Article

Teaching Dissents

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> Perhaps the most powerful trick of the human sciences is to decontextualize the obvious and then recontextualize it in a new way.[1]

INTRODUCTION

In her dissenting opinion in *Utah v. Strieff*, Justice Sonia Sotomayor began by describing the majority's holding plainly, in her own words: "The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights."[2] She then warned: "Do not be soothed by the [majority] opinion's technical language."[3] Justice Sotomayor's framing of the case and subsequent warning were remarkable in many respects—not the least of which was her breaking of the fourth wall to speak directly to the reader. Even more, Justice Sotomayor acknowledged that legal opinions are writings—and persuasive writings at that.

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1. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 4 (2000).

2. 579 U.S. 232, 243 (2016) (Sotomayor, J., dissenting). In *Strieff*, the five-justice majority found an exception to the exclusionary rule, which otherwise would have required the evidence to be suppressed, concluding that the discovery of an arrest warrant for the defendant attenuated the connection between the police officer's unlawful stop and the evidence seized. *Id.* at 235 (majority opinion).

3. *Id.* at 243–44 (Sotomayor, J., dissenting).

While Justice Sotomayor's dissent drew considerable attention, her statements revealed what should be an obvious truth: Legal opinions are documents written by judges to persuade the legal audience of the correctness of a court's decision.[4] Yet, the fact that legal opinions are rhetorical[5] pieces of writing is not often discussed by judges in an opinion's text. On the contrary, opinions are often written to sound authoritative and sure.[6] They project confidence and authority, channeling a tone of "affected certainty."[7] While judges' perspectives and attitudes—and even their biases and assumptions—naturally find their way into legal analysis and decision-making, this reality is something that the language of opinions tends to deny.[8] Indeed, as judges select

4. *See, e.g.*, John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 447 (2001) ("[L]ike an oration," an opinion "seeks to persuade"); Judith S. Kaye, *Judges as Wordsmiths*, N.Y. ST. B.J., Nov. 1997, at 10, 10 (explaining that judicial opinions are "efforts to persuade . . . lawyers, litigants, the community at large that the decision they have made . . . is the absolutely correct one"); James D. Hopkins, *Fictions and the Judicial Process: A Preliminary Theory of Decision*, 33 BROOK. L. REV. 1, 7 (1966) (stating that the judge is attempting to persuade the parties, the profession, and the public).

5. *See* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 692 (1985) (describing law as operating "through speakers located in particular times and places speaking to actual audiences about real people" and "by narrative," and noting that these and other qualities mark law as a "rhetorical system").

6. *See* Lisa Eichhorn, *Declaring, Exploring, Instructing, and (Wait for It) Joking: Tonal Variation in Majority Opinions*, 18 LEGAL COMM. & RHETORIC: JAWLD 1, 7 (2021) (referencing scholarly commentary on judicial opinions' tendencies towards "verbosity and affected certainty").

7. *Id.*; see *infra* notes 38–50 and accompanying text for additional discussion on this topic.

8. *See, e.g.*, Andrew J. Wistrich & Jeffrey J. Rachlinski, *Implicit Bias in Judicial Decision Making: How It Affects Judgment and What Judges Can Do About It*, *in* ENHANCING JUSTICE: REDUCING BIAS 87, 89 (Sarah E. Redfield ed., 2017) ("In an era in which judges embrace egalitarian norms, why do we continue to observe large disparities in outcomes between Black and White parties in court?"); Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 66–68 (2017) (interrogating how implicit bias causes well-intentioned judges to harm stereotyped groups); Sherri Lee Keene, *Stories That Swim Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 MD. L. REV. 747, 751–52 (2017) (urging courts to critically examine the implicit racial bias underlying criminal precedent); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 350 (2007) (finding that a civil plaintiff or a criminal defendant's race shapes jurors' recollections of legal facts); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF.

and interpret facts and draw inferences, judicial writing often neglects to even acknowledge that this is occurring, leaving these choices hidden from the reader's view.[9] In doing so, judges obscure that they are making subjective decisions to favor one viewpoint over another, based on their own experiences and ideas about how the world works.[10]

While dissenting judges are not always as forthcoming as Justice Sotomayor in acknowledging the persuasive nature of judicial writing, it makes sense that a dissenting opinion,[11] more often than a majority opinion,[12] would point out the ambiguity and uncertainty in a case. The very presence of dissents challenges the myth of legal decision-making as objective and straightforward; in speaking back to court opinions, dissents lay bare the complexities and reveal points of ambiguity in cases. In contrast to the voice of the majority, which often seeks to draw attention away from conflicts, dissents can show where choices were made in the decision-making process and where other choices could have been made.[13] In exposing the turning points

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L. REV. 969, 971–72 (2006) (discussing empirical studies documenting implicit and internalized racial bias).

9. *See* Elizabeth Thornburg, *(Un)conscious Judging*, 76 WASH. & LEE L. REV. 1567, 1572 (2019) (citing Dan Simon, *A Psychological Model of Judicial Decisionmaking*, 30 RUTGERS L.J. 1, 42 (1998)) (defining "inference" "as any cognitive process of reasoning, in which a person goes beyond some known data to generate a new proposition").

10. Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 32 (2021) (asserting that whiteness "is embedded in what we teach, and in the common law system we have inherited"); Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 2–3 (1988) (discussing the belief in the objectivity of legal discourse and the denial that it privileges a particular worldview).

11. In this Essay, "dissent" or "dissenting opinion" is used broadly to include an opinion that challenges the majority opinion's reasoning, and thus includes concurrences that agree with the court's decision but nonetheless challenge how it was reached.

12. In this Essay, the term "majority opinion" is used synonymously with "opinion of the court," "court opinion," or "court's opinion." All these terms are meant to describe a court's binding decision that establishes legal precedent on a legal issue.

13. *See, e.g.*, Sherri Lee Keene & Susan A. McMahon, *The Contextual Case Method: Moving Beyond Opinions to Spark Students' Legal Imaginations*, 108 VA. L. REV. ONLINE 72, 78–79 (2022) (discussing the illusion of certainty that majority opinions may place on disputed facts and decisions); Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 102 (2011) ("A dissent

in a case, dissents make room for alternative realities and experiences that are not raised by the majority and show where their consideration could have made a difference in the result.[14]

The inability to talk about law in a deeper and more hopeful way in the law school setting is not hard to understand given law schools' traditional approach of teaching law primarily through the reading of appellate legal opinions.[15] Despite their deficiencies in addressing the whole of a legal issue, traditional law teaching focuses on the intrinsic study of legal texts with students examining judges' writing to understand the law's meaning.[16] This process teaches students what the law is and what judges report as the reasons for their decisions, but it fails to show students what the law could be and how, as advocates, they might challenge the court precedent they are reading. In reading legal opinions largely at a surface level, students are taught to look only to the author's words to understand what matters in a legal decision.[17] They are encouraged to accept what judges say

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in the court of appeals increases the length of the majority opinion by about 20 percent, which we treat as a rough measure of the cost that a dissent imposes on the majority.").

14. *See* Keene & McMahon, *supra* note 13, at 78–79 (noting the frequent omissions of disfavored arguments and deprioritized perspectives in majority opinions); Orit Gan, *I Dissent: Justice Ginsburg's Profound Dissents*, 74 RUTGERS L. REV. 1037, 1039 (2022) (illustrating how Justice Ginsburg's dissents provide an alternative reasoning rooted in different perceptions of society and the law).

15. *See, e.g.*, Keene & McMahon, *supra* note 13, at 78 ("[A]ppellate opinions . . . form the bread and butter of the traditional case method . . . .").

16. *See, e.g.*, Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDUC. 562, 563 (2015) ("[T]he Socratic method has existed for thousands of years in its foundational inquisitive approach and has been the bedrock of legal education for well over a century. Core features of the modern case-based Socratic method in law schools include its (1) inquisitional format; (2) use of appellate cases; and (3) objective to teach students to 'think like lawyers.'"); Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 597–98 (2007) (hypothesizing on why the Langdellian case method has persisted for so long).

17. *See, e.g.*, Keene & McMahon, *supra* note 13, at 74 ("Students who are shown these opinions as the prime example of legal reasoning, with few counterpoints that introduce outside perspectives or acknowledge alternative realities, are instead subtly encouraged to replicate the status quo."); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 591 (1982) ("Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world.").

at face value and are thus discouraged from challenging the validity of the court's statements. But the motivations for a court's decision are not always stated in the court's opinion, and statements presented with an air of inevitability may reflect a persuasive spin.[18]

Law schools need to reconsider how they are teaching if they want to meet the needs of today's law students and help them work toward a more equitable legal system and society. Many students come to law school eager to work for social change and to improve the law, but traditional teaching methods can frustrate these efforts.[19] In relying nearly exclusively on legal opinions in appellate cases, law teaching too often fails to show students the subjective aspects of legal decision-making, often unaddressed in judicial writing, which can help students cultivate their critical thinking skills, expand their legal imaginations, and challenge the status quo. Many law schools tout a commitment to diversity and inclusion and social justice initiatives;[20] the American Bar Association (ABA) even requires

18. *See, e.g.*, Keene & McMahon, *supra* note 13, at 78–79 (highlighting the discrepancies between majority opinions and their bases on the one hand, and their levels of certainty on the other); GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES 1946–1963, at 14 (1965) ("[I]t seems evident that the whole point of the opinion-writing ritual is to provide acceptable rationales which will protect the justices from personal criticism—and even from personal responsibility—for their decisions."); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 56 (1960) (arguing that "only by happenstance will an opinion accurately report the process of deciding" and "that such report is not really a function of the opinion at all").

19. ASS'N OF AM. L. SCHS., BEFORE THE JD: UNDERGRADUATE VIEW ON LAW SCHOOL 43 (2018) ("Undergraduates considering law school report that their top reasons for going are that it is a pathway to a career in politics, government, or public service (44%) . . . . Other important reasons given are opportunities to be helpful to others (35%) and to advocate for social change (32%)."). *See generally* L. Danielle Tully, *The Cultural (Re)Turn: The Case for Teaching Culturally Responsive Lawyering*, 16 STAN. J. C.R. & C.L. 201, 206–07 (2020) (arguing that cultural competency is a critical aspect of ethical lawyering, but it has not historically been part of law school curricula).

20. Just search online for "law school diversity commitments," and you will find a long list of schools with webpages describing law schools' commitments. *See, e.g.*, Heather Gerken, *Diversity and Inclusion, A Message from the Dean*, YALE L. SCH., https://law.yale.edu/student-life/diversity-inclusion [https://perma.cc/P36Y-E4KK] (touting Yale Law School's progress on diversity "in the wake of the diversity report issued in 2016," that the law school "implemented 30 of the 60 recommendations before the report was even released," and that

instruction in cultural competency.[21] Yet, class discussions that take their inspiration primarily from judicial writing can be demoralizing, rather than empowering for law students.[22] In relying on legal opinions to teach, many law professors gloss over racial and other biases in legal decision-making, which can operate beneath the surface, making them complicit in perpetuating their influence.[23] Moreover, in failing to acknowledge the perspectives that courts have left out, law teaching denies their existence and leaves law students blind to these viewpoints. Or worse, it subjects students to sitting in a classroom and hearing about courts' cold analyses of legal issues as if they have no connection to their lived experiences.[24]

"[s]ince the release of that report, our faculty admitted the six most diverse classes in its history"); *Diversity, Equity, and Inclusion*, COLUM. L. SCH., https://www.law.columbia.edu/community-life/diversity-equity-and-inclusion [https://perma.cc/DE3V-6EPP] (listing Columbia Law School's various diversity- and equity-related programs and initiatives, including the school's Anti-Racism Coordinating Committee); *Our Commitment to Diversity*, UNIV. OF WASH. L. SCH., https://www.law.uw.edu/about/diversity [https://perma.cc/LJP5-3YR7] (describing the University of Washington School of Law's Dean's Advisory Committee on Diversity, Equity, and Inclusion and linking the school's Strategic Plan for Diversity, Equity, Inclusion, Multiculturalism, and Antiracism).

21. *See, e.g.*, *ABA Standards and Rules of Procedure for Approval of Law Schools 2022–2023*, A.B.A. ch. 3, Standard 303(c) (2022), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/22-23-standard-ch3.pdf [https://perma.cc/72V6-ECGV] ("A law school shall provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation."); *id.* at Standard 302, Interpretation 302-1 (listing "cultural competency" among the "skills needed for competent and ethical participation as a member of the legal profession").

22. Teri A. McMurtry-Chubb, *The Practical Implications of Unexamined Assumptions: Disrupting Flawed Legal Arguments to Advance the Cause of Justice*, 58 WASHBURN L.J. 531, 575 (2019) ("Law professors, lawyers, and law students can point to cases in the core law curriculum, the class discussions of which obscured the existence of difference and made them feel marginalized, insignificant, and unsafe.").

23. *See* Capers, *supra* note 10, at 37 (discussing how law school dialogue encourages students to adopt a "way of thinking" that "discounts social context, or race, or class"); Crenshaw, *supra* note 10, at 2 (describing "perspectivelessness," the dominant view that legal analysis is objective when it is taught without addressing conflicts of individual values, experiences, and worldviews).

24. In her article, *(Un)*Wicked *Analytical Frameworks and the Cry for Identity*, Leslie Culver quotes Canadian indigenous scholar Patricia Monture-Angus, who speaks to her experience in law school: "The study of law for me is the

As law professors, if we are going to use appellate opinions to teach, we need to find better ways to do so. This Article considers the role that dissenting opinions can play in preparing students to be critical readers of judicial texts who look beyond the court's language to find meaning and who consider court opinions in a broader social and cultural context. Some dissents are already assigned for study by law students, typically to challenge the majority's legal reasoning, and often with emphasis placed on their limited importance given their lack of precedential value. But dissents can do more than challenge the court's offered justifications for a legal decision. They can expose the human aspects of judicial decision-making, revealing the points where unacknowledged choices were made in the majority's legal analysis, and offering alternative experiences and perspectives.[25]

This Article challenges law professors to consider how they are currently using dissents in their teaching and offers examples of how dissents can be better used to reveal subjective aspects of legal analysis and judicial decision-making, including reliance on biases and assumptions. But challenging the basis for court decisions is too important to leave to chance that a dissenting opinion has been written. While offering the example of using dissents to deconstruct majority opinions, this Article also encourages the use of any writings, including adversarial briefs, that can talk back to court opinions and help law students see beyond their shiny veneers.

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study of that which is outside of myself and my community . . . my survival of the law school depends on my intimate knowledge of who and what White people are. The same does not hold true in reverse. White people have the opportunity to fully discard my reality." 21 NEV. L.J. 655, 668 (2021) (quoting PATRICIA MONTURE-ANGUS, THUNDER IN MY SOUL: A MOHAWK WOMAN SPEAKS 64 (1995)); Crenshaw, *supra* note 10, at 3 ("To assume the air of perspectivelessness . . . expected in the classroom, minority students must participate in the discussion as though they were not African-American or Latino, but colorless legal analysts."); Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 20 (1998) (arguing that legal writing pedagogy contributes to the "muting of outsider voices").

25. *See, e.g.*, Gan, *supra* note 14, at 1039 ("[Justice Ginsburg's] profound dissents offer an alternative world view to that of the majority. They challenge the core of the majority's opinion and thoroughly explain why it is deeply wrong, why its basis is erroneous, why its reasoning is flawed, and why its conclusion is mistaken. In other words, Justice Ginsburg's profound dissents not only reach different conclusions than the majority, but indeed create an alternative reasoning, and are based on an alternative perception of society and the law.").

This Article proceeds in three Parts. In Part I, this Article examines why judicial opinions can be persuasive to novice legal readers, like law students, and illustrates the importance of critically analyzing and questioning the underlying biases and assumptions they embed. It encourages students not only to consider what the court chooses to discuss, but also to recognize what it leaves out. Part II of this Article argues that law professors can use one simple, practical tool to disrupt students' habit of reading opinions without a critical lens and force students to notice the complexities of judicial decision-making: dissents. Throughout these two Parts, this Article uses *Utah v. Strieff* as a potent example. In Part III, this Article provides practical suggestions about how law professors can incorporate dissents—and similar tools—to improve their pedagogy and better prepare students to advocate for positive changes in the law. Finally, this Article concludes with a call to action: if we want to see progress in the law, it starts with the way we teach.

I. THE LACK OF TRANSPARENCY IN COURT OPINIONS AND WHAT READERS CAN MISS

Law students spend considerable time reading appellate opinions to understand law. But what more can students learn if they look beyond the text of court opinions? To teach law students to be effective advocates and culturally competent lawyers, we must teach students to approach judicial writing with a sharper eye. Law students should be trained not to rely on the author's statements alone, even when the author is a judge, to understand the legal issues in a case or why the court reached a decision.[26] To be effective advocates, law students must learn to see problems in the law and the human dimensions of legal decision-making—even when the court does not acknowledge them. When they can recognize the rhetoric in court opinions, students can see how law is malleable, where other choices could be made in legal analysis, and that their advocacy can make a difference. But there are challenges to confronting the court's

26. *See generally* Mark A. Hannah & Susie Salmon, *Against the Grain: The Secret Role of Dissents in Integrating Rhetoric Across the Curriculum*, 20 NEV. L.J. 935, 936–37 (2020) (describing the use of dissents as a pedagogical tool to reveal rhetoric in the law).

language.[27] This Part considers why court opinions can be so convincing to legal readers, particularly legal novices like law students, and what can be missed when the reader is unable to see beyond the words written on the page.

A. JUDGES' UNWARRANTED TONE OF CERTAINTY

A persistent myth exists that law is objective and neutral, and generally correct.[28] But experience working in law quickly teaches that seemingly neutral laws hide subjective choices, and that legal decision-makers can tap into their existing biases and assumptions, sometimes without even knowing.[29] Indeed, most legal professionals believe in legal realism, the idea that matters other than rules tend to impact judicial decisions.[30] Yet, while most would say that they reject the idea of formalism—the idea of legal decision-making being dominated by logical and object-

27. Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of the Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 163 (1993) (arguing that to advocate effectively "lawyers cannot take legal documents at their word," but "students are all too often simply seduced by the text").

28. Kenneth Chestek, *Dimensions of Being and the Limits of Logic: The Myth of Empirical Reasoning*, 19 LEGAL COMM. & RHETORIC: JALWD 23, 46–47 (2022) (discussing the myth of empirical reasoning that seeks "to reduce all legal decisionmaking to binary, true/false tests, in an attempt to infuse the law with 'certainty' and 'objectivity'"); Kathleen E. Mahoney, *The Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice*, 32 WILLAMETTE L. REV. 785, 788–91 (1996) (identifying the lawmaking function of judges in common law systems). Of course, the American Legal Realism movement challenged the idea that legal results are derived from logic alone and detached from broader social contexts, and many scholars, including several cited in this Part, have challenged the myth of neutrality. *See, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897) (challenging the dangerous notion that law can be "worked out like mathematics from some general axioms of conduct").

29. *See generally* Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 270 (2009) (suggesting that internalized societal norms can cloud court judgments in custody cases).

30. Holmes, *supra* note 28, at 466 ("Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, . . . and yet the very root and nerve of the whole proceeding.").

tive reasoning—many legal structures and practices still support this ideal.[31]

The way many judicial opinions are written reflects formalist idealism.[32] Legal scholarship often discusses the unique approaches that judges, particularly those on the Supreme Court, take in opinion writing.[33] But while several scholars have written about judicial writing style and voice,[34] Professor Lisa Eichhorn's work on judicial writing is particularly instructive. This scholarship focuses on tone, a subset of style, defined as the "speaker's attitude toward a listener."[35] Drawing on the discussion of tone in literary works, this description encompasses the idea of the writer's persona or the writer's view of their relationship to the reader.[36] Tone can be "formal or intimate, outspoken

31. Chestek, *supra* note 28, at 25 (citing Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 199 (2009)) (noting that the legal academy today "almost universally accepts the realist view of the law," viewing the law as "instrumental, practical, contextual, constructed, and adaptive"); Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 636 (2007) ("[M]ost scholars now regard the law as a product of culture, constructed by a particular society and drawing its value from the role it plays in that society.").

32. Chestek, *supra* note 28, at 25 (noting that public perception of the legal system still considers formalism as the ideal). This public perception, however, does not extend to the legal academy, which holds a more realist view. *Id.* (citing Schlag, *supra* note 31, at 207) ("[R]ealism has remained, along with the residues of formalism, an enduring tacit understanding of law throughout the twentieth century.").

33. *See, e.g.*, Gan, *supra* note 14; Donald L. Beschle, *Catechism or Imagination: Is Justice Scalia's Judicial Style Typically Catholic*, 37 VILL. L. REV. 1329 (1992); Laura Krugman Ray, *Linking Law and Life: Justice Sotomayor's Judicial Voice*, 64 BUFF. L. REV. DOCKET 1 (2016); Nina Varsava, *Elements of Judicial Style: A Quantitative Guide to Neil Gorsuch's Opinion Writing*, 93 N.Y.U. L. REV. ONLINE 75 (2018).

34. *See* Eichhorn, *supra* note 6, at 4–5 (describing "voice" as reflecting the author's persona, focusing on the speaker independent of their attitude toward listeners, and "style" as the author's overall manner of expression, independent of content); *see also* Andrea McArdle, *Understanding Voice: Writing in a Judicial Context*, 20 LEGAL WRITING: J. LEGAL WRITING INST. 189, 189 (2015) (linking "authorial" voice to the opinion author's particular "rhetorical choices and expressive style"); Richard A. Posner, *Judges' Writing Styles (and Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1425 (1995) (identifying "voice" as the signature style of an author).

35. Eichhorn, *supra* note 6, at 3 (citing I.A. RICHARDS, PRACTICAL CRITICISM 175 (1929)).

36. *Id.*

or reticent, . . . condescending or obsequious," or numerous other "possible nuances of relationship and attitude."[37]

In her study of majority opinions, Professor Eichhorn found that there were just two tones typically ascribed to judicial writers—"authoritative" or "exploratory."[38] Authoritative tone is described as writing that speaks down to the reader with "decided confidence."[39] Scholars have also described this tone as one of "affected certainty"[40] or carrying a "rhetoric of inevitability."[41] And this tone has been deemed as "declarative," as one of "[h]yperbole, certitude, assertion, simplification, and abstraction."[42] Tone is expressed most directly through word choice but can also be expressed through other means such as "sentence structure, organization of ideas, and inclusion or omission of certain information."[43] The organization of legal opinions, often written with the familiar IRAC structure,[44] can add to the feeling that the court's legal analysis is logical and correct.[45]

Some scholars have criticized the courts' frequent use of authoritative tone in opinion writing, complaining that it "masks the decisional difficulty in hard cases."[46] Indeed, authoritative tone is described in contrast to an "exploratory tone" which "draws the reader into a participatory community with the

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37. *Id.* at 3 (quoting M.H. ABRAMS, A GLOSSARY OF LITERARY TERMS 136 (5th ed. 1988)).

38. *Id.* at 8 (quoting WILLIAM D. POPKIN, EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES 147 (2007)).

39. *Id.*

40. *Id.* at 7 (quoting Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. REV. 915, 924 (1961)).

41. *Id.* at 8 (quoting Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMANS. 201, 213 (1990)).

42. *Id.*

43. *Id.* at 3–4.

44. *See* Tracy Turner, *Flexible IRAC: A Best Practices Guide,* 20 LEGAL WRITING: J. LEGAL WRITING INST. 233, 233 (2015) (noting that "IRAC stands for **I**ssue, **R**ule (i.e., discussion of the relevant law on the issue), **A**pplication (i.e., application of the law to the case at hand), and **C**onclusion," and that this "paradigm is based on an adaptation of deductive syllogism to legal reasoning"). The IRAC paradigm and variations on the paradigm are considered by many as the proper organization of a legal analysis. *See generally* Tracy Turner, *Finding Consensus in Legal Writing Discourse Regarding Organizational Structure: A Review and Analysis of the Use of IRAC and Its Progenies*, 9 LEGAL COMM. & RHETORIC: JALWD 351 (2012).

45. Holmes, *supra* note 28, at 466 ("[T]he logical method and form flatter that longing for certainty and for repose which is in every human mind.").

46. Eichhorn, *supra* note 6, at 8 (citing POPKIN, *supra* note 38, at 173).

judge, wondering aloud about how to deal with the complexities of the case."[47] Noting the need to both create judicial authority and be transparent in legal writing, Judge Richard Posner believed that judges should express doubt or acknowledge that there may be more than one way to resolve a legal issue.[48] Yet, some scholars argue that authoritative tone is most appropriate for majority opinions given the courts' need "to preserve judicial legitimacy."[49] To do so, one scholar asserts, the court must "reach[] down from above in a way that can be accepted from below."[50]

While court opinions are written to appear as if the results of a legal dispute are certain, conflict might merely be hidden from the reader's view. In writing appellate opinions—which are "negotiated documents"—judges often seek to hide their disagreement.[51] In drafting documents built on consensus, judges look for points of agreement, often avoiding the more contentious aspects of a legal dispute.[52] As such, the task of writing an appellate opinion is one that clearly requires judges to make choices, including what to include and what to leave out, and

47. *Id.* at 8.

48. *Id.* at 8 n.43 (citing POPKIN, *supra* note 38, at 167–75).

49. *Id.* at 8. According to Justice Ginsburg, the use of authoritative language aligns with the civil law tradition of European courts and those controlled by the continental power of issuing a "collective judgment, cast in stylized, impersonal language." Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 2 (2010). In these opinions, the author was neither named nor identified and any disagreement was not revealed.

50. Eichhorn, *supra* note 6, at 8 (quoting Ferguson, *supra* note 41).

51. Arthur Selwyn Miller, *The Myth of Objectivity in Legal Research and Writing*, 18 CATH. U. L. REV. 290, 294 (1968) (describing legal opinions as "negotiated documents"); *see also* Holmes, *supra* note 28, at 467 (noting that the result of the "often proclaimed judicial aversion" to weighing considerations of social advantage is "simply to leave the very ground and foundation of judgments inarticulate"); Cass R. Sunstein, *Unanimity and Disagreement at the Supreme Court*, 100 CORNELL L. REV. 769, 780 (2015) (characterizing this behavior as the "norm of consensus" and describing it as a suggestion that disagreements should not be expressed unless the "intensity of their disagreement and the magnitude of the stakes" justifies it).

52. Miller, *supra* note 51, at 293 ("[F]or appellate judges the written products (opinions) tend often to be a resultant of a process of bargaining."); *see also id.* (citing WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY ch. 3 (1964)) (noting that judges want to maximize agreement and will change opinions to gain votes). *See generally* Pamela C. Corley, *Bargaining and Accommodation on the United States Supreme Court*, 90 JUDICATURE 157 (2007) (providing examples of the bargaining and accommodation process as memorialized in Justice Blackmun's papers).

how to approach the case facts and legal analysis. In this way, a court opinion reflects only what the judges have chosen to present and is not merely a statement of the court's inevitable reasons for deciding the case.[53]

Where a court's decision feels certain and correct, a reader may just be reacting to the court's effective use of advocacy.[54] Like all lawyers, judges are trained to write persuasively. Law students learn early on how to write facts to subtly persuade, using narrative "consciously and rhetorically."[55] Themes are constructed, offering a framework meant to resonate with the reader. Word choices are carefully considered. Facts are emphasized or deemphasized. Indeed, a judge's description of the facts "may be only a lawyer's argumentative arranged selection, omission, emphasis, distortion, all flavored to make the result tolerable or toothsome."[56] The lawyer's craft involves subtle persuasion in legal analysis as well; lawyers are trained to present their argument persuasively, articulating the rule and framing case precedent in a manner that best supports the client's story. Prior cases are then presented in the most favorable light to support analogies or distinctions, depending on what best suits the writer's argument. The lawyer's "analytical task is to articulate and structure the rule in a way more favorable to the client's narrative."[57]

One could question whether it is impractical to expect judges—who, like all lawyers, are trained advocates—to write with objectivity once on the bench.[58] Indeed, one could argue that appellate judges' manner of approaching a case is not much different than that of practicing attorneys. As representatives of clients, attorneys often take a desired result as a "given" and

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53. Jerome Frank, *What Courts Do in Fact*, 26 ILL. L. REV. 645, 653 (1932) ("Opinions . . . disclose but little of how judges come to their conclusions. . . . [T]hey are *censored expositions*.") (emphasis in original); Miller, *supra* note 51 (asserting that a reader would be "ill-advised" to look to an opinion alone to understand "what motivated the judge").

54. *See* LLEWELLYN, *supra* note 18 (stating that, if a justification is needed for public consumption, any certainty an opinion may provide could be "contrived delusion").

55. Berger, *supra* note 29, at 268.

56. LLEWELLYN, *supra* note 18.

57. Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7, 34 (1996).

58. *See* Miller, *supra* note 51, at 293 (arguing that, after years of client-focused practice, judges often would not attain "invincible disinterestedness").

then "reason backwards" to find support in the law.[59] Here, the result guides the analysis, rather than the analysis driving the result. Likewise, appellate judges often start with an agreed result and then write the legal analysis to support it.[60] In doing so, the court will necessarily make strategic writing choices in favor of the chosen result—framing the issues and relevant legal rules strategically, presenting facts with a subtle spin, or interpreting a prior case broadly or narrowly.[61]

Yet, a judge's tone of certainty, the presentation of what is preferred as being correct, can obscure a legal opinion's subjective aspects and persuasive nature.

B. CHOICES HIDDEN BY THE COURT'S AUTHORITATIVE TONE

While it is important to recognize subtle persuasion in judicial writing hidden by its tone of "affected certainty,"[62] it is even more important to appreciate the often-unacknowledged subjective choices underlying a court's decision. Legal opinions project an air of certainty and neutrality, but complex decision-making often requires judges to exercise discretion, filling in gaps in logic with their own understanding.[63] As Justice Oliver Wendell Holmes, Jr. observed long ago: "Behind the logical form lies a judgment as to the relative worth and importance of competing

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59. *Id.*

60. *See id.* (claiming that, by starting with the decision and then evaluating law and facts to support it, the process of judicial reasoning moves "from conclusion to premise rather than from a logical deduction from major premises to conclusion."). *But see* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1419 (1995) (noting the legal realists' philosophy that "judges reasoned backward from result to rationale, selecting rules and facts to fit into a preordained pattern," but arguing this is imprecise because "judges of other persuasions" factor in other considerations and "brake the momentum").

61. *See* LLEWELLYN, *supra* note 18 (stating that various factors or pseudo-factors might be omitted or emphasized, and weights may be skewed to support a particular decision); Wald, *supra* note 60 (noting that within some restraints judges use rhetoric to maneuver—the way judges "present the facts, the way they describe rules and standards of review, the way they 'handle' precedent . . . all provide wide avenues in which to drive the law forward").

62. *See supra* note 40 and accompanying text.

63. *See* Chestek, *supra* note 28, at 29–30 (discussing Justice Oliver Wendell Holmes and Justice Benjamin Cardozo's observations about the more arbitrary aspects of decision-making and the need to resort to preferences); *id.* at 50 (discussing Judge Richard Posner's view that judge's "decision-making freedom" is an inevitable consequence of "legalism's inability in many cases to decide the outcome (or decide it tolerably . . .)").

legislative grounds, often an inarticulate and unconscious judgment" at the "very root and nerve."[64]

Value judgments are deeply embedded in the process, even built right into the frame.[65] Legal rules themselves represent choices between values, the prioritizing of one interest over another.[66] Yet, value judgments affect more than how the law frames the issues in a case. More discrete choices such as how to interpret facts and what meaning to assign to them in legal analysis also require value judgments. As Professor Arthur Miller aptly stated, "At the very best, legal reasoning depends on choices to be made from basic value premises, choices that quite often (perhaps usually) can only be personal and essentially arbitrary."[67]

Narratives bring values into the legal decision-making process. According to Professor Linda Edwards, narrative reasoning "evaluates a litigant's story against cultural narratives and the moral values and themes these narratives encode."[68] Cultural narratives "define the moral value and meaning of actions and

64. Holmes, *supra* note 28, at 466 (explaining that an implied choice in the law, which may appear to be a logical conclusion, might be made "because of some belief as to the practice of the community or of a class, or because of some opinion as to policy," or "because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions").

65. Edwards, *supra* note 57, at 13 ("If a law-creator sees a legal dispute from a particular narrative perspective, that narrative will play its role in law creation, whether or not the story is historically accurate; . . . best able to make sense of the facts; and . . . is shared by those to whom the newly-made law will apply.").

66. Hopkins, *supra* note 4, at 4 (noting that the comparison of competing theories "inevitably results in a weighing of values"); *id.* at 9 (noting that "the values" established in prioritizing one fact over another is "the result of a choice consciously or unconsciously made by the judge").

67. Miller, *supra* note 51, at 293; *see* Holmes, *supra* note 28, at 466 (explaining that an implied choice in the law, which may appear to be a logical conclusion, might be made because of "some belief as to the practice of the community or of a class, or because of some opinion as to policy," or "because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions"); Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 723 (1979) (explaining that "[a] good result, or a bad one, may be based more on judicial intuition, on a judge's sense of what fits in with his standards and ideals, than on thorough analysis").

68. Edwards, *supra* note 57, at 11; *see also* Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983) (describing law and narrative as "inseparably related").

events by setting them in the context of a narrative structure."[69] While logical reasoning is more often recognized in legal decision-making, judges must employ other forms of reasoning to address matters that cannot be resolved by legal rules alone.[70] In trying to understand how judges and juries decide cases, scholars have acknowledged the particular importance of narrative reasoning—the cognitive process of weighing competing narratives to interpret new information.[71]

As part of human cognition, narrative reasoning necessarily plays a role in legal decision-making.[72] Narrative is ubiquitous in law, even laying the groundwork for legal rules and facilitating analogical reasoning.[73] Lawyers consciously bring narrative into legal cases to persuade, and judges tell the story of the case in legal opinions. But narrative also plays a role beneath the surface.[74] When it comes to narrative, one could say "there is a surface ('manifest') story and an underlying ('latent') story."[75] As Professor Linda Berger explained, "The rhetorical narrative does

69. Edwards, *supra* note 57, at 11.

70. *Id.* at 9–10 (identifying and illustrating five forms of reasoning that judges use: rule-based, analogical, policy-based, consensual normative, and narrative).

71. Chestek, *supra* note 28, at 26, 47; *see* Olwyn Conway, *Are There Stories Prosecutors Shouldn't Tell?: The Duty to Avoid Racialized Trial Narratives*, 98 DENV. L. REV. 457, 469–70 (2021) ("Human beings use narrative to understand and seek meaning in the world. . . . [J]urors use story construction to understand and interpret the information they receive.").

72. *See* Berger, *supra* note 29, at 263 ("Because of the way the mind works and the culture is constructed, metaphor and narrative are essential, and unavoidable, for persuasion and understanding.").

73. *See* Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 285 (2013) ("As a matter of both cognitive psychology and advocacy within the adversarial system, stories are unavoidable."); Conway, *supra* note 71, at 470 ("Stock stories from the listener's own life experience and worldview create the backdrop against which they contextualize new information."). *See generally* Christy H. DeSanctis, *Narrative Reasoning and Analogy: The Untold Story*, 9 LEGAL COMM. & RHETORIC: JAWLD 149 (2012) (describing the relationship between narrative reasoning and analogical reasoning).

74. Berger, *supra* note 29, at 268; Steven L. Winter, *The Cognitive Dimension of the* Agon *Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2256 (1989) ("[T]he doctrinal surface of the judge's opinion merely conceals the subjective purposes, values, beliefs, and biases of the particular judge . . . .").

75. Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 701 (1994).

more than put logical propositions and legal arguments into narrative form; it allows the storyteller to set the scene, establish a time frame, and tap into the listener's understanding."[76]

As people process new events, they are naturally placed in a familiar narrative context. Cognitive psychologists have shown that when people acquire new information it is placed "into slots in an existing framework"[77] or embedded knowledge structures, formed from earlier experiences. Embedded knowledge structures can include schema, scripts, and stock stories—entrenched narratives etched into one's thinking.[78] These structures act as cognitive shortcuts, allowing people to avoid "having to interpret and construct a diagram of inferences and relationships for the first time."[79] Through this narrative reasoning process, judges bring their pre-existing ideas and perspectives into decision-making. "Lawyers and judges argue and decide within a context that is limited, but also illuminated, by experiences and preconceptions derived from the culture's models and myths."[80] Indeed, it can be an effective persuasive technique to leave some matters unsaid, inviting an audience to actively participate in constructing meaning.[81]

Yet, value judgments in legal decision-making can go unacknowledged in legal opinions that seek to project objectivity.[82] Preferences for one way of looking at the world are often

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76. Berger, *supra* note 29, at 268.

77. *Id.* at 265.

78. *See* Sherwin, *supra* note 75, at 700 (describing "schema[s] or script[s]" as "simplified models of experiences we have had before" that work as "a kind of shorthand that transcribes our stored knowledge of the world, describing kinds of situations, problems, and personalities"); Jennifer Sheppard, *What if the Big Bad Wolf in All Those Fairy Tales Was Just Misunderstood?: Techniques for Maintaining Narrative Rationality While Altering Stock Stories That Are Harmful to Your Client's Case*, 34 HASTINGS COMMC'NS & ENT. L.J. 187, 199 (2012) ("The audience's sense of what happens in the world is based on stock stories and the course of events that are inherently associated with them.").

79. Berger, *supra* note 29, at 265.

80. *Id.* at 269; Susan H. Williams, *Legal Education, Feminist Epistemology, and the Socratic Method*, 45 STAN. L. REV. 1571, 1574 (1993) ("Facts are made, through a process of selection and interpretation, rather than found.").

81. Sherwin, *supra* note 75, at 709 (stating that effective lawyering requires "sound narrative analysis" and that a lawyer may choose a role for the audience inviting "active participation in the construction of meaning from interior sources," which includes their implicit world knowledge and basic beliefs).

82. *See* Hopkins, *supra* note 4, at 3 ("In contrast to the fact choice, there have been no guidelines articulated for the aid of the judge in making a law

presented in opinions without mention of an alternative worldview, making it appear as the only logical choice.[83] The fact that the court has even reached a turning point where a choice needs to be made may not even be acknowledged. And when the fact that there is a choice to be made is discussed, the basis for choosing one option over another is often inadequately explained, or not explained at all.

It is hard to know whether a judge's failure to acknowledge turning points in a decision and selections made between competing values, is a deliberate choice.[84] As judges try to present decisions as simple and straightforward, it seems fair to assume that ignoring subjective choices in legal analysis might be a persuasive strategy. But it is quite possible that some choices simply occur without the judges' notice, or at the very least, without judges appreciating that there was a real choice to be made.[85] As decision-makers evaluate new events in the context of what they already know, they are prone to accept the interpretation of new events that most aligns with their pre-existing understandings of how the world works.[86] This cognitive process can operate as a "hidden hand," influencing "how we conceptualize all aspects of our experience."[87] "[B]oth information and understanding float beneath the surface, neither consciously acquired nor

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choice. Perhaps this lack has arisen from the avoidance by the courts in admitting that there is a process leading to a choice in applying the law. In the past judges were prone to say that they declared the law, not made it.").

83. *See* Crenshaw, *supra* note 10, at 3 (discussing that, especially in law schools, "what is understood as objective or neutral is often the embodiment of a white middle-class world view").

84. Hopkins, *supra* note 4, at 4 ("Though the process of comparison may be deliberate, it may be unconscious as well. The end product doubtless is formed of decisions not wholly rationalized, but reached out of an almost instinctive, inarticulate reaction to the facts of the case.").

85. *See* Leflar, *supra* note 67, at 722–24. Leflar notes that the so-called "real" reasons that judges reach their conclusions are often obfuscated, though the propriety of that obfuscation is not seriously interrogated. *Id.*

86. *See* Berger, *supra* note 29, at 267 (quoting JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 11 (1986)) ("[A]rguments convince one of their truth, stories of their lifelikeness.").

87. *Id.* at 263 (quoting GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT 128 (1999)); *see* Griffin, *supra* note 73, at 287 ("Paradigms exercise a 'grip on the human imagination' and therefore guide and influence the reception of evidence as well. They recur so frequently in stories that familiar elements can enact them implicitly.") (internal citations omitted).

examined."[88] The choices a judge makes can seem natural and right; familiarity can be mistaken for objective truth.[89] Thus, even if a judge earnestly seeks to walk the reader through the court's decision-making process and to offer transparency on each matter of consideration, such a goal at best would be challenging to attain.

The failure to acknowledge choices in legal decision-making can have concerning implications. While choices made in legal reasoning may seem "arbitrary," there is a connection between one's preferences and life experiences. While judges do not represent the entire demographic, their perspectives are more often represented in the law.[90] Interpretations of facts that seem like the only commonsense choice to judges might simply reflect their life experiences; perspectives can be shaped by one's characteristics that can impact how a person encounters the world and how they are treated as they navigate it.[91] Where diversity is lacking, varied experiences of people belonging to marginalized groups that challenge commonly held beliefs can easily be ignored or disregarded for being outside of the norm.[92] And while

88. Berger, *supra* note 29, at 263.

89. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 LEGAL WRITING: J. LEGAL WRITING INST. 53, 67 (2008) ("The narrative is plausible, and persuasive, to the extent that it bears a structural correspondence to one of these stock scripts or stories, not to the extent that it 'really happened.'") (internal quotations omitted); Griffin, *supra* note 73, at 297–98 ("'Good lawyers,' one such manual states, tie the circumstances of the case to 'plotlines already deeply embedded in listener's minds, to mythic narratives whose familiar moves reveal how the world is and how people, faced with fateful choices, act for good or for ill.'") (internal citations omitted); Steven J. Johansen, *Was Colonel Sanders a Terrorist?: An Essay on the Ethical Limits of Applied Legal Storytelling*, 7 J. ASS'N LEGAL WRITING DIRS. 63, 64 (2010) (questioning legal storytellers' ability to refrain from "cross[ing] the line from effective and appropriate persuasion to inappropriate manipulation").

90. Edwards, *supra* note 57, at 13 ("[S]ome would claim that the American people share a narrative, while others would claim that the narrative commonly attributed to the American people is simply the narrative of its most powerful subculture.").

91. Williams, *supra* note 80 ("One's position in a social framework will have profound effects on what one knows and the path by which one comes to know it, and no social position can claim access to some undistorted truth. Knowledge is socially created, not individually discovered, and it is created through a process that involves emotion as well as reason.").

92. James D. Hopkins, *Public Policy and the Formation of the Rule of Law*, 37 BROOK. L. REV. 323, 332 (1971) (noting that "intuition, which has hardened into certainty, is the manner in which the court's sense of 'general and well-settled public opinion' is gathered").

these lived realities and perspectives go undiscussed, popular assumptions about how the world works and stereotypes and stock stories about people who belong to certain groups can fill in the void.[93]

One would hope that the adversarial process would help to even the playing field. Each side has an opportunity to speak before the court on matters in a case, offering different perspectives. Yet, the law determines what is relevant in a case and may bar consideration of some narratives.[94] And to the extent that alternative realities are shared in legal briefs, their relevance may go unacknowledged by legal decision-makers who write legal opinions to convince the reader that the court has reached the objectively correct conclusion—rather than acknowledging the competing interests at play in legal decision-making.

Given the reality of how things work, legal opinions should be evaluated and reframed—placed in context for better understanding. The goal of reading legal opinions to study law can be recast from an exercise of understanding what the law is and how it came to be, to a discovery of law's current limitations as well as its endless potential. Toward this end, this Article seeks to decenter the intrinsic study of court opinions as the core component of legal study and to advocate for law teaching that offers more tools for their deconstruction and meaningful inspection, and perhaps even their rebuilding.

C. AN EXAMPLE OF AUTHORITATIVE JUDICIAL WRITING: JUDGE THOMAS'S MAJORITY OPINION IN *UTAH V. STRIEFF*

To illustrate the problems of law teaching that focuses primarily on studying the text of majority opinions, the Supreme Court's opinion in *Utah v. Strieff* provides a helpful example.[95] Justice Thomas's majority opinion in *Strieff* uses an authoritative tone and familiar organizational structure, which hides the

93. In evaluating the facts of a case, a decision-maker can easily resort to slotting the individuals in the narrative into existing categories of people that are assumed to possess certain traits. In this way, judges can tap into popular stereotypes and stock stories about people who belong to certain groups. *See* Keene, *supra* note 8, at 766–67 (discussing how implicit racial bias can fill in logical gaps in legal reasoning); Sherwin, *supra* note 75, at 701–02 (noting how an audience may be called upon to fill in missing information and actively supply this information "out of their own world view"); Conway, *supra* note 71, at 470 ("[S]tock stories are among the most persuasive of narrative forms.").

94. *See* Keene, *supra* note 8, at 752.

95. 579 U.S. 232 (2016).

subjective choices—including those that invite biases and assumptions—underlying the Court's decision.[96] *Strieff* also includes a powerful dissenting opinion by Justice Sotomayor. This Article discusses Justice Sotomayor's dissenting opinion in Part II to illustrate how dissents can speak back to majority opinions, allowing readers to see beyond a majority opinion's shiny veneer to get a better sense of what contributed to a court's decision.

Strieff is best known for Justice Sotomayor's dissent, and it seems likely this case would be introduced in a law school class with great attention being given to that case's dissenting opinions.[97] Here, however, this case will first be described as if there were no dissents, to illustrate the limitations of looking to the Court's opinion alone to understand the reasons for a decision. Moreover, to illustrate how a law student might read a legal opinion, the discussion of *Strieff* will be drawn from Justice Thomas's own words memorialized in the text of the Court's opinion.[98]

To begin this exploration of *Strieff,* it is important to offer some facts about the case.[99] According to the Court's opinion, Strieff was stopped unlawfully by Officer Fackrell, who asked for his identification, ran a warrant check, and then learned he had an outstanding warrant for a traffic violation.[100] Officer Fackrell

96. Eichhorn, *supra* note 6, at 11 (quoting POPKIN, *supra* note 38, at 175–76) (noting the argument that Supreme Court judges "might feel especially burdened by their responsibility and anxious to project an air of authority that could be undermined by the familiarity of a personal/exploratory style").

97. *See Strieff*, 579 U.S. at 243–54 (Sotomayor, J., dissenting). In *Strieff*, Justice Kagan also authored a dissent that shed light on the majority opinion, but Justice Kagan's dissent is beyond the scope of this Essay. Both dissents were joined in part by Justice Ginsburg.

98. To respect the relationship between language and meaning, the author has made an honest attempt not to alter the Court's language in any significant way or overly characterize what the Court has said. Yet, the author understands that language has meaning and recognizes that she may fail to some extent in this task.

99. It is worth noting the statement of facts on which the Supreme Court relies is itself the product of an adjudicatory process. The author does not challenge the validity of these facts in her analysis, but nonetheless acknowledges that subjectivity can impact what courts determine are the facts of a case and the inferences to be drawn from them. *See* Griffin, *supra* note 73, at 287 (describing narrative as "preconceptual," and thus able "to influence not just how facts are perceived but what facts *are*"). *See generally* Thornburg, *supra* note 9 (demonstrating the variability in how judges draw inferences and arguing there is a need for more deliberative thought).

100. *Strieff*, 579 U.S. at 235.

approached Strieff after he saw him leave a house that Officer Fackrell was investigating based on an anonymous tip that indicated that its occupants might be selling drugs.[101] Officer Fackrell observed several visitors make short visits to the house and leave prior to stopping Strieff.[102] Officer Fackrell had no idea how long Strieff was at the house and lacked reasonable suspicion to stop him. Nonetheless, Officer Fackrell indicated that he stopped Strieff as part of his investigation of the house. After discovering Strieff's outstanding warrant, Officer Fackrell arrested Strieff and searched him.[103] Officer Fackrell discovered drugs and drug paraphernalia on Strieff's person, and Strieff was then charged with possession.[104] Strieff sought to suppress the evidence found during the search as it followed an unlawful stop.[105]

The majority opinion in *Strieff* starts with the question before the Court, which Justice Thomas discusses in the context of relevant legal rules. Given the importance of Justice Thomas's language in this opening paragraph to later discussions about this case, the majority's opening paragraph is provided in full:

> To enforce the Fourth Amendment's prohibition against "unreasonable searches and seizures," this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.[106]

A subjective choice is demonstrated in the author's decision to frame the legal question to make the exception to the rule, the attenuation doctrine, the central concern of this case—not whether the police officer's unlawful act supported exclusion, but

101. *Id.*
102. *Id.*
103. *Id.* at 235–36.
104. *Id.* at 236.
105. *Id.*
106. *Id.* at 234–35.

whether a limitation on the general rule should be imposed. At the very start of this opinion, the majority presents the exclusionary rule as a burdensome requirement that must be restricted. The Court's opinion describes the exclusionary rule as "at times required" and focuses on "the significant costs of this rule," rather than its benefits and purpose.[107] The antagonist in this story was not the unlawful act of the police or the need to deter his police misconduct. Instead, the burdensome exclusionary rule was cast as the villain in the first act. Here, the Court's writing primes the reader to see the legal issue in a particular way and directs the reader toward a particular outcome. While this use of subtle persuasion may be perceptible to a reader who knows the law, a reader who is less familiar may not recognize that there were other ways to consider the issue in the case and options for presenting this question.

The remainder of the Court's opinion, as one would expect, is devoted to explaining the Court's decision to find the evidence seized from Strieff following Officer Fackrell's unlawful police stop to be admissible.[108] The Court presents its legal analysis in *Strieff* in a traditional IRAC structure. After stating the issue and facts, Justice Thomas discusses the law, laying out the exclusionary rule and its exceptions, including the attenuation doctrine, and citing and discussing case precedent. After considering the threshold question of whether the attenuation doctrine could apply under the circumstances, and concluding that it could, the Court, in methodical fashion, explains its consideration of each factor of the attenuation doctrine: (1) "temporal proximity" between the stop and the police officer's discovery of drugs and drug paraphernalia on Strieff; (2) the presence of an "intervening circumstance" between the stop and the police officer's discovery of drugs and drug paraphernalia on Strieff; and (3) "the purpose and flagrancy of the official misconduct."[109] The Court finds that the "temporal proximity" factor weighs in favor of suppression but that the "intervening circumstance" and "purpose and flagrancy of official misconduct" factors favor admissibility.[110] The Court holds that, based on the application of these factors, the evidence "discovered" on Strieff is admissible because "the unlawful stop was sufficiently attenuated by the pre-

107. *Id.* at 237 (discussing whether the deterrence benefits of the exclusionary rule outweighed "its substantial social costs").

108. *Id.* at 238–43.

109. *Id.* at 238–39.

110. *Id.* at 239–42.

existing arrest warrant."[111] After stating these conclusions, the Court's opinion briefly addresses and rejects Strieff's counterarguments that the police stop was purposeful and flagrant.[112] Finding the stop to be an "isolated instance of negligence," the majority further dismissed Strieff's broader concerns that a decision not to suppress would encourage aggressive policing.[113]

A legal novice reading this case to understand the relevant rule of law could easily find their answer in this Supreme Court opinion. Indeed, this case is written in a straightforward way, focusing on the case before it, and should be an easy decision to brief. Justice Thomas presents his opinion in a manner that is consistent with many legal opinions. The Court's opinion in *Strieff* tells the reader what the Court held and offers reasons to support its decision. Indeed, this case is presented as a simple application of clear facts to established law; the circumstances here appear to fit squarely within existing precedent.

Yet, the Court's tone of affected certainty and use of a familiar organizational structure associated with logical reasoning masks the complexities of this case. One could argue that IRAC's general acceptance, and familiar approach to organization rooted in deductive reasoning, can hide judicial writing's subtle persuasion.[114] In this way, judicial writing's logical organization can offer a false sense of security, suggesting that a legal analysis is built solely on logic, even though this familiar structure fails to accommodate the nuances of legal process and decision-making.[115]

A reader, especially a legal novice, may be convinced by the Court's confident tone and comforted by the Court's methodical approach to discussing its legal analysis. But a more experienced

111. *Id.* at 242.

112. *Id.* at 243.

113. *Id.*

114. Culver, *supra* note 24, at 670–71 (quoting Charles Calleros, *IRAC: Tentative and Flexible and Therefore Reliable*, 10 SECOND DRAFT 4 (1995)) ("[A]s a tentative and general approach to organization based on deductive reasoning, IRAC provides an analytical framework that is illuminating or persuasive in most legal analyses or arguments."); *id.* at 676 ("That the law must be used to resolve a legal issue in view of a specific set of facts is both intuitive and non-threatening.").

115. *Id.* at 676 ("IRAC cannot deliver an intellectual process of learning when it comes to making various decisions. Such decisions include issue framing, and from whose perspective; the rule(s) of law, including justifications, defenses; or when to yield to stare decisis, or push the law to change.").

audience reading this legal opinion as a piece of persuasive writing, should be able to see more. While the Court's use of an IRAC structure tends to suggest that the decision is a simple application of law to facts, a critical reader might notice the writer's strategic choices. For example, in engaging in a case comparison, the Court described *Segura v. United States*,[116] a prior case, as having "similar facts" to the case before it.[117] However, even from just a reading of the majority opinion, one can see that the circumstances of that case were quite different. Indeed, as an advocate, one might hesitate before describing them as alike, given their significant dissimilarities.

Segura involved a search warrant that police had requested but not received before they engaged in an unlawful search of the location for which the search warrant was being sought.[118] The Court decided not to suppress the evidence discovered in that case in a later search of the same location that occurred after the issuance of the search warrant.[119] Justice Thomas wrote that the independent source doctrine was applied in that case because the police officer's prior unlawful search "did not contribute in any way to the discovery of evidence seized under the warrant."[120]

Justice Thomas does not assert that the situation in *Strieff* survives the application of that reasoning, as indeed it could not. Officer Fackrell's unlawful stop clearly contributed to the discovery of evidence on Strieff's person as it started the chain of events that led to his arrest. To sidestep this inconvenient reasoning from a prior case, Justice Thomas construed the Court's holding more broadly, saying that *Segura* "suggested" that "the existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is 'sufficiently attenuated.'"[121] Rather than addressing whether Officer Fackrell's conduct contributed, Justice Thomas's opinion states that the *warrant*, which was valid and predated the stop, was "entirely unconnected" to the stop.[122]

While written in IRAC form, on closer inspection, a legal reader might notice that here the Court has given the *Segura*

116. 468 U.S. 796 (1984).
117. *Strieff*, 579 U.S. at 240.
118. *Segura*, 468 U.S. at 800–01.
119. *Id.* at 814.
120. *Strieff*, 579 U.S. at 240 (quoting *Segura*, 468 U.S. at 815).
121. *Id.*
122. *Id.*

case a strained reading to support the circumstances of Strieff's case and suspect that the author affixed the "similar" label to draw attention away from their factual differences.[123] Even though there were gaps between the facts of *Segura* and those in the present case, this judicial writer chose to present the result as a natural consequence of the application of an objective and clearly-defined standard, rather than an expansion of the existing law produced through a series of subjective choices.[124]

To support the Court's conclusion in *Strieff*, Justice Thomas makes a number of persuasive moves: offering a strategic framing of the issue and legal rule, presenting the facts of the case with a subtle narrative spin, drawing convenient inferences (while ignoring inconvenient ones), and generously reading case precedent to encompass the present (albeit largely different) scenario—all resulting in a seemingly perfect fit between the (subtly manipulated) law and case facts. From the surface of this opinion, a reader who appreciates the rhetorical nature of opinion writing may be able to recognize the author's persuasive framing of law and facts to support the Court's decision. But, because legal decision-makers often choose not to acknowledge when they make these types of choices, these subjective choices can go unnoticed—particularly by legal novices.

While experienced legal readers may be able to recognize some of the Court's strategic writing choices, biases and assumptions underlying the case can be much harder to see. The tone is set here, not only by choice of language and framing of the issues and law, but through the omission of certain information. Indeed, the Court says little about what the competing interests are in this case or its implications; it denies a problem that it never truly explores. At points, the majority opinion does indicate that the exclusionary rule was meant to deter police misconduct, yet it does not expand upon this statement and fails to offer meaningful context. To be fair, the opinion also never explains "the substantial social costs" of the exclusionary rule. Instead, the Court chooses to flatten the discussion, hiding the conflict, and making the case appear more like a calling of "balls

123. *See* Hopkins, *supra* note 4, at 5 ("When the judge cites a precedent in a case not bearing a direct parallel to the precedent, he is engaging in a feat of imaginative logic.").

124. *See id.* (describing the act of drawing a parallel with an indirect case as "a slippery process, [that], of course, depends for its force of persuasion on the skill with which the author leads the reader to the brink of the parallel and conveys him over the gap").

and strikes" than a case that taps into deep conflicts of interests and whose outcome will have significant consequences.[125]

To be clear, the decision in *Strieff* created a shift in the law, permitting more police discretion and reducing citizens' rights in police stops, but the conflict between these interests is never expressed in the Court's opinion. The opinion lacks any discussion of what this decision will mean for citizens, or police for that matter. If a reader wants to understand the tensions in this case and the implications of this decision—who this case impacts and how—the reader will need to look elsewhere. Perhaps, it is time to look to the dissent.

II. THE ROLE OF THE DISSENT

Dissents can shine light on court precedent, but are often thought of as just presenting the losing argument.[126] Before we turn to dissents, it may be helpful first to raise their profile. Indeed, the necessity of dissenting opinions has long been questioned. Maybe dissenting opinions need an origin story.

A. DISSENTING OPINIONS' DISRUPTIVE PRESENCE

As a starting point, it should be considered that the practice of writing dissents is not a given. In fact, it developed over time. In writing about dissents, Justice Ruth Bader Ginsburg described an earlier practice of the Supreme Court in which each Supreme Court Justice issued their own seriatim opinion and initially spoke only for himself.[127] Under Chief Justice Marshall, who served as Chief Justice from 1801 to 1835, the Supreme Court later moved to a new practice of announcing judgments in

125. At his confirmation hearing, Chief Justice John Roberts famously referred to his job as to "call balls and strikes." *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005).

126. *See* William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986) (quoting H. HART, THE CONCEPT OF LAW 138 (1961)) (asserting that a "statement that the court was 'wrong' has no consequences within the [legal] system: no one's rights or duties are thereby altered"). *But see* Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781 (2000) (describing dissents that have emerged as highly authoritative legal texts).

127. Yep, "himself." Remember, having women on the courts is new. Back then, there were only white men on the Court. Ginsburg, *supra* note 49.

a single opinion for the Court.[128] Interestingly, it seems that Justice Marshall took it upon himself to write many of the Court's opinions at the start of his term.[129] Justice Ginsburg, a fierce dissenter, explained that "[o]pinions that speak for the Court remain the custom in the U.S. today," but "each member of the Court has the prerogative to write separately."[130]

While writing dissenting opinions is each judge's prerogative, some judges have expressed mixed feelings about their use.[131] This makes sense, given the courts' efforts to make opinions sound like they are presenting the natural results of a dispute.[132] By their very existence, dissenting opinions challenge the certainty of opinions and bring to light the ambiguities of the decision-making process. Some scholars, and judges, have raised concerns that dissents, particularly if overused, can call into question the legitimacy of the courts.[133]

Justice Ginsburg wrote that "[n]o doubt . . . the U.S. Supreme Court may attract greater deference, and provide clearer guidance, when it speaks with one voice."[134] But she added that

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128. In his first case, Justice Marshall "broke with the English tradition and adopted the practice of announcing judgments of the Court in a single opinion." Edward McGlynn Gaffney, Jr., *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U. L. REV. 583, 592 (1994); *see also* Brennan, *supra* note 126, at 433 (noting that Chief Justice Marshall's practice was met with the criticism that it "had shut down the marketplace of ideas").

129. Gaffney, *supra* note 128 ("[I]n the first few years of the Marshall Court, the Chief Justice delivered all opinions of the Court, which were virtually always unanimous. There were no dissents, and only one one-sentence concurring opinion. . . . Unanimity was consciously pursued and disagreements were deliberately kept private.") (internal citations and quotations omitted).

130. Ginsburg, *supra* note 49, at 3. Justice Ginsburg described this practice as a middle ground between British courts where each judge produced their own seriatim opinion, and European Courts where judges produced one collective opinion and did not voice disagreement. *Id.* at 2. *See generally* Gan, *supra* note 14, at 1095 (referring to Justice Ginsburg as a "fierce dissenter" and discussing the impact of her dissents).

131. *See, e.g.*, Brennan, *supra* note 126, at 429 (discussing Judge Learned Hand's, Justice Potter Stewart's, and Justice Holmes's negative comments about dissents, including Justice Holmes's description of dissents as "useless" and "undesirable").

132. Holmes, *supra* note 28 (noting that dissents are often "blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come").

133. *See, e.g.*, Brennan, *supra* note 126, at 432 (noting that "critics of dissent advocate the primacy of the unit over its members and argue that the Court is most 'legitimate' . . . when it speaks with a single voice").

134. Ginsburg, *supra* note 49, at 3.

although she appreciated the value of unanimous opinions, she would nonetheless "continue to speak in dissent when important matters are at stake."[135] Justice Ginsburg found that dissents can "augment rather than diminish the prestige of the Court."[136] In reaching this conclusion, Justice Ginsburg praised the utility of dissenting opinions and noted their role in challenging the writer of the majority opinion: "My experience teaches that there is nothing better than an impressive dissent to lead the author of the majority to refine and clarify her initial circulation."[137] Justice Ginsburg also described the public impact of dissenting opinions, citing Chief Justice Charles Hughes: "A dissent in a Court of last resort is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[138]

While articulating the important role of dissents, Justice Ginsburg still expressed some reservations about dissents and warned of their potential for overuse. Justice Ginsburg emphasized the importance of saving dissents for important moments and knowing when to acquiesce. Justice Ginsburg quoted comments made about Justice Louis Brandeis, who often wrote dissents but did not publish them: "[Justice Brandeis] realized that . . . random dissents . . . . weaken the institutional impact of the Court and handicap it in the doing of its fundamental job. Dissents . . . need to be saved for major matters if the Court is not to appear indecisive and quarrelsome . . . ."[139]

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135. *Id.* at 7. Justice Ginsburg noted the "extra weight carried" by the Court's unanimous decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). *Id.* at 3. "In that case, all nine Justices signed one opinion making it clear that the Constitution does not tolerate legally enforced segregation in our Nation's schools." *Id.*

136. *Id.* at 5 (quoting Antonin Scalia, *Dissents*, OAH MAG. HISTORY, Fall 1998, at 18, 19).

137. *Id.* at 3. Justice Scalia likewise commented that "the first draft of a dissent often causes the majority to refine its opinion, eliminating the more vulnerable assertions and narrowing the announced legal rule." Scalia, *supra* note 136, at 22.

138. Ginsburg, *supra* note 49, at 4 (citing Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 144 (1990) (quoting CHARLES HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1936))); *see also* Brennan, *supra* note 126 (stating the dissent is "offered as a corrective—in the hope that the court will mend the error of its ways in a later case").

139. Ginsburg, *supra* note 49, at 7 (quoting John P. Frank, Book Review, 10 J. LEGAL EDUC. 401, 404 (1958) (reviewing ALEXANDER BICKEL, THE UNPUBLISHED OPINIONS OF JUSTICE BRANDEIS (1957))).

While dissents challenge the correctness of majority opinions, one could view this as their strength. "Dissents contribute to the integrity of the process, not only by directing attention to perceived difficulties within the majority's opinion," but "also by contributing to the marketplace of competing ideas."[140] And while dissents are not binding and lack precedential value, they play an important institutional role, offering more transparency than court opinions that stand alone.[141] "[U]naminity which is merely formal, which is recorded at the expense of strong, conflicting views, is not desirable . . . ."[142] What must ultimately sustain public confidence in the courts "is the character and independence of the judges."[143]

Like all legal opinions, dissents are persuasive as they are written by judges to support their position and embed rhetorical, analytical, and writing choices. But the dissenting opinion never stands by itself; it is read in juxtaposition to the majority opinion. Viewed in this posture, dissents can shed light on the court's opinion.

B. WHAT DISSENTS REVEAL

Dissents can help pierce through a majority opinion's veneer of certainty, revealing the strategic choices behind the court's legal analysis. After noting the use of persuasion within judicial opinion writing, Professor Karl Llewellyn observed that dissenting opinions brought this persuasion to light: "That something of this does occur is demonstrated by that occasional dissenting opinion" which "pounds home facts or authorities the majority has found it convenient to ignore."[144] A dissenting opinion may offer a different framing of the legal question, interpretation of the rule, or reading of case precedent than the majority. A dissent may emphasize different facts or tell a different story. It can offer a different view of the law.

Unbridled from the need to project unwavering authority, dissents reveal complexities in the law and acknowledge conflicts and disagreements. Dissents can reveal the fundamental, competing interests at stake in a case that too often go unspoken.

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140. Brennan, *supra* note 126, at 435.

141. *Id.* at 434.

142. *Id.* (citing CHARLES HUGHES, THE SUPREME COURT OF THE UNITED STATES 67–68 (1928)).

143. *Id.* (citing HUGHES, *supra* note 142).

144. LLEWELLYN, *supra* note 18.

They can reveal the turning points in legal analysis where subjective choices were made, showing what other choices could have been.[145] Dissents can address in real terms how court decisions might impact various stakeholders, including everyday people who are subject to the laws the court creates and shapes.

Even more, dissents can challenge biases and assumptions underlying the majority opinion that can easily be overlooked. They can reveal where the court has made logical leaps, assuming a fact that has not been established or drawing one inference when another was available without explaining the choice—or even acknowledging the existence of other valid options.[146] Dissents can show where dominant narratives align with stereotypes and stock stories; they can share stories of marginalized people that are too often missed when judges quickly settle on other more familiar narratives.[147]

In the dissent, judges can challenge common understandings of how the world works, introducing new voices into the discussion—perhaps even their own. Dissents offer an opportunity for judges to write with fewer restraints, at times writing alone—a "voice crying out in the wilderness."[148] In contrast to the majority, dissenting opinions are expected to be more individualized and personal in style, adding to their accessibility and removing barriers to connecting with the reader.[149] Writing at times without the concerns of setting precedent or seeking broad consensus, the dissenter has more opportunities to tell the story of the case and expand the conversation beyond it.[150] Dissents can bring to light alternative realities and show how the court's failure to consider unfamiliar perspectives impacted the court's decision.

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145. Hannah & Salmon, *supra* note 26, at 962 (discussing using dissents to encourage students "to read cases at an even deeper level to identify the undercurrents and thematic threads that allow lawyers to make creative, persuasive, and even world-changing legal arguments . . . .").

146. Thornburg, *supra* note 9, at 1608–20.

147. Keene, *supra* note 8.

148. Brennan, *supra* note 126, at 431 (describing Justice Harlan's remarkable dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), where he stood alone in rejecting the Court's view that separate but equal facilities were not unconstitutional, and discussing other powerful, solo dissents).

149. *Id.* (discussing dissents that "soar with passion and ring with rhetoric," and "at their best, straddle the worlds of literature and law").

150. RICHARD POSNER, REFLECTIONS ON JUDGING 267 (2013) (discussing that, unlike authoring a dissent, authoring a majority opinion may require a judge to compromise or soften the opinion's rhetoric to persuade others).

In revealing the spaces where courts have made choices where other choices could have been made, dissents not only expose the rhetoric of the majority opinion, they uncover opportunities to advocate for change.

C. AN EXAMPLE OF DISRUPTIVE LEGAL WRITING: JUSTICE SOTOMAYOR'S DISSENTING OPINION IN *UTAH V. STRIEFF*

From the very start, Justice Sotomayor's dissent in *Utah v. Strieff* strikes a different tone than that in the majority opinion. In plain, direct language, Justice Sotomayor lays out the implications of *Strieff* as if in conversation with the reader.

While the Court's opinion focuses narrowly on the dispute before it, Justice Sotomayor's opinion opens up the discussion, focusing on the broader impact of the precedent set by the majority's opinion, which redefines the boundaries of citizen and police encounters going forward. Justice Sotomayor's dissent in *Strieff* starts with a statement that describes the Court's holding in real-life terms considering what the Court's decision allows police to do and how this will impact citizens.[151] The following is the entirety of Justice Sotomayor's opening paragraph:

> The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the opinion's technical language. This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants–even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent.[152]

Justice Sotomayor's framing of the legal issue in this paragraph calls the reader's attention to the *majority's* persuasive choices as to how to frame the legal question, which may have gone unnoticed if the majority opinion was read alone. In contrast to Justice Thomas's majority opinion, Justice Sotomayor's dissent describes the central concerns in the case as the extent of police power and the preservation of individual dignity; she prioritizes considerations of how the Court's expansion of this power in *Strieff* will impact everyday people. Rather than the

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151. In *Strieff*, Justice Sotomayor issued a dissenting opinion, parts of which were joined by Justice Ginsburg. Justice Kagan issued a dissent as well. While both dissents challenged the Court's opinion in revealing ways, this discussion will focus on Justice Sotomayor's dissent.

152. Utah v. Strieff, 579 U.S. 232, 243–44 (2016) (Sotomayor, J., dissenting).

exclusionary rule itself, government abuse of power is the clear antagonist here.

Justice Sotomayor's subtle persuasion in this paragraph also calls the reader's attention to other choices in the Court's opinion that may have otherwise gone undetected. Justice Sotomayor approaches the case differently than the majority, emphasizing facts the majority said little about. Sotomayor emphasizes in this opening paragraph that the case involved a "traffic warrant" and an "illegal" stop for doing "nothing wrong."[153] These facts, not in dispute, are rarely mentioned in the Court's opinion, and thus when reading that opinion, they were not at the forefront of the reader's mind. For example, while Sotomayor emphasizes that the warrant in this case was a "traffic warrant" at the start of her dissent, the majority only mentions this fact once, in the middle of its recitation of the case facts—a choice that allowed the word "warrant" to be received with all its negative connotations.[154] Justice Sotomayor's emphasis of the fact that the warrant was for a traffic violation, coupled with her framing and manner of speaking directly to the reader using the word "you," makes this case one of concern to every citizen.[155] In contrast, Justice Thomas's framing suggests that its holding is only of concern to Strieff, a "suspect" with a "valid arrest warrant."[156]

Likewise, Justice Sotomayor's framing of the relevant rules in the case reveals the strategic choices that the majority made in framing the rule in its opinion. Justice Sotomayor's rule statement focuses on a police officer's "breach" of the Fourth Amendment's protection of people from "unreasonable searches and seizures."[157] Justice Sotomayor's efforts to bring the issue back to the police officer's violation of Fourth Amendment rights exposes the majority's subtle efforts to shift attention away from it.[158] In her discussion of the law, Justice Sotomayor describes the function of the "exclusionary rule," noting that it "removes an incentive for officers to search us without proper justification."[159] By contrast, Justice Thomas in the majority opinion acknowledges

153. *Id.*

154. *See id.* at 235 (majority opinion).

155. *Id.* at 243 (Sotomayor, J., dissenting) (noting the decision affects "*your* Fourth Amendment rights") (emphasis added).

156. *Id.* at 235 (majority opinion).

157. *See id.* at 244 (Sotomayor, J., dissenting).

158. *Id.*

159. *Id.* at 245.

but then says little more about the intended purpose of the exclusionary rule, focusing instead on the need to limit its use.[160]

The dissenting opinion also reveals the subjective choices made in the Court's use of *Segura* to support its decision that are obscured by the familiar logical organizational structure of its analysis. Justice Sotomayor specifically addresses the Court's strained reading of *Segura*, noting the majority's labeling of that case as "similar."[161] In the majority opinion, Justice Thomas broadly construes the Court's holding in that case, saying that *Segura* "suggested that the existence of a valid warrant favors finding the connection between unlawful conduct and the discovery of evidence is 'sufficiently attenuated . . . .'"[162] In her dissent, Justice Sotomayor rewrites Justice Thomas's strained interpretation of *Segura*, stating it in plain language: "a valid warrant will clean up whatever illegal conduct uncovered it."[163] Justice Sotomayor then addresses the Court's reading of the case head on, explaining the factual differences in the cases in simple prose: "In *Segura*, the agents' illegal conduct in entering the apartment had nothing to do with their procurement of a search warrant. Here, the officer's illegal conduct in stopping Strieff was essential to his discovery of an arrest warrant."[164] Justice Sotomayor confirms what a reader of the majority opinion, perhaps a new law student, may have been reluctant to voice: the cases are not actually similar at all, and the Court's choice to use the word "similar" seems inaccurate.

But Justice Sotomayor's dissenting opinion does even more; it reveals biases and assumptions in the majority opinion that even a seasoned advocate might have missed. In Justice Thomas's application of the law to the facts, he makes several factual assertions with little or no supporting evidence. These assertions are not addressed in Part I, as they are presented as objective truths and could easily be accepted by the reader. There is no hint that they represent just one way of viewing the facts or that there are other viable options. But Justice Sotomayor draws attention to them, challenging the majority's factual statements and pointing out evidence to the contrary.

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160. *See id.* at 237–38 (majority opinion).

161. *Id.* at 248 (Sotomayor, J., dissenting).

162. *Id.* at 240 (majority opinion) (citing Segura v. United States, 468 U.S. 796, 815 (1984)).

163. *Id.* at 248 (Sotomayor, J., dissenting).

164. *Id.*

In challenging a counterargument by the defendant that Officer Fackrell's action was "flagrant," the Court's analysis states that the police officer was "at most negligent" and describes the unlawful stop as a "good-faith mistake."[165] Justice Sotomayor addresses these assertions from the Court's opinion, pointing out the facts and narratives that these statements ignore. Justice Sotomayor also focuses the reader on the established fact that the police officer acted unlawfully—"[i]n his search for lawbreaking, the officer . . . himself broke the law."[166] Contrary to the majority, Justice Sotomayor's opinion does not draw attention away from the fact that there is no question in the case whether Officer Fackrell's actions violated a citizen's rights—in prior cases, a finding often sufficient alone to warrant the suppression of evidence.

Justice Sotomayor's dissent also unmasks other deeper assumptions that are concealed by the majority's confident language. The majority found that "evidence suggests" that the police officer's unlawful stop of Strieff was "isolated."[167] The majority opinion further states that there was "no indication" that Strieff's unlawful stop "was part of any systemic or recurrent police misconduct."[168] Here, the majority opinion chose not to acknowledge widespread concerns that have been raised about police misconduct.[169] While the majority assumed the police officer's good faith, the majority simultaneously required concerns about police overreach to be proven. To counter the majority's assertion, Justice Sotomayor offers troubling statistics about the prevalence of outstanding warrants and police practices that encourage police to run warrant checks on pedestrians they detain without justification.[170] These statistics included some specific to Salt Lake County and Utah, the location of Strieff's stop. In raising these statistics, Justice Sotomayor considers lived experiences that the Court's opinion ignored. Moreover, in explaining the prevalence of warrants, Justice Sotomayor challenged biases and assumptions about the type of people who might possess a warrant that buoyed the majority's legal analysis.

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165. *Id.* at 241 (majority opinion).
166. *Id.* at 244 (Sotomayor, J., dissenting).
167. *Id.* at 242 (majority opinion).
168. *Id.*
169. *Id.*
170. *Id.* at 249–52 (Sotomayor, J., dissenting).

Justice Thomas also describes the police officer's decision to run the warrant check of Strieff as a "'negligibly burdensome precautio[n]' for officer safety."[171] Such a precaution might seem reasonable after reading the majority opinion, which frames Strieff in a poor light, while emphasizing the police officer's good intentions. The majority opinion reminds its audience that Strieff was stopped leaving a "drug house," as Justice Thomas described it, and that he was subject to a "valid warrant"—a fact unknown to Officer Fackrell at the time he unlawfully seized Strieff. In her dissent, Justice Sotomayor reminded the Court—and the reader—that at the time of the stop, the officer lacked reasonable suspicion.[172] Thus, like any other citizen, he should not be assumed to pose a threat and be subject to a warrant check. As Justice Sotomayor points out, "[s]urely we would not allow officers to warrant-check random joggers, dog walkers, and lemonade vendors just to ensure they pose no threat to anyone else."[173]

And finally, in a part of the dissent that Justice Sotomayor says that she is "[w]riting only for [her]self, and drawing on [her] professional experiences," Justice Sotomayor describes at length the severe consequences of unlawful "stops," that are "much greater than the inconvenience suggested by the name."[174] She describes the indignity of a stop that "is not limited to an officer telling you that you look like a criminal," but rather allows an officer to frisk you for weapons if "the officer thinks you might be dangerous"—an action that goes beyond a pat down.[175] "As onlookers pass by" the officer is allowed to "feel with sensitive fingers every portion of [your] body."[176] But Justice Sotomayor went further, explaining that the officer's control "does not end with the stop" and that while many innocent people are subjected to the humiliations of unconstitutional searches, people of color are disproportionately affected.[177] Here, Justice Sotomayor offers a narrative that was hidden beneath the majority's language and logical structure, of aggressive policing, degradation of citizens, and racism and oppression:

171. *Id.* at 241 (majority opinion) (citations omitted).
172. *Id.* at 248, 254 (Sotomayor, J., dissenting).
173. *Id.* at 249.
174. *Id.* at 252.
175. *Id.* at 252–53.
176. *Id.* at 253 (quoting Terry v. Ohio, 392 U.S. 1, 17 n.13 (1968)).
177. *Id.* at 253–54.

> For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.[178]

In her dissent, Justice Sotomayor challenges not only the Court's stated reasoning, but also the Court's weighing of competing interests that she acknowledges explicitly. She reveals that the existing law encompassed those concerns, which were diminished by the majority's framing. Justice Sotomayor confronts biases about whose wrongdoing matters and who the Fourth Amendment was meant to protect. She disrupts dominant narratives and challenges the Court's assumptions about how the world works, discussing at length the lived experiences of marginalized citizens that were not discussed in the majority's opinion, in a case that could impact them most.

In reading Justice Sotomayor's dissenting opinion, a reader gains a new perspective of the majority opinion and better understands the law it establishes.

III. A NEW ROLE FOR DISSENTS IN LEGAL EDUCATION

As Justice Sotomayor's dissent demonstrates, court opinions can hide a great deal beneath their authoritative tone. To help students better understand the law, law professors should invite law students to examine judicial opinions as pieces of legal writing and acknowledge the human aspects of legal decision-making. As legal novices, law students can miss what legal opinions conceal if we do not invite students to consider these documents in context. Without a proper introduction, court opinions will speak for themselves. Their authoritative tone will tell students that legal decisions are not to be questioned; they will suggest that there is one correct answer to a legal problem. They will signal to students that there is a normative worldview, and this is the only perspective that matters in the law.[179]

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178. *Id.* at 254. After sharing this narrative, Justice Sotomayor references W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (1903); JAMES BALDWIN, THE FIRE NEXT TIME (1963); and TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015).

179. Crenshaw, *supra* note 10, at 3 (discussing how the expectation of "perspectivelessness," combined "with the fact that what is understood as objective or neutral is often the embodiment of a white middle-class world view," places minority law students in a difficult situation).

As our discussion of *Strieff* demonstrates, one answer can be found in deconstructing court opinions to reveal their hidden elements—a cadre of selections that the dissenting opinion lays bare for closer inspection and reconsideration. Court opinions offer a shiny veneer that can be difficult for law students to see beyond.[180] But dissents have immense pedagogical value, raising a reader's awareness of the majority's strategic—and perhaps even unconscious—choices simply by demonstrating another approach.[181] Dissents can be used to disrupt court opinions, problematizing the majority's legal analysis and revealing the complex choices that underly legal decision-making. Where a reader might hesitate to question the majority's presentation of facts or legal analysis, a dissent might speak back to the court's opinion validating the reader's concerns. In exposing the ambiguity in legal decision-making and logical gaps that judges must fill, we can help students find spaces to fight for positive change.

Ideally, in a law school classroom, time will be taken not only to teach the legal rules that can be derived from cases and the stated reasons for court decisions, but also to recognize the persuasion in legal opinions and to acknowledge what courts have left out. As students read an assigned case, law professors might ask students to consider what the competing interests are in case and how the court has addressed these interests in its opinion. Are these interests acknowledged explicitly? Are they thoroughly explained? Can you tell how the court's choice to prioritize one interest over another impacted the court's decision? Law students might be asked to consider the parties before the court and how the court is presenting each. How does the court refer to or describe each party? Are all parties' perspectives acknowledged? What perspectives does the law favor? They may be asked to consider the narrative written in the opinion as well as those operating underneath its surface. Whose story does the opinion tell? Whose story does the opinion leave out? What stereotypes and stock stories does the law embed? What biases does the court's storytelling invoke? What role does a party's race or other status seem to play in the court's legal analysis?

Here, dissents can be of immense value to law students—future lawyers—as they offer much needed context for the law. Dissenting opinions can help law students answer these questions about court precedent, sharpening their ability to look at

180. *See* Fajans & Falk, *supra* note 27.

181. LLEWELLYN, *supra* note 18 (describing how dissenting opinions bring "context and clarity" to the majority's "justifications").

cases critically. Dissents can show that court opinions can be challenged and open a window through which students can see behind the court's uninviting language. Offering a different approach and perspective, dissents can be repurposed as tools to help students see beyond what is written in court opinions.

Dissents can also help make law school classrooms more inclusive spaces, acknowledging diverse perspectives and unpacking embedded biases and assumptions in court opinions. In following the courts' lead, classrooms have too often failed to acknowledge perspectives that are germane to legal issues, but not often explored in legal analysis. In this way students are subtly taught that these perspectives do not matter.[182] In discussing dissenting opinions, law schools can find more opportunities to recognize outsider perspectives ignored in the law.[183] They can bring diverse perspectives into the classroom that are too often left out of majority decisions, showing law students why these viewpoints matter in legal analysis. Students who might otherwise feel marginalized in the law school classroom might come to see their knowledge and lived experiences as a strength that they bring to the legal field.

But even where dissents are absent, other writing can help law students hone their reading of legal opinions and bring in outside perspectives. Advocates' briefs in *Strieff* offered alternative realities ignored in the Court's opinion and revealed perspectives that opinion failed to address.[184] Reading the briefs has

182. Capers, *supra* note 10, at 39 (discussing how the Socratic method devalues race). *See generally* LANI GUINIER, MICHELLE FINE & JANE BALIN, BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE (1997) (urging law schools to reform their educational culture to be more accepting of women and other historical outsiders); 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) (describing how the author felt pressure to erase her cultural identity in educational settings).

183. *See* McMurtry-Chubb, *supra* note 22 (offering a shared experience of class discussions of cases that "obscured the existence of difference" and made law students "feel marginalized, insignificant, and unsafe").

184. *See, e.g.*, Brief for Respondent at 1, Utah v. Strieff, 579 U.S. 232 (2016) (No. 14-1373), 2016 WL 1254378. An example of a perspective that the majority chose not to acknowledge can be found at the beginning of Strieff's brief:

> The police in some jurisdictions run routine warrant checks on the people they encounter, regardless of whether the police have particularized suspicion that the person being stopped is involved in criminal activity, and regardless of whether they have any reason to believe that the person being stopped has any outstanding warrants. The question

the added benefit of showing a connection between the work of lawyers and the court's legal opinion in a case.[185] And, as Justice Sotomayor's opinion illustrates, other writings can disrupt limited thinking, introducing new perspectives as well.[186] When there is no dissent, law professors can still encourage students to look beyond the court's opinion to other writings—such as adversarial briefs, law review articles, studies, reports, literature—that can talk back to court opinions.[187]

If we point out these tools and engage students in the practice of taking a closer look at court opinions and a deeper dive into legal issues, law students will gain valuable skills that they can use not only to know the law, but to know how to advocate to change the law for the better. Dissents can help readers "to discern 'what interpretative frameworks are at work'" in court opinions, "so that we can develop competing or complementary rhetorical moves."[188] Indeed, in reading dissents, law students can get a better sense of how they might expand the framing of the issues in a case, present the facts and law more favorably, or challenge a case comparison. Even more, in exposing the ambiguity in legal decision-making and logical gaps that judges must fill, dissents might help students find new opportunities to challenge biases or assumptions that could otherwise go unacknowledged—for example, by questioning a court's factual assertions

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presented in this case cannot be understood without an appreciation of this context.

185. One discrete example is Strieff's "Question Presented" which, like Justice Sotomayor's dissenting opinion, emphasized that Strieff's "warrant" was related to a traffic violation. *Id.* at i ("Whether the evidence seized from respondent incident to his arrest on a minor traffic warrant discovered during a patently unconstitutional detention is inadmissible . . . ."). Moreover, Strieff's brief offered statistics on the prevalence of arrest warrants. *Id.* at 1–4; *see also* Hopkins, *supra* note 4, at 1 ("In general terms, a judicial decision is a choice made between competing arguments. The arguments represent the reasoning advanced by litigants for a result favorable to them.").

186. *See* Utah v. Strieff, 579 U.S. 232, 247, 250–51, 254 (2016) (Sotomayor, J., dissenting) (citing non-legal authority including canonical literature by African-American authors, including W.E.B. DuBois, James Baldwin, and Ta-Nehisi Coates, in addition to reports, manuals, law review articles, and other academic works); Hannah & Salmon, *supra* note 26, at 944–45 (noting how dissents draw on "extra-legal discursive resources as vehicles for pointing out incongruences or perceived variances between existing law and evolving societal norms and law's inability to respond to them").

187. *See, e.g.*, Tully, *supra* note 19, at 241; Fajans & Falk, *supra* note 27, at 195 ("Seeing a case in context is perhaps one of the best heuristics for introducing close-reading.").

188. Berger, *supra* note 29, at 307–08.

or challenging inferences the court draws.[189] Students can learn how to find room to bring in their client's narrative, even when it is not invited, offering a new perspective on how the world works into legal discourse. In this way, students can find space to bring outsider perspectives into legal decision-making whose relevance the court's tone of certainty works to hide.

In offering these suggestions, this Author is merely seeking to add to the conversation. The discussion of these ideas is not meant to suggest that many law professors are not already doing the work of teaching students to look critically at the law. This approach has a long tradition.[190] Many law professors, using various analytical frameworks, are offering students tools to help pierce the veneer of legal opinions so that law students can deconstruct their meaning and place them in a broader context.[191]

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189. Notably, in *Commonwealth v. Warren*, 58 N.E.3d 333 (Mass. 2016), the Massachusetts Supreme Court reconsidered the inference that flight is strongly suggestive of a citizen's guilt. There, the court found that a "flight is not necessarily probative of a suspect's state of mind or consciousness of guilt. Rather, the finding that black males in Boston are disproportionately and repeatedly targeted for [police] encounters suggests a reason for flight totally unrelated to consciousness of guilt." *Id.* at 342. While a modest step, this language demonstrates how considerations of diverse experiences and perspectives can impact legal analysis. *See also, e.g.*, Miles v. United States, 181 A.3d 633, 641 (D.C. 2018) (noting that "[t]here are myriad reasons an innocent person might run away from the police," and acknowledging the defendant's statement in his brief on "the proliferation of visually documented police shootings of African-Americans that has generated the Black Lives Matter protests").

190. Of course, challenges to laws' claims of objectivity and neutrality are hallmarks of Critical Legal Studies and Critical Race Theory, movements that have challenged non-critical approaches to legal pedagogy. *See* Kimberle Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1287–1310 (2011) (explaining the intertwining histories of Critical Legal Studies and Critical Race Theory); Crenshaw, *supra* note 10, at 3 (discussing the problems arising from "narrowly framing classroom discussions as simple exercises in rule application and by not giving students permission to step outside the doctrinal boundaries to comment on or critique the rules").

191. One example is teaching that incorporates the Feminist Judgments Rewritten. *See* Bridget J. Crawford, Kathryn M. Stanchi, Linda L. Berger, Gabrielle Appleby, Susan Frelich Appleton, Ross Astoria, Sharon Cowan, Rosalind Dixon, J. Troy Lavers, Andrea L. McArdle, Elisabeth McDonald, Teri A. McMurtry-Chubb, Vanessa E. Munro & Pamela A. Wilkins, *Teaching with Feminist Judgments: A Global Conversation*, 38 LAW & INEQ. 1, 3–4 (2020) (exploring the pedagogical potential of using feminist judgments in the classroom); Linda L. Berger, Kathryn M. Stanchi & Bridget J. Crawford, *Learning from Feminist Judgments: Lessons in Language and Advocacy*, 98 TEX. L. REV.

The goal here is not to diminish this work but, to the contrary, to amplify its importance.

It is also important to acknowledge the realities of law school teaching. Its pace does not always allow time for close critical exploration of legal opinions to consider not only what was said but also what went unsaid. And methods of assessment, particularly those used in the first year of law school, so often focus on knowledge of rules and rule application. Thus, these explorations might be beyond the scope of current assessments. But can law schools afford not to give more time to preparing our students to see the law more critically? Given the great need for fair-minded, culturally competent advocates who know not only what the law is but also what the law can and should be, the answer is that they cannot.

While there is much to gain, this advocated shift in approach is a modest one. Making greater use of dissenting opinions does not require law professors to bring new substantive knowledge to the classroom but rather encourages law professors to introduce law students to accessible tools and techniques that they can use to engage in deeper critiques of the law. Students might be asked to closely read and prepare to discuss dissents in cases that professors have already assigned to help further their understanding. The goal is for this practice to become a habit offering a new generation of lawyers a more optimistic and empowered way to understand and practice law. Once introduced to dissents, or other writings that help deconstruct majority opinions, the hope is that students will learn to read cases more critically and be able to see beyond what is said in legal opinions even when dissents are absent.

ONLINE 40, 42–43 (2019) (same); *see also* BENNETT CAPERS, DEVON W. CARBADO, ROBIN LENHARDT & ANGELA ONWUACHI-WILLIG, CRITICAL RACE JUDGMENTS: RE-WRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW (2022) (collecting rewritten opinions to demonstrate how landmark Supreme Court decisions can be analyzed through a critical lens and written to embrace diverse socio-cultural perspectives). An array of strategies and techniques for challenging legal opinions and acknowledging absent perspectives can be found in TERI A. MCMURTRY-CHUBB, STRATEGIES AND TECHNIQUES FOR INTEGRATING DIVERSITY, EQUITY, AND INCLUSION INTO THE CORE LAW CURRICULUM: A COMPREHENSIVE GUIDE TO DEI PEDAGOGY, COURSE PLANNING, AND CLASSROOM PRACTICE (2021) (offering a rich discussion of the need and a concrete guidance for incorporating diversity, equity, and inclusion in core law school classes).

CONCLUSION

Some years ago, Professor Kathryn Stanchi challenged law faculty to teach students to "challenge biased language" in the law that is so often replicated in advocacy.[192] Professors Lorraine Bannai and Anne Enquist spoke of the need for professors to encourage students "to examine the cultural biases lurking beneath the surface of language and legal analysis."[193] Teri McMurtry-Chubb has argued for teaching methods that allow students to "grapple with the inequities" that legal analysis and reasoning create.[194] In the wake of George Floyd's killing and the racial reckoning that followed, and the fallout from the pandemic, which revealed deep inequities, the calls for change have only increased. Yet, the law has not changed significantly, and many law students are still learning in the same ways. This Article has offered one simple, but powerful, practical tool for breaking the status quo and preparing law students to advocate for change—teaching dissents.

Lawyers need to be aware of the "stories and symbols that interfere with the ability of courts and judges to address individual diversity and complexity."[195] To be prepared to challenge the law and advocate for change, law students need to be able to see beyond what is written in legal opinions. They need to be able to penetrate the surface of a decision, to get a deeper look. They should be taught to recognize where judges are making subjective choices, so they can envision other possibilities. They need to learn to recognize when decision-makers are resorting to biases and commonly held assumptions, to know how they can work to disrupt this thinking. They need to be made aware of diverse perspectives, so often unacknowledged in legal opinions, and understand how this knowledge can be deployed to better the law and the lives of real people that the law impacts.

Dissents can be of immense value to law students—future lawyers—as they offer much needed context for the law and help students see new possibilities. This Article offers some ways to use dissents as a pedagogical tool, however, it has a broader goal. The Author seeks to raise awareness of the opportunity that is

192. *See* Stanchi, *supra* note 24, at 51–57.

193. 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, 40 (2003).

194. McMurtry-Chubb, *supra* note 22, at 535.

195. Berger, *supra* note 29, at 308.

missed when dissents are dismissed as the losing argument. Rather, dissents should be appreciated as a tool to teach law students the subjective aspects of legal decision-making and where they can advocate for change. Majority opinions hide their subjective aspects, presenting them as objective truth. But dissenting opinions reveal the human aspects of a case that can be questioned and challenged.

Dissenting opinions can inspire and empower, challenging biases and assumptions embedded in legal analysis and amplifying marginalized voices that majority opinions ignore. In shining a light on majority opinions, dissenting opinions can make classrooms more inclusive spaces and perhaps courts one day too.