DISRUPTIVE LAWYERING 101

Sonya Bonneau and Susan McMahon*

In one of my first years of teaching, I[1] showed students a clip labeled "Bad Seventh Oral Argument."[2] It was, indeed, a bad argument. The advocate made no attempt to distinguish a recent Supreme Court precedent. He grew frustrated with judges prodding him for answers. He even said, "I don't want to argue. I want to effect a change that is positive to this country."[3]

See? I was saying to the students as they prepared for their own oral argument. *You can do better than this guy. Nothing to worry about.*

But as I re-listened to that argument this summer, as George Floyd's execution played on my phone, as rivers of humans ran through the streets, as federal officers teargassed protestors a few miles from my house, I realized something new:

In at least one way, that advocate was right.

He had been tasked with distinguishing his case from the Supreme Court's *Illinois v. Caballes* precedent, which allowed police to bring a drug-sniffing dog to a traffic stop, even when there was no indication of drugs in the car.[4] I re-read *Caballes* while writing this Essay, and it is simply a naive opinion, written for an imaginary police force and society rather than the one that actually exists. It winked and nodded at police stopping motorists—usually Black drivers[5]—and

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* Sonya Bonneau is Professor of Law, Legal Practice, Georgetown University Law Center. Thanks to Susan McMahon, who inspired this Essay, and to all who offered feedback. Susan McMahon is Professor of Law, Legal Practice, Georgetown University Law Center. My thanks go to Erin Carroll, Eun Hee Han, Sherri Keene, and Tom Spoth, all of whom gave valuable feedback on this Essay.

[1] "I" is Susan McMahon.

[2] Armen Adzhemyan, *Bad Seventh Circuit Oral Argument*, YOUTUBE (Apr. 27, 2007), https://www.youtube.com/watch?v=c8ksvG_X4Z4.

[3] *Id.*

[4] *Illinois v. Caballes,* 543 U.S. 405, 409 (2005).

[5] *See generally* Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 737 (2020), https://5harad.com/papers/100M-stops.pdf.

then using signals from often-unreliable drug dogs to justify a search of the car.[6] It, along other Supreme Court decisions,[7] enabled the over-policing of Black and Brown drivers that led to the deaths of many unarmed people during traffic stops.[8]

Most horrifyingly, the decision does all of that without mentioning race once. Even the dissents in the case never note the disproportionate impact the decision would have on communities of color.

The advocate in that "bad" oral argument refused to participate in the broken system that produced this decision and then required that all future judges pledge fealty to it.

I don't want to argue. I want to effect a change that is positive to this country.

My teaching has always been focused on helping my students derive, synthesize, and apply legal rules. Deductive reasoning, syllogisms. Crafting analogies to precedents. Premises leading to conclusions. I had co-authored a textbook that emphasized these principles.

Those foundations prioritize maintaining the status quo; they emphasize stability and continuity. But the restraints of legal reasoning now felt hollow and broken against the videos on our phones, unable to accommodate the demands of protestors in the streets. What I now saw was that legal reasoning, as I've taught it in my legal writing classes, can paint a false veneer of neutrality on rules and precedents and demand that injustices be replicated over and over again.

I spoke with my co-author, and we decided to confront that gulf. We wrote this Essay to disrupt the foundations upon which our own text and teaching stood.

How do legal writing professors begin to address the social failures of legal analysis? We can teach students to recognize biases in

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[6] *Caballes*, 543 U.S. at 411 (Souter, J., dissenting) ("The infallible dog . . . is a creature of legal fiction.").

[7] *See, e.g.*, *Whren v. United States,* 517 U.S. 806 (1996) (allowing pretextual stops of drivers); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (allowing suspicionless seizure of motorists at sobriety checkpoints); *United States v. Sharpe*, 470 U.S. 675 (1985) (permitting lengthy seizures of cars and their occupants).

[8] To name just a few: Philando Castile, Walter Scott, Darrius Stewart, Samuel DuBose, and Maurice Gordon. *See* Fatal Force Database, WASHINGTON POST, (Dec. 16, 2020), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/?itid=lk_inline_manual_5.

their own arguments.[9] We can ask students to confront their differences through writing assignments, illustrations, and hypothetical examples that make diverse perspectives explicit.[10] We can identify and interrogate the use of racial stereotypes in legal narratives.[11]

Yet the *Caballes* opinion reveals that injustice is burrowed deep. It lives even in the precedents we teach our students to analogize to, in the rules we ask them to apply. It exists in the gaps, in the cases that never mention race but will harm communities of color, in the rules that never mention power, but entrench privileges for some at the expense of others.

This Essay confronts the silence of legal analysis: the reality that editing out the stereotypes, tropes, and cultural assumptions will not yield conditions of neutrality. Unless we go deeper, the latent power imbalances that disproportionately harm communities of color, which we have been conditioned to perceive as neutral, will remain.

Many scholars, including legal writing scholars, have rejected the premise that legal analysis is neutral.[12] Teaching students to "think like lawyers," as Teri A. McMurtry-Chubb pointed out, merely forces students to "replicate racist and elitist legal structures as they learn the very process of legal reasoning and analysis . . . ."[13] Kathy Stanchi notes that judicial opinions can be biased, but "legal writing and

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[9] Lorraine Bannai & Anne Enquist, (*Un)examined Assumptions and (Un)intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 32 (2003).

[10] *See* Charles R. Calleros, *Training A Diverse Student Body for A Multicultural Society*, 8 LA RAZA L.J. 140, 150–56 (1995).

[11] *See* Bannai & Enquist, *supra* note 9, at 10–14; Helena Whalen-Bridge, *The Lost Narrative: The Connection Between Legal Narrative and Legal Ethics*, 7 J. ASS'N LEGAL WRITING DIRS. 229, 244 (2010).

[12] *E.g.*, Teri A. McMurtry-Chubb, *Writing at the Master's Table: Reflections on Theft, Criminality, and Otherness*, 2 DREXEL L. REV. 41, 54–55 (2004) [hereinafter *Writing*] (citing WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY 38, 48–49 (2008)); *see also* Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability Into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 544–45 (1996); Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for A "Woke" Legal Academy*, 21 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 255, 259–60 (2019) [hereinafter *Still Writing*].

[13] McMurtry-Chubb, *Writing, supra* note 12, at 54–55 (citing WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY at 48–49).

lawyering require [students] to use the law without considering the hidden bias."[14] Sherri Keene has argued that ignoring race and implicit bias in police stops "skew[s] the conversation in the courtroom" and leads to unjust results.[15]

What is the alternative to this neutrality fiction?[16] We have no easy answers. As legal writing professors, we must teach students how to operate within this system; to say, "I don't want to argue"—no matter how morally correct the advocate—will never win a legal case.

But we can, at the very least, fill the silences. We can unearth the values and biases that underlie the rules. And we can give students the tools to change the system from the inside out.

First, students need to understand the power dynamics that underlie many legal rules and precedents. Simply asking students to analyze who the rule benefits and who it disadvantages helps them understand that rules are not neutral statements; they invest power in some people and take it from others.

For example, this semester, we are teaching a problem that involves a right of publicity statute. In class, we have been treating the rule as neutral. We are deep in the weeds of analyzing what it means to use an identity or when that identity is used for a commercial purpose, using the traditional deductive and analogical reasoning tools of legal analysis. But once we have finished with that work, we'll ask students to take a step back and assess the statute more broadly, ask them to see the entrenchment of wealth and power that results when someone with value associated with their name can prevent others from using it. We can ask students this for every rule: "Who does this rule privilege? Who does it disadvantage? Do you think this is the right approach? Why?"

Such conversations force students to see that rules almost always perpetuate power disparities, even when racial or other biases are not directly implicated. We could go a step further and crystallize how

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[14] Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outside Voices*, 103 DICK. L. REV. 7, 36 (1998).

[15] Sherri Lee Keene, *Stories that Swim Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 MARYLAND L. REV. 747, 752 (2017).

[16] Teri A. McMurtry-Chubb argues powerfully that law professors should look outside of Western approaches to analysis for alternatives to the classical rhetoric model of legal reasoning. McMurtry-Chubb, *Still Writing*, *supra* note 12, at 258–60.

those with power and wealth are most often those who are white and male, thus entrenching their view of the world in our laws.[17]

Students should also learn to understand where rules invest discretion and how that discretion can lead to unjust outcomes. Upon reading a case that allows police to bring drug dogs to traffic stops without probable cause, students should think through the effects of such a rule and analyze who it would disproportionately impact.[18] Upon reading a public drunkenness statute that allows an arrest for an intoxicated condition manifested by "boisterousness," students should think through how much discretion police have in determining who is boisterous and who is not. Simply asking these questions can help students see that rules are never neutral, either in conception or execution.

Second, students should be introduced to certain legal analysis tools explicitly as tools that can help them to change the law. Once students are attuned to the different layers of power and bias underlying legal rules, they will want to effect change, and legal writing professors are uniquely positioned to help them achieve that goal.

Spaces within legal analysis offer examples of positive change when law responds to or is consistent with social realities and consequences. Rule synthesis, for example, provides a way for students to craft new rules that have a foothold in the precedents but that chart a new course. Law can move incrementally in one direction, crafting exception upon exception to a common law rule, until, suddenly, a court decides to swallow the old rule whole.[19]

One old example of this comes from the *MacPherson v. Buick Motor Co.* case, in which then-Judge Cardozo synthesized a new rule abolishing the need for privity of contract in negligence lawsuits

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[17] For example, the New York Times' recent study of power and race illustrates how the people who make, interpret, and enforce laws are disproportionately white. Denise Lu, Jon Huang, Ashwin Seshagiri, Haeyoun Park & Troy Griggs, *Faces of Power: 80% Are White, Even As U.S. Becomes More Diverse*, N.Y. TIMES (Sept. 9, 2020), https://www.nytimes.com/interactive/2020/09/09/us/powerful-people-race-us.html.

[18] Pointing out the gaps between the abstract rules and the coercive environments in which they are applied is a hallmark of Justice Sotomayor's opinion writing in criminal law. *See, e.g.*, Rachel E. Barkow, *Justice Sotomayor and Criminal Justice in the Real World*, 123 YALE L.J. FORUM 409, 413 (2014).

[19] *See* SONYA G. BONNEAU & SUSAN A. MCMAHON, LEGAL WRITING IN CONTEXT 55–56 (2017).

against manufacturers of dangerous products.[20] Judge Cardozo was able to pivot from this longstanding shield to liability by tracing the many exceptions made to the privity doctrine in the precedents.[21] His new rule tied the potential of consumer recovery for injuries caused by product defects to the manufacturer's conduct rather than to contract and product classification.[22] Judge Cardozo thus acknowledged social realities implicitly—consumers purchase items from retailers, not manufacturers—and recalibrated products liability law to reflect individual interests, by synthesizing a rule.

Similarly, analogies can be made to be as broad as a river or fit on the head of a pin. Zooming in or zooming out from a case allows a decisionmaker to see points of similarity or wide gulfs of distinction. Every case is like another case in some respects, and unlike the case in others.

For example, the Supreme Court later limited the impact of *Caballes* by finding that a dog sniff at a home's entryway was an unreasonable government intrusion because it was the defendant's home, the quintessential private space.[23] But that decision easily could have gone the other way; the state argued that *Caballes* stood for the proposition that a dog sniff did not expose private items, regardless of where it took place, and thus was not a Fourth Amendment violation.[24] By strengthening students' fluency with these tools, by showing them that it is a choice to analogize to precedent or distinguish from it, we could help them broaden the impact of good precedents and limit the spread of bad ones. We could foster their images of themselves as agents of change rather than passive recipients of law's demands.

Aside from these uses of legal analysis tools in service of reform, students also must be taught that legal analysis may not be enough to effect change—that many changes to law result from social movements, and not the other way around. Familiarizing students with other pathways for change other than litigation—through grassroots organizing or the political and legislative process—can help them expand their view as to what a lawyer does. For example, asking them to write an op-ed advocating for a legislative change could allow

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[20] *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389–91 (1916).
[21] *Id.* at 389–90.
[22] *Id.* at 390 ("We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else.").
[23] *Florida v. Jardines*, 569 U.S. 1, 7–10 (2013).
[24] *Id.* at 10.

them to see the other levers of power that they can push when the law itself is broken.[25] Such an assignment allows students to see the rules as "a point of departure rather than a despairing final chapter."[26]

In this year of plagues and protests, our jobs should not be simply to give students tools to operate within the system as it is. It should be to give them the tools to improve that system from the inside and out, bit by bit. Because, while that Seventh Circuit advocate was right on the merits, he was wrong on the strategy. A lawyer trained to see rules as expressions of values, flawed and changeable, as opposed to unyielding decrees, need not abandon legal analysis. Lawyers can both argue *and* effect a change that is positive to this country.

Coda: We are mid-way through a full-year course, having only sown the seeds of disruption. We don't yet have data on the student response, although informal conversations suggest positive reactions. But we do know of some benefits to ourselves. We have engaged with the pedagogy this semester with a sense of purpose and social connection. Knowing the value of the tools we offer beyond the well-crafted legal argument (as an end unto itself) is already a reward—one that will enhance our teaching in this year and the years to come.

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[25] For examples of other ways to incorporate non-litigation legal reform work into law school pedagogy, *see* Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2244–46 (1992) (describing a simulation in his race discrimination course in which students engaged in long-term strategic thinking about legal reform); Alina S. Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 CLINICAL L. REV. 1, 46–47 (2015) (suggesting selecting clients for a transactional clinic who present issues situated in a social justice context to allow for greater incorporation of critical theory).

[26] Lawrence, *supra* note 25, at 2246.