench and bar as the sole standard for good lawyering means that students are likely to get a narrower view of narrative and emotion in law than is entirely accurate or appropriate.

I hope that my introductory exploration of legal writing will encourage other law teachers to ask the "what is law" question in the context of their teaching and explore the boundaries that they place on law when teaching their students. Exploring this question will help us challenge ourselves and our students to think beyond a narrow, rigid vision of law and law practice.

#### I. WHAT IS "THINKING (AND WRITING) LIKE A LAWYER" IN LEGAL WRITING?

Legal writing has been constructed (and has constructed itself) as a foil to its more theoretical, so-called doctrinal counterparts in the first year. Consequently, legal writing professors take the responsibility to prepare students for the "real world" of law practice seriously. In part, we accomplish this task by placing practicing lawyers and judges at the center of our pedagogy. When we teach, we define law for our students as what practicing lawyers and judges do. So, for legal writing, there are two important corollaries to Professor Baron's question: how do legal writing professors define what practicing lawyers and judges do and how do legal writing professors define who the members of the bench and bar are?

Practicing lawyers and judges are at the heart of the two primary methods of teaching legal writing in United States law

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7. Frank O'Connor, *Counsel for Oedipus*, in *LAW IN LITERATURE: LEGAL THEMES IN SHORT STORIES* 442 (Elizabeth Villers Gemmette ed., 1992).

8. See Jane B. Baron, *Language Matters*, 34 *J. MARSHALL L. REV.* 163 (2000).

9. *Id.* at 167.

schools: the process method and the social method.<sup>10</sup> The process method shows students what law is by teaching them to be aware of and tailor the substance of communications to fit the audience and purpose of the communications.<sup>11</sup> A critical aspect of the process method is the legal audience; the theory is that students learn good lawyering skills when they internalize the needs, questions and reasoning processes of a sophisticated legal audience.<sup>12</sup> The process method also defines the audience of most legal documents as practicing lawyers or judges.<sup>13</sup>

The social method emphasizes law as a discourse—of language, community and culture.<sup>14</sup> Accordingly, it teaches lawyering by simulation and immersion. Students learn legal analysis by doing legal analysis, learn application of law by applying it, and learn how to communicate analysis by writing and speaking it.<sup>15</sup> The bench and bar are the “society” of the social method; its goal is to socialize students into the community of the bench and bar. For the social method, the language of law is what lawyers and judges speak, the culture of law is the traditions and customs of the practicing bench and bar, and the community comprises practicing lawyers and judges.

Legal writing’s reliance on the process and social methods means that when legal writing professors teach—when we guide and critique students’ papers, arguments and analyses—we are telling our students implicitly what a lawyer is and what the culture and community of law is. In this way, we construct the concepts of what “law,” “lawyer” and “law practice” are for our students. For example, legal writing professors often guide students from writing unsupported assertions of unfairness (a common novice mistake) to writing arguments based on rules or policy. Therefore, the sentence “it is unfair to prohibit a woman from seeing the daughter she raised with her estranged lesbian lover” becomes “to safeguard the best interests of the child, a woman who has acted as a parent should have standing to sue for partial custody of the daughter of her estranged lesbian lover.”<sup>16</sup> When we guide students from the first sentence to the second, we

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10. See Rideout & Ramsfield, *supra* note 5, at 52-65; Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 DICK. L. REV. 1, 12-15 (1998).

11. Durako et al., *supra* note 4, at 722-23; Phelps, *supra* note 5, at 1094.

12. Kearney & Beazley, *supra* note 5, at 900-01.

13. Durako et al., *supra* note 4, at 728; LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION 244-45 (1996); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 73, 239 (3d ed. 1995).

14. BOYD WHITE, *supra* note 3, at xi; Rideout & Ramsfield, *supra* note 5, at 56-57.

15. Rideout & Ramsfield, *supra* note 5, at 56-57.

16. This example is drawn from an assignment created by my colleague, Professor Elena Margolis. (source on file with author)

implicitly tell them that the first sentence is not law and the second sentence is. Through this same critique, we tell our students what a lawyer is—a lawyer is someone who writes and will be influenced by the second sentence.<sup>17</sup> Finally, we show our students that the first sentence is not legal language, but the second sentence is.

## II. HOW LEGAL WRITING PEDAGOGY DEFINES LAW, LAWYERS, AND LAW PRACTICE: BEGINNING THE DIALOGUE

Because legal writing implicitly defines law for its students through reference to the community of practicing lawyers and judges, it is important for legal writing professors to examine explicitly how they define this community and its members. Who is the audience/lawyer of the process method?<sup>18</sup> Who comprises the community of the social method? To explore these two questions, I will look at the treatment of narrative and emotion in legal writing courses.

Interestingly, these two topics demonstrate that legal writing teaches law that is both more expansive than the stereotype of law that Professor Baron attributes to lawyers and, at the same time, troubling close to that vision.<sup>19</sup> By teaching students to use narrative and emotion in lawyering, legal writing shows students that lawyering is much more than doctrine and rules. However, examination of how these two topics are taught in legal writing shows that legal writing pedagogy tends to define lawyers and judges, and the practice of law, in a mainstream, narrow, and even stereotypical way. In this way, legal writing pedagogy can create boundaries and restrictions on law that, while partially accurate, are not the sum of law. Specifically, the boundaries may discourage creative, deconstructive thinking in law practice and exclude non-mainstream, outsider<sup>20</sup> thinking.

### A. *Storytelling in Legal Writing*

Legal writing might be one of the few courses in law school

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17. Our reasoning is that the audience/lawyer of the process method would be more receptive to sentence two and that sentence two is in the standard language of community/bar of the social method (and sentence one is in lay language). Of course, overlap exists between the two complementary methods. A legal audience would be more receptive to sentence two largely because it is standard legal discourse.

18. Most legal writing texts do not explore this question beyond the perfunctory description of the busy lawyer or judge who is unfamiliar with the law and facts of a given case. *See supra* note 13.

19. Baron, *Interdisciplinarity*, *supra* note 1, at 1082-83.

20. The word "outsider" has become something of a term of art to describe those who have been excluded from the creation and the practice of law. *See* Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds In Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 1 n.2 (1988).

that teaches the skill of crafting a story as an integral part of law. Not many lawyers think of what they do with facts as “storytelling” or “narrative,” but no lawyer would deny the importance of the skill, whatever one calls it, of telling the client’s story. Indeed, a favorite chestnut of the bar is “I’d rather have bad law than bad facts,” which emphasizes the importance of story (facts) over doctrine. In law practice, this kind of storytelling does not disrupt or challenge analysis; it is in many ways a critical part of the analysis.<sup>21</sup> Therefore, as part of teaching, students think and write like lawyers, legal writing teaches (and has taught for quite some time) students to craft compelling, cohesive, human stories from the mechanical, nonemotional form that facts frequently take in legal documents such as interrogatories and pleadings.<sup>22</sup>

Although there are certainly mechanical aspects to this kind of legal storytelling, it is also a creative and strategic part of the lawyering process. Many legal writing texts speak of drafting facts sections in artistic terms—they speak of painting a picture and of “the art of legal storytelling.”<sup>23</sup> Legal writing teaches law students to take control over the language of their stories—much as authors do in composing fiction. As with composing a fictional story, very little in the legal story should be haphazard or the result of chance—written because “it just came out that way.” Rather, the writer should use language, structure and syntax to create the precise picture she wants the reader to see. Thus, students learn to think about and make (conscious) decisions about what facts to include and exclude, in what order to present them, and what vocabulary to use to describe the parties and events.<sup>24</sup> In other words, legal writing teaches students that “language matters.”<sup>25</sup>

For example, students learn in legal writing that they should decide the order of facts strategically, to emphasize certain things and de-emphasize others. Students begin to learn not only that “all seeing derives from *some* perspective,” but that perspectives

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21. See Baron, *Interdisciplinarity*, *supra* note 1, at 1080 (quoting Martha Minow who states that “stories disrupt . . . rationalizing, generalizing modes of analysis.”) In briefs, for example, the client’s story appears in narrative form in the Statement of Facts, but facts are almost always interspersed throughout the document, in large part to remind the court of the human face of the case. See NEUMANN, *supra* note 4, at 271 (reminding students that judges are human beings who can be swayed by sympathetic facts).

22. Stanchi, *supra* note 10, at 14; NEUMANN, *supra* note 4, at 322-27; EDWARDS, *supra* note 13, at 327.

23. NEUMANN, *supra* note 4, at 322 (quoting John W. Davis); EDWARDS, *supra* note 13, at 328.

24. NEUMANN, *supra* note 4, at 322-27; EDWARDS, *supra* note 13, at 333-42.

25. Baron, *Language Matters*, *supra* note 8 at 163.

can differ and can change the outcome of the case.<sup>26</sup> They also learn to use the writer's tools to persuade their audience to view a story with a particular perspective.<sup>27</sup> To do this, students can allude to a fact early in a narrative without detailed explanation (a legal equivalent of foreshadowing) or they can begin with a fact out of chronological order and work back (somewhat like beginning a story *in media res*). They learn to choose vocabulary carefully. For example, using the word "girl" instead of "woman" can change the meaning of a sentence, even the meaning of the story.<sup>28</sup> In sum, while some legal writing professors and texts might not use or emphasize the word "narrative," because this is not common parlance for most lawyers, the creation of stories is a large part of teaching legal writing.<sup>29</sup> For legal writing professors, this kind of narrative is *already* in law.

On the other hand, the storytelling that lawyers do and that legal writing teaches is bound by doctrine in a way that personal or fictional narrative is not. Legal storytelling is neither fictional nor personal.<sup>30</sup> It is the non-fictional account of someone else's story and therefore lacks the catharsis, freedom and political challenge of personal narratives.<sup>31</sup> Moreover, in many ways the audience of the process method and the legal community of the social method confine the legal story. The lawyer/law student can choose what facts to include or exclude only within the universe of facts considered relevant by the audience and within the discourse community.<sup>32</sup> The relevance of facts is dictated, in large part, by rules. This constraint can be meaningful, especially with facts relating to race, gender, sexual orientation and other outsider characteristics. Moreover, the rules—and the power of stereotypes over the audience—can also invite the legal writer to fall back on

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26. *Id.* slip at 146.

27. *See id.* (discussing power of "perspective"). *See also* EDWARDS, *supra* note 13, at 328; NEUMANN, *supra* note 4, at 322 (quoting John W. Davis).

28. *See* Baron, *Language Matters*, *supra* note 8, at 163-74 (discussing use of "girl" in line from *Notting Hill*).

29. *See* Baron, *Interdisciplinarity*, *supra* note 1, at 1083 (acknowledging the view that lawyers must be effective "tellers of tales").

30. Except for the unfortunate lawyer who is his own client, the story the lawyer gets to tell is not his own. Indeed, there is very little room for personal expression in legal writing. The process method tells us that the purpose of legal documents is not to express oneself—the feelings and personal views of the writer must take a backseat to the goal of informing or persuading another lawyer. Rideout & Ramsfield, *supra* note 5, at 52; SHAPO ET AL., *supra* note 13, at 264.

31. *See* Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 975 (1991); Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 666 (1992) (noting that one purpose of storytelling is to challenge stereotypes and preconceptions in law).

32. Stanchi, *supra* note 10, at 30-35.



“stock” stories or stereotypes in the narrative.<sup>33</sup>

Legal writing pedagogy usually reinforces the traditional, more conservative view of the bench and bar that, as a general rule, facts about the race or gender of the parties in a law suit are not strictly relevant unless the legal issue depends on them, such as in an employment discrimination or equal protection case. Therefore, legal writing teaches students either to exclude these irrelevant facts from the legal story, or use them only sparingly and with caution.<sup>34</sup>

Therefore, in a case about a young woman who is accused of murdering her infant shortly after giving birth, legal writing teaches that the audience (practicing lawyers and judges) considers facts about the woman’s ethnic background, her class and her economic status irrelevant.<sup>35</sup> Thus, the use of these facts is circumscribed—they can be used sparingly for “context” or emotional punch in the legal story, but cannot be the centerpiece of it, at least not overtly.<sup>36</sup> These facts certainly should not be given the same treatment as facts that are relevant to the legal issues—such as whether the woman knew the baby was alive at birth, whether she meant to kill the baby or only hide it, etcetera. Thus, legal writing teaches students that facts relating to ethnicity, poverty, and class are not really part of the law in this case—unlike the facts about intent and knowledge, which are law. Facts that are “really” law can be used throughout the piece of legal writing, arguments may be based on them, they may be covered in depth—the legal community acknowledges that they *belong* in the legal story. Facts that are not law generally cannot form the basis of legal arguments. They must be used, if at all, sparingly and almost *subliminally*—they have to be slipped into the legal story while the legal audience is paying attention to something else.<sup>37</sup>

Moreover, in teaching students to use the writer’s tools to create a story with a particular perspective that is advantageous

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33. Baron, *Language Matters*, *supra* note 8, 175 (citing Gerald Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 5-6 (1984)).

34. Stanchi, *supra* note 10, at 33-35.

35. This example is taken from an article by Professor Margaret Montoya. See Margaret Montoya, *Mascaras, Trenzas y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L.J. 185 (1994) (citing and discussing *People v. Chavez*, 176 P.2d 92 (Cal. App. 1947)).

36. Stanchi, *supra* note 10, at 33.

37. Overt use of facts about race, ethnicity or similar characteristics in a case where they are not strictly relevant can make judges angry and have unfortunate consequences for the client. See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1370, 1376-77 (1992) (describing a judge’s anger at a lawyer’s attempt to argue facts related to race in a Fourth Amendment case).

to their clients, legal writing pedagogy, consistent with “real world” lawyering, may sometimes encourage the use of “stock” stories or stereotypes in legal narratives.<sup>38</sup> As Professor Baron points out, stereotypes are part of the “mental equipment” with which human beings “apprehend the social world.”<sup>39</sup> Since both the writers and the audience of legal narratives are human beings, it seems difficult (if not impossible) to create a legal narrative without using them. Another reason is that legal narrative is tied inextricably to legal doctrine—and legal doctrine (again being the product of human beings) often seems to rely on stereotypes or stock stories.<sup>40</sup>

In the story described by Professor Baron, *Counsel for Oedipus*, the lawyers present the characters of the litigation in stereotypical fashion—Nellie Lynam as the meek, downtrodden wife, Tom Lynam as the overbearing, abusive, control-freak. Later, Nellie Lynam is re-born as the manipulative, sex-hating disgrace to her gender.<sup>41</sup> Perhaps we can castigate the lawyers for their contribution to the perpetuation of these stereotypes, but we can also see how the stereotypical stories are encouraged by the doctrine of domestic relations laws based on “fault,” which relied heavily on the stereotype that in every human relationship, there is a good, innocent person and a bad, guilty person.<sup>42</sup> However, as Professor Baron points out, it makes little sense to “blame the law” and stop there.<sup>43</sup> Perhaps stereotypes “work” for lawyers—in the story and in real life—not simply because the law encourages them, but because the judge and the jury understand the stereotypes and are, in some sense, comfortable with and accepting of them. All of these considerations, of course, impact the way legal writing teaches students to define and deal with the legal audience.

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38. I do not mean to suggest here that legal writing teaches that it is acceptable or ethical to use racist, sexist or otherwise offensive stereotypes—even though some lawyers may interpret the professional responsibility of zealous advocacy to require the use of such stories. But, as Professor Baron points out, stereotypes abound in our minds and our culture—in many ways it would be difficult to tell a coherent story without making use of them.

39. Baron, *Language Matters*, *supra* note 8, at 165.

40. Consider the “spontaneous utterance” rule of evidence (stock story: excited people tend to tell the truth), the reasonable person/man of torts, the classic victim and perpetrator of rape law. For a description of the stereotypes underlying rape law, see, e.g., Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 B.C.L. REV. 441 (1996); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991).

41. Baron, *Language Matters*, *supra* note 8, at 169-70.

42. See, e.g., 23 PA. CONS. STAT. ANN. § 3702 (b)(14)(West 2000) (alimony awarded in part based on one party’s “misconduct” toward the other) (amended 1998).

43. Baron, *Language Matters*, *supra* note 8, at 178-79.

Thus, unlike some narrative legal scholarship, the storytelling taught in legal writing generally supports, rather than challenges, legal doctrine—in part because legal writing pedagogy tends toward a (perhaps stereotyped) vision of the practicing bar that is mainstream and conventional. This construction of law fails to tell students that there are times when it is necessary and perhaps even appropriate to argue overtly facts that are not strictly relevant as a centerpiece to the legal theory, because it is the right thing to do, is the best path to justice, or simply because that is the client's story.<sup>44</sup> Or, that trying to fit clients or adversaries into the stereotypes or stock stories underlying legal doctrine is not always the best service to the client, and not always ethically or morally right. Sometimes, as many believe was the case with fault divorce, it is better to take the more radical step of challenging the doctrine and the stereotypes on which it is based and thereby challenging the audience's perceptions of what human beings are really like.

### *B. Emotion in Legal Writing*

Legal writing also teaches students how to use emotional arguments in law and, consequently, that emotion is an important part of law. Most legal writing texts emphasize to students that judges and lawyers are human and have feelings; judges especially want to be (or appear) fair and effect (and be viewed as effecting) justice.<sup>45</sup> Although, as in classical rhetoric, law disfavors direct appeals to emotion, most practicing lawyers would never underestimate the power of a sympathetic client or circumstance to determine the outcome of a dispute.<sup>46</sup> Because it is a skill crucial to practicing lawyers, legal writing teaches students to use facts and arguments that appeal to the human side of judges.

Consider a case involving a widow suing her insurance company for its refusal to pay her benefits because her husband lied about his diabetes on the insurance application.<sup>47</sup> The husband was murdered and therefore died for reasons completely unrelated to his diabetic condition.<sup>48</sup> Legal writing pedagogy would encourage students representing the widow to make use of

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44. See Cunningham, *supra* note 37, at 1329-30 (exploring times like this in the life of a lawyer).

45. See, e.g., EDWARDS, *supra* note 13, at 245; NEUMANN, *supra* note 4, at 271-72.

46. See EDWARD P.J. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 86-87 (3d ed. 1990) (describing use of emotion in classical rhetoric). The maxim quoted earlier, "I'd rather have bad law than bad facts," can also be viewed to mean that it is better to have an emotionally strong case than a doctrinally strong case. See also EDWARDS, *supra* note 13, at 245, 327 (noting that a judge or jury will choose justice over technical application of law).

47. See *State v. Manzo*, 584 A.2d 190 (N.J. 1990).

48. *Id.* at 191.

the emotional elements of the case in several ways. First, “emotional” facts such as the widow’s need for and reliance on the insurance money, her lack of knowledge about her husband’s deception, and her unsuitability for employment because of her age, gender and life-long devotion to her husband and family should appear in the legal story, the Statement of Facts.<sup>49</sup>

Second, legal writing pedagogy would encourage students to construct a theory of the case that would allow them to maximize the use of emotional facts and arguments.<sup>50</sup> Some legal writing texts go so far as to encourage students to begin a brief with a summary that has human or emotional appeal.<sup>51</sup> Finally, legal writing professors would encourage students to explore legal arguments that would exploit the more sympathetic aspects of the case.<sup>52</sup> For example, is an equity argument based on “clean hands” or reliance possible?

On the other hand, both the process and social methods put significant limits on the use of emotional arguments—emotion is part of law, but in a hidden, embarrassed kind of way. The rules of legal discourse require that the emotional arguments be made indirectly, subtly—almost sneakily. Like facts that are not strictly relevant, emotional arguments are not quite full members of the legal community. They are not really law to the same degree as doctrinal arguments and the law distrusts them. In the insurance case, for example, legal writing pedagogy would strongly discourage arguments that appeal directly to emotion, such as “the wife should recover because she has had enough misfortune by losing her husband in a terrible accident and the law should help her” or “the wife should recover because in our society women who have been homemakers are discriminated against by employers and the wife will not be able to get a job and support herself.” These arguments are not part of traditional legal discourse and the legal audience would consider these arguments unpersuasive, unsupportable, and even inappropriate.

Here again, though, language matters and stereotypes loom. Legal writing teaches that emotional arguments can be quite powerful, but only if they are phrased in the proper way (to sound like doctrine). The language used to make emotional appeals, such as the vocabulary, tone, and sentence structure, can be the difference between a successful emotional argument and an embarrassing one. Moreover, are appeals to emotion in law just a more intellectual way of recasting the use (and possibly abuse) of

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49. See, e.g., EDWARDS, *supra* note 13, at 327-28; NEUMANN, *supra* note 4, at 320-21, 323-24.

50. See, e.g., NEUMANN, *supra* note 4, at 263, 271-72, 365.

51. See, e.g., *id.* at 273; EDWARDS, *supra* note 13, at 334.

52. See, e.g., NEUMANN, *supra* note 4, at 271-73; NANCY L. SCHULTZ, ET AL., INTRODUCTION TO LEGAL WRITING AND ORAL ADVOCACY 223 (2d ed. 1993).

stereotypes? Are some emotions just “gut reactions” to stereotypes—like the reactions of moviegoers (even *feminist* moviegoers) to Julia Roberts’ happily married and pregnant character in *Notting Hill*? What are lawyers doing when they try to appeal to the emotions of their audience?

Part of what the social and process methods teach students is that emotion is part of law, but it is also in some sense not quite law. While this proposition may be true much of the time, it is a view of law practice that is very traditional and conservative. It ignores those marginal, novel cases (usually for marginalized clients) where doctrinal precedent is scarce, and the most useful, effective thing to do is make an argument that appeals baldly to the court’s feelings about justice and fairness.<sup>53</sup> To be well-rounded, capable and creative lawyers, students need to learn both how to do this and when it might be appropriate. On the other hand, to paraphrase Professor Baron, it is difficult to control the reaction of the audience to an emotional appeal, even an artfully crafted one.<sup>54</sup> It is far from clear that appeals to emotion are somehow more feminist, or less burdened by stereotypes, than purely doctrinal arguments.

#### CONCLUDING THOUGHTS

The two examples of storytelling and emotion in legal writing demonstrate the importance of asking the “what is law” question in what we teach. For legal writing, two primary corollary questions emerge upon close examination of the process and social pedagogies. First, who exactly is the audience/lawyer of the process method? Does this entity have a race, gender, sexual orientation, or class? What does it say about the audience to whom we are speaking when we teach our students that in a legal dispute certain personal characteristics are irrelevant because the audience would consider them irrelevant? What does it say about the audience when we treat emotion as a thing to be hidden or embarrassed about because of our audience?

Second, what exactly are the characteristics and qualities of the legal culture and community central to the social method? To answer “the practicing bench and bar” only begs the question. Who do we see as the members of the practicing bench and bar? What does the treatment of facts related to race, gender and sexual orientation say about our vision of the practicing bench and bar? Do all members of the community agree that emotional arguments should (always) be camouflaged as doctrine or policy?

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53. The bar has a maxim that seems on point for these cases, too: if you have good facts, pound the facts; if you have good law, pound the law; if you have neither, pound the table.

54. Baron, *Language Matters*, *supra* note 8, 168.

Are emotional arguments always more feminist than purely doctrinal ones?

These questions are meant to begin the process of applying Professor Baron's question to law pedagogy. I see this as a feminist process in that it will lead us to explore beyond artificially constructed (and perhaps sexist, racist and homophobic) definitions of law. In teaching students to think like lawyers, law professors are constructing what lawyers are (indeed, constructing lawyers) and therefore, are constructing law. Law professors must guard against treating the boundaries of law and law practice as fixed and inflexible, as always narrow, rigid, anti-feminist and racist. For legal writing, this idea means being careful not to define the "practicing bar" in an exclusively mainstream, conservative way. That conservative viewpoint can be *part* of what is taught, but it cannot be the only part. If legal writing professors limit themselves to this narrow picture of the law, students may not learn to push the boundaries, to think creatively, and to deconstruct within the context of law practice. To truly educate students, legal writing professors must also teach them that "thinking like a lawyer" can mean what a good, creative lawyer who is challenging the system might think and do. This way, students can enter law practice knowing that creativity and deconstruction are not solely scholarly activities, but are useful—even essential—to good lawyering. As Professor Larson noted in one of her articles:

[T]he law already contains within it the seeds of [feminist] transformation ... feminist practitioners [must] develop skill in finding analogies that can create a path for judges and legislators between [women's] present reality and ... future vision.<sup>55</sup>

How can students as future practitioners develop these skills? Only if we teach them.

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55. Jane B. Larson, *Introduction: Third Wave—Can Feminists Use the Law to Effect Social Change in the 1990s?*, 87 NW. U. L. REV. 1252, 1259 (1993) (summarizing the thesis of Jennifer Nedelsky's article, *The Practical Possibilities of Feminist Theory*, 87 NW. U. L. REV. 1286 (1993)).

