CONTEXTUAL LEGAL CRITICISM:  
A DEMONSTRATION EXPLORING 
HIERARCHY AND "FEMININE" STYLE

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Conceptual critics strive to expose assumptions buried within traditional legal analysis; closely related, the project of contextual critics is to examine the cultural contexts that shape legal decisionmaking. Drawing upon tools and methodologies used in gender research, Professor Davis applies these devices to a specific legal text and thus demonstrates how they can facilitate contextual legal criticism. She selects as her text the transcripts of two simulated lawyer-client interviews taken from the N.Y.U. first-year Lawyering program. From her analysis of the hierarchical discourse patterns revealed in these transcripts, Professor Davis argues that the interactive lawyering style, traditionally thought of as powerless or feminine, has significant potential for the future of legal representation.

INTRODUCTION

When legal scholars believed that law was only and always derived by reasoning from fixed principles, legal scholarship was confined, justifiably, to the critique of deductive syllogisms within the judicial opinion. Our beliefs have become more complicated. We no longer imagine law, or much of anything, to be a matter of simple deduction. Instead, we understand that law is created by people—people who reason within a culture, from a perspective, and with a set of sensibilities. Accordingly, we see that law is shaped by culture, perspective, and sensibility as well as by logic. Mastery of the deductive syllogism is still foundational, but no longer sufficient, to fulfillment of the legal scholar's obligation to provide critical commentary as law evolves. The thorough scholar looks not only to the logic of principles that we call law, but also to the characteristics of interactive, cultural processes that comprise lawyering and judging. S/he takes as texts both the statutes and judicial opinions that constitute law and the discursive acts by which law is articulated, debated, and applied.

Many scholars have recognized the need for critical analysis of the interactive and cultural contexts of legal decisionmaking. But legal scholars have just begun the difficult task of developing tools for system-

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ate, contextual analysis of the discursive and written work that lawyers and judges do. The mission of this Article is to advance the process of fashioning those tools. In Part I, I describe the stance and the critical tradition from which methodologies for contextual criticism of lawyering are beginning to emerge. It is in this context that the theme of this commemorative issue of the Law Review is prominent, for I seek to show that inclusion of the voices of women—and of other subordinated or stigmatized groups—facilitates contextual criticism. In Part II, I turn to the elaboration of critical methodologies. For purposes of isolating and testing methodological strategies, I focus on a single aspect of lawyering discourse: the presence and effect of hierarchical conversational patterns. I cull from other disciplines techniques and principles that can serve to isolate hierarchical patterns in conversational interactions. These techniques and principles are found in studies of gender, in studies of narrative, and in studies of speech acts. In Part III, I apply the identified techniques and principles in a case study designed to explore the presence and effect of hierarchical behavior in a lawyer-client interview. Finally, in Part IV, I discuss the effects of hierarchical lawyering behaviors upon legal representation and the possibilities associated with less hierarchical lawyering styles.

I

THE ORIGINS OF CONTEXTUAL CRITICISM

A. Going Meta: The Relevance of Outsider Status

In describing the social stance of stigmatized people, Erving Goffman refers to a tendency to “go meta”—to withdraw from fully focused participation in a social scene and to attend instead to the interactive dynamics of the scene. If, for example, I suspect that an interaction with another person is affected by the fact that I am black, or a woman, my focus shifts—or shifts back and forth—from the content of the interaction to the interactive process itself as it is affected by my race and sex. This participant-observer stance of the stigmatized has both pathological and creative potential.

The pathological potential of the stance has been studied rather

1 E. Goffman, Stigma: Notes on the Management of Spoiled Identity 111 (1963): [The stigmatized person] may be led into placing brackets around a spate of casual social interaction so as to examine what is contained therein for general themes. He can become “situation conscious” while normals present are spontaneously involved within the situation, the situation itself constituting for these normals a background of unattended matters. This extension of consciousness on the part of the stigmatized persons is reinforced . . . by . . . [a] special aliveness to the contingencies of acceptance and disclosure, contingencies to which normals will be less alive.

Id.
carefully. The lure of going meta can interfere with the ability of the stigmatized to act in the world. Moreover, the data accumulated when one goes meta are often irritating. They generate stress, and stress can paralyze.

The creative potential of going meta has not been analyzed as thoroughly. Louise Nevelson, whose work overcame resistance to associating the concepts “woman” and “sculptor,” once said that if a claimed “truth” stifled, harmed, or inhibited her, she would deny it. Her statement caused an outcry against intellectual dishonesty, but it contains a grain of gold. The instinct of self-preservation that motivated Nevelson to deny established “truths” is a legitimate and healthy force capable of transforming the participant-observer stance of the stigmatized from passive isolationism to active participation in the critique and redefinition of social constructs. For the stigmatized, the familiar way of seeing things is life-threatening; it stifles life possibilities. From the stance of the stigmatized who dare to be creative critics in self-defense, consciousness raising and reconceptualization are possible. Nevelson did not simply deny conventional wisdom about gender and art; she changed the way we think about sculpture.

Creative and active exploitation of the participant-observer stance has special value in the study and practice of law. Going meta expands one’s focus so that assertions of legal principles can be considered in terms of their cultural context. This process was exemplified in the decision and criticism of a 1975 case in which a New York law firm was sued for gender discrimination. The case drew a black woman judge. The

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A few exceptionally strong people, usually reinforced by an alternative sense of community, can just ignore . . . [outsider status] and carry on, despite the lack of that part of education which flows from full participation, perhaps thus resulting in a brand of knowledge that is more abstract than relational. But most others become driven to transform the outsider status into its own excuse, either by obsessional and abstracted overachievement, or by underachievement occasioned by the loss of relation and loss of interest. Either way the outsider status is a kind of unresolved wound, driven by pain, for after all that is the seeded prophecy contained in the word and the concept of those who are designated “outsider.”

Id.

4 See E. Goffman, supra note 1, at 7-19; see also Davis, supra note 3, at 1565-68 (citing authorities).
5 A truth isn’t a truth to me, a lie isn’t a lie . . . . If I were to accept academically these words and what they stand for, it would kill me immediately. If a so-called lie will be a tool for me to fulfill myself, I’ll use it and have no morals about it. And if a so-called truth can destroy me, to hell with it.

attorneys representing the law firm asked that she recuse herself, alleging, among other things, that she "strongly identified with those who suffered discrimination in employment because of sex or race" and therefore could not judge the matter impartially. This claim of partiality undoubtedly seemed reasonable to the lawyers who made it, but the Honorable Constance Baker Motley, the formidable judge called upon to decide the motion and the case, must have gone meta for a moment. We can imagine her asking, "What combination of social and psychological forces makes it possible for a man to conceive and utter this claim?"

Returning to the interaction, she calmly pointed out that each judge of the Southern District of New York had both a race and a gender and therefore was equally likely to be partial to one side or the other in the case before her.8

Judy Scales-Trent, commenting upon the case, offers a critique that responds to the question one imagines Judge Motley asking in the meta voice.9 Scales-Trent tells us that categories that have no sense of stigma or unusualness—categories that, in her words, carry power—become invisible.10 In the professional culture of the litigators representing the law firm, women were women; blacks were blacks; and white males were "regular people."11 It therefore was possible for them to imagine, and to argue, that blacks and women were "biased" while white males were not.12

Motley and Scales-Trent acted in self-defense to unsettle the categorization that made white men the norm and women and blacks the special case. They were driven meta, but they were not isolated or passive in the meta voice; they undertook the hard work of critical analysis and reconstruction. They broadened their focus in order to understand the cultural and social context within which buried assumptions invisibly determined the shape of legal argument. As a result, they were able to confront a probably unconscious assertion of power and chip away at a definition of "Everyman" that framed and constrained legal discourse.

As the recusal case shows, feminists and critical race theorists who

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7 Id. at 4.
8 Id. at 4-5 ("If background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.").
10 See id. at 338.
11 Id. Commenting on a draft of this Article, Jerome Bruner observed that this invisible or background status of "regular people" is typical of those who occupy a "canonical role" and that the canonical role is "constructed ... for enforcing power or legitimacy." Notes to the author from Jerome Bruner (July 26, 1991) (on file with author).
12 See Scales-Trent, supra note 9, at 338.
work from the perspective of participant-observer fix their critical sights on embedded cultural assumptions. As a result, they are natural leaders, not only in the work of exposing and challenging conceptual constraints upon legal discourse, but also in the broad intellectual movement to rediscover culture by making the tacit explicit and the familiar strange.\textsuperscript{13} This movement has stirred consciousness across the range of academic disciplines. In the words of Jerome Bruner:

[T]he mark of our own era—in the law and in virtually every domain of human endeavor—is a quickened...[sense] of the importance of explicit awareness, of consciousness, of the dangers of hidden agendas... We would do better, we now think, to replace id with ego, ritual with choice, to go "meta" in general.\textsuperscript{14}

Feminist consciousness-raising exemplifies the spirit of this era, as does the postmodernist exhortation "to question over and over again what is postulated as self-evident, to disturb people's mental habits, the way they do and think things, to dissipate what is familiar and accepted, to reexamine rules and institutions."\textsuperscript{15} The goal is to learn and to teach by exposing and taking control of unconscious patterns of behavior. The method is to build upon Freud's central insight: the realization that human behavior is determined as much by a creative unconscious as by conscious assertions of will.

Scholarship in this tradition seeks to replicate the moments of revelation that occur when one understands the psychopathologies of everyday life.\textsuperscript{16} The novelist's shift from the voice of an omniscient narrator to the inner voices of individual characters; the physical scientist's understanding that questions shape answers; the philosopher's focus on language as vehicle for interaction rather than symbol; the social scientist's interest in interpretative study of culture—all of these are, as Bruner has demonstrated, part of a turn from unquestioning work within the terms of conventions to critique and refashioning of conventions.\textsuperscript{17} While unquestioning work within the terms of conventions proceeds with a sense of choicelessness, work from the meta stance exposes the choices that are foreclosed by uncritical adherence to convention.

As it explodes the illusion of choicelessness in legal decisionmaking, legal criticism from the meta stance leads to the development of analytic

\textsuperscript{13} For a description of that intellectual movement, see J. Bruner, On Making it Strange Again, Opening Lecture: Lawyering Theory Colloquium, New York University School of Law (Spring 1991) (on file with author).
\textsuperscript{14} Id. at 3.
\textsuperscript{17} See J. Bruner, supra note 13, at 3-11.
methodologies that are consonant with critiques of positivism. Contemporary scholars easily reject the positivist view that law exists, fully formed, for the legal decisionmaker to find and apply, but they do not so easily see that customary methods of case analysis imply and build upon the positivist model. When law seemed to be "out there" merely to be found and applied to the facts at hand, a judicial opinion could be analyzed fully in terms of preexisting constructs. (And the analysis of judicial opinions seemed to cover adequately the ground necessary to the study of law). Great scholars imagined new constructs, but, in the main, legal scholars did not set out to question premises or to pose alternative premises. Within the growing tradition of making the implicit explicit and the familiar strange, scholars working from the participant-observer perspective look behind the logical structure of legal texts to expose the possibility of alternative structures.

B. Conceptual Criticism from the Meta Stance

The capacity to imagine new structures led first to conceptual criticism. Conceptual criticism initially addressed the classic text of legal scholarship, the judicial opinion. The conceptual critic exposed embedded conceptualizations and expanded the focus of legal analysis beyond the conceptual frame of an opinion to encompass the choice of conceptual frames. In this section, I review pioneering works of conceptual criticism. In the next, I trace the development from conceptual criticism to contextual criticism, in which legal scholars explore the contexts within which conceptualizations are chosen and shaped.

When Martha Minow worked through opinions of the Supreme Court's 1986 Term, she began with the understanding that there would be, embedded in the language of those opinions, "categories that bury their perspective and wrongly imply a natural fit with the world." She also began with the understanding that categorization is a matter of choice rather than discovery. As a result, Minow was able to see, and to show, that opinions about the lawfulness of granting disability benefits to pregnant workers turned in important part upon the capacity to entertain and accept different conceptualizations of the facts and principles involved. If the opinion-writer imagined a world in which the non-

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18 Although those who have the perspective of "not-regular people" often lead this work, see notes 20-57 and accompanying text infra, it is by no means their exclusive province. One can be driven meta, or one can choose to go.


20 See id. at 34-35.

21 See id. at 38-45 (discussing California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987)). In Guerra, the Supreme Court, in an opinion by Justice Marshall, rejected the lower court's reasoning that legislation protective of pregnant workers "'requir[ed] preferential

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pregnant worker was the norm, "special treatment" for the pregnant worker would be rejected. If the opinion-writer imagined a world in which having a family without losing one's job was normal (as it is for men, but often is not for women), then the imposition of "special hardships" upon pregnant, working women would be rejected.

Patricia Williams works similarly. She begins with a "recognition of the way in which the concept of indeterminacy questions the authority of definitional cages." If law is not simply "out there" to be found and applied, definition and characterization are essential, for definition and characterization pave the way to choices of syllogisms, while making the syllogisms seem unchosen and their conclusions seem inevitable. Williams therefore analyzes judicial opinions in terms of the rhetorical devices used to justify the opinions' outcomes. In Williams's analysis of City of Richmond v. Croson, the Richmond set-aside for minority contractors is invalidated by the Supreme Court after the Court has used words to construct a world in which the set-aside has become unjustifiable. Similarly, in her description of the Court's opinion in Metro Broadcasting v. FCC, Williams observes that although the issue was framed as a choice of the appropriate standard of review, the decision to approve a federal program giving preferences to minority broadcasters rested upon buried assumptions about "the nature of group identity, individualism, and the role of the market." Williams uncovers these assumptions by analyzing characterizations embedded in the "subtly nuanced and infinitely slippery vocabulary" of the majority and dissenting opinions.

Showing how legal vocabulary evolves, and how very much it mat-

22 See Minow, supra note 19, at 41.
23 See id.
24 P. Williams, supra note 2, at 109.
26 See P. Williams, supra note 2, at 105-06. Williams points out that in the world created by the language of the Court's opinion, "[s]ocial discrimination is 'too amorphous' [as a legislative justification]; racial goals are . . . 'unyielding'; goals are . . . 'quotas'; statistics are . . . 'generalizations'; testimony [is] mere 'recitation'; legislative purpose and action [are] 'mere legislative assurances of good intention'; and lower-court opinion is just 'blind judicial deference.'" Id. at 106. And, perhaps most important, the beneficiaries of the set-aside have been distanced, and the idea that they are harmed by discrimination has become a thing not so much real as imagined; they are described as "those whose societal injury is thought to [be intolerable]." Id. at 105 (quoting Croson, 488 U.S. at 505-06).
29 Id.
ters, Gerald Torres and Kathryn Milun trace the evolution of a definition of the word "tribe" as it shapes and determines the outcome of litigation involving a land claim of the Mashpee Indians.\textsuperscript{30} In a telling example of the emerging genre of conceptual criticism, Torres and Milun provide a nuanced portrayal of the Mashpee's cultural self-image: a multiracial, nonterritorial, evolving community bound by loyalty and consensus.\textsuperscript{31} They then trace the process by which parties, lawyers, and experts on both sides of the land claim struggled over the way in which the idea of a tribe would be conceptualized in the litigation.\textsuperscript{32} The Mashpee's opponents turned to definitions drawn from arguably analogous (and arguably irrelevant) case law.\textsuperscript{33} By the terms of those definitions, "racial purity, authoritarian leadership, and consistent territorial occupancy"\textsuperscript{34} were necessary to tribal legitimacy. In the end, the Mashpee's tribal identity was denied because it was out of fit with a definition formulated by outsiders.\textsuperscript{35} The testimony and evidence offered by the interracial Mashpee community, bound by consensus rather than to authority or land, "never quite 'signified.'"\textsuperscript{36}

Torres and Milun offer a model of concepts of relevance in a legal system that is both indeterminate and loyal to precedent.\textsuperscript{37} Legal argument proceeds by analogic reference to precedent, which stands simultaneously as "fact-filled instance" and as "fact-denuded rule."\textsuperscript{38} Although the analogic structure disciplines legal argument, the identification of fit between a prior instance or preexisting rule and a new (inevitably different) instance "is not a neutral process; it always involves adoption of a substantive perspective."\textsuperscript{39} Working within this model of relevance, Torres and Milun are able to reveal the rational structure—as well as the "substantive perspective"\textsuperscript{40} and "choseness"—of the opinion that "rendered the Indian storytellers mute and the culture they were portraying invisible."\textsuperscript{41}

C. From Concept to Context—The Birth of Contextual Criticism

Minow, Williams, and Torres and Milun have shown that analysis

\textsuperscript{30} Torres & Milun, Translating "Yonnondio" by Precedent and Evidence: The Mashpee Indian Case, 1990 Duke L.J. 625.
\textsuperscript{31} See id. at 637-41.
\textsuperscript{32} See id. at 633-36.
\textsuperscript{33} See id at 633.
\textsuperscript{34} Id. at 634.
\textsuperscript{35} See id. at 636.
\textsuperscript{36} Id. at 635.
\textsuperscript{37} See id. at 642-49.
\textsuperscript{38} Id. at 645.
\textsuperscript{39} Id. at 642.
\textsuperscript{40} See id.
\textsuperscript{41} Id. at 649.
of the norms and presuppositions embedded in judicial opinions broadens and deepens our understanding of how law develops and of what legal culture is. But the norms and presuppositions that shape legal outcomes cannot be understood fully in the isolation of a judicial opinion. They are shaped by a cultural context, and they emerge long before judges sit down to compose their opinions.

The conceptualizations that determine legal outcomes begin to be formed in the process by which a matter is reduced from a situation in the world of social reality to an issue for resolution in the world of law. The thorough student of law therefore takes as texts the full range of lawyering interactions—from the intake interview, in which lawyer and client negotiate the meaning of a situation in the world to determine whether and how it translates as a legal matter, through the varieties of subsequent interactions among clients, advocates, and decisionmakers. The study of lawyering as practice becomes essential to the study of law as an evolving, socially constructed corpus.

Phenomena related to stigmatization motivate the study of law as practice just as they motivate the unearthing of premises in the study of law as corpus. People are stigmatized because they deviate from socially constructed norms. The stigmatized are, in this sense, abnormal. The life situations of the abnormal often do not translate well into the language of law; as a result, the legal system does not satisfactorily address their needs. The stigmatized and their advocates therefore are driven not only to uncover and question norms expressed in judicial decisions, but also to expose and challenge patterns of discourse that channel out dissonant and nonconforming concepts as frames are set for the decision of cases and the application or modulation of norms.

The work of Lucie White and Gerald Lopez exemplifies legal scholarship that grows out of recognitions born when life stories are out of fit with, and rub against, legal norms. White describes lawyer-client interactions in which the client will not, or cannot, live within the role created for her as her life situation is refashioned in litigation to fit within a theory of the case. The case concerned welfare entitlement. Monies had been received and spent by the client, and the state had made a belated claim of overpayment with a demand that the funds be returned.

42 See id. at 644 ("The translation of the raw material of life into legally cognizable claims is at the heart of the lawyer's art.").
45 See White, supra note 43, at 32-44.
46 Id. at 21.
47 Id. at 24.
The legal theories brought to bear by the attorney were reliance (the client had been told by her case worker that she might spend the money) and need (applicable norms excused repayment where funds had been spent for necessities). The theories were combined, and the lawyer proceeded to construct a case based upon a soft version of the reliance story and a story of subsistence needs—food, basic furniture, clothing, and hygiene. Together, the lawyer and the client prepared for litigation, the client recalling purchases of necessities, and recalling confidence that the funds provided were hers to spend, at least for purposes of survival. On the witness stand, the client surprised her lawyer, telling a story of a case worker who had done no wrong and adding to her story the “need” of her children for Sunday shoes. White forces her readers to ask why the lawyer-client discourse failed to probe the client’s relationship with the case worker, and why it channeled out the family’s needs beyond subsistence. It becomes possible to imagine various conceptualizations of reliance, some involving villains, others not. It becomes important to add new perspectives to the process of conceptualizing need.

Lopez also constructs, and then deconstructs, lawyer-client interactions in which the lawyer—bound by training and culture—tries conscientiously, but fails, to represent, in the fullest sense, her politically marginalized and socially subordinated client’s interests and goals. As the lawyer translates her client’s problem into a legal issue and develops a strategy, she unwittingly cedes powers of issue definition and conceptualization to the forces against which her client struggles. As a result, she finds herself in the same position as the lawyer in the case presented by White: she has formulated the client’s claim in language that garbles the client’s reality. The lawyer then is confronted with a colleague’s charge that the laws in terms of which the lawyer seeks to resolve her client’s claim can only be counterproductive for the client, for they are enforced by systems that replicate the mechanisms by which the client is subordinated, and they are interpreted in terms that reflect a subordinating ideology. In response, the lawyer renews, but cannot be sanguine about, the effort to open lawyering discourse to outsider voices—to hear and represent the outsider perspective so that it “signifies” in the concep-

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48 Id. at 27-31.
49 Id.
50 Id. at 30.
51 Id. at 31.
52 See id. at 48-51.
53 See Lopez, supra note 44, at 1612-29.
54 See id. at 1667-76.
55 See id. at 1676-99.
56 See id. at 1700-02.
tualization of legal claims and principles.\textsuperscript{57}

Minow and Williams remove veils of neutrality from legal discourse. White and Lopez seek room in legal discourse for aspirations and life situations that do not compute in terms of established norms. Torres and Milun do both, illuminating the interplay of rule, fact, and choice in legal opinions as well as in the various stages of representation and advocacy. All of these scholars address the tension between the outsider voice and the established discourse of law.

From the first report of an arguably legal problem to the last word of an appellate tribunal, there is a struggle to demonstrate the fit between a claimant's situation and a predetermined rule. In that struggle, a lawyer working to serve a client's interests may unwittingly garble the client's reality as the lawyer assumes the work of conceptualization and frames the matter in the terms most easily recognized by legal decisionmakers. The result is often that conventional conceptualizations shape the law, while conceptualizations that address the needs of outsiders elude the grasp of legal decisionmakers.

It may be that hierarchical conventions of the lawyer-client relationship exacerbate the tendency to recast the needs and values of clients to fit the conventional discourse of law and lawyers. The balance of this Article focuses upon that possibility. It explores that possibility in the context of an analysis of the early, informal stages of the lawyering process. The analysis builds upon the argument from the meta stance that legal scholarship must attend to the phenomena of conceptualization that precede formal judgment. But it proceeds, not at the level of meta-analysis, but at the level of microanalysis. It does so on the theory that processes outside the frame of the judicial opinion deserve the same detailed examination as do the syllogisms of appellate opinions. This theory implies that legal scholarship requires a zoom lens so that each of a broad range of relevant texts can be observed without loss of the capacity to focus closely on any. Part II offers a collection of tools for microanalysis of those aspects of lawyering discourse that are likely to reveal the effects of hierarchy in the closely focused study of early lawyer-client interactions.

II

GOING MICRO: NEW TOOLS FOR CONTEXTUAL ANALYSIS

[A] tool of analysis, of perception, of de-coding—a possibility of defining practice, etc. That, indeed, is the thing to be worked out.\textsuperscript{58}

\textsuperscript{57} See id. at 1712-13.

\textsuperscript{58} Foucault, Cooper, Faye & Zecca, Confinement, Psychiatry, Prison, in Foucault, supra note 15, at 178, 194.
Disciplines concerned with the analysis of gender patterns, of discourse, and of narrative structure provide a rich variety of tools of perception. These tools can deepen consciousness by unearthing usually unnoticed patterns that affect the ways in which people act through language to interpret and use the law. Placed at the disposal of practitioners, they make possible the substitution of focused control for rote response. Placed at the disposal of scholars, they facilitate demystification and enhance interpretive capacity.

The study of hierarchy and lawyering offered in Part III draws upon three types of consciousness-raising tools: from narrative analysis, theories of the function of the orientation and the coda in storytelling; from gender-pattern research, characterizations of feminine and masculine forms of speech; and from conversational analysis, theories concerning the speech acts of requesting and challenging. The focus on the orientation and coda in storytelling was chosen because these segments of conversational interaction are concise sources of insight into the perspectives with which parties begin and end an exchange. Gender-pattern research is utilized because it is the largest and richest body of research addressing the issue of hierarchical patterning in interpersonal exchange. Work concerning speech acts is used on the assumption that focus upon speech as an active phenomenon will serve to illuminate ways in which speakers achieve dominance and subordination in conversation.

A. Narrative Analysis: The Function of the Orientation and Coda

Whether in a lawyer’s office or at a dinner table, the teller of a story must give the tale meaning by revealing some deviation from the expected. Reports of the usual do not make complete narratives. For example, “I looked around the room and saw four walls, a floor and a ceiling” is an incomplete tale. To complete it, the storyteller must provide a reason for the telling. This is done by showing what is unusual about the events reported—how those events mark a deviation from some preexisting norm or steady state: “The time had come for the doctor to remove the bandages from my eyes. I looked around the room and saw four walls, a floor and a ceiling.” When a client tells the story of a trouble for which legal redress is sought, identification of the steady state disturbed by the trouble gives clues to the norms against which the client sees the situation. When an advocate tells the story of a trouble for which legal redress is sought, the advocate consciously or unconsciously frames the story in terms of a steady state that law seeks to maintain or support.

Stories typically begin with a segment that orients the listener to

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time, place, and behavioral situation.\textsuperscript{60} In more elaborate stories, this orientation section describes the steady state that will be disrupted as the tale progresses.\textsuperscript{61} The orientation also can serve to alert the listener to what the tale means to the teller.\textsuperscript{62} Similarly, as a speaker signals the end of a tale—usually by a shift of tense or perspective\textsuperscript{63}—she or he typically offers an evaluative coda in the form of a comment upon the meaning of the tale.\textsuperscript{64}

In the analysis of stories told in lawyering contexts, orientations and codas are check points at which the values and objectives of participants are displayed with special candor and clarity. In the case study reported in Part III, they serve, together with the hierarchical patterns of gender research and the action markers of speech-act theory, to facilitate interpretation of the conversations by which lawyers and clients define their goals and fix the terms of their relationships.

B. Discourse Patterns Associated With Gender

Close study of discourse patterns serves especially well to make the familiar strange and the unconscious conscious. For example, in their classic analysis of a segment of a psychoanalytic session, William Labov and David Fanshel call attention to the common, but subterranean, “understanding” that a postverbal particle must follow pronoun objects.\textsuperscript{65} Few are conscious of the rule that leads English speakers to say “I picked it up” and to avoid saying “I picked up it,” but English speakers follow this rule almost invariably.\textsuperscript{66} The rules that reflect gender patterning in conversation are less invariant, and somewhat closer to consciousness, but deeply pervasive. Bringing them to consciousness can be immensely revealing.

Robin Lakoff provided an early catalogue of gender patterns in conversation.\textsuperscript{67} Lakoff’s catalogue was derived “mainly by introspection.”\textsuperscript{68} It revealed gender-associated differences concerning degrees of expressiveness, as in the difference between the masculine “Oh, shit, I lost my

\begin{itemize}
\item \textsuperscript{60} See id. at 431.
\item \textsuperscript{61} See J. Bruner, Narrative, Legal and Otherwise, Lecture 4: Lawyering Theory Colloquium, New York University School of Law 7 (Spring 1991) (on file with author).
\item \textsuperscript{62} See id.
\item \textsuperscript{63} Labov and Waletzky give examples of these transition devices, for example, following an actor to the present tense “And you know that man who picked me out of the water? He’s a detective in Union City, and I see him every now and again.” Labov & Waletzky, supra note 59, at 439.
\item \textsuperscript{64} See id. at 438.
\item \textsuperscript{65} See W. Labov & D. Fanshel, Therapeutic Discourse: Psychotherapy as Conversation 75 (1977).
\item \textsuperscript{66} Id.
\item \textsuperscript{67} R. Lakoff, Language and Woman's Place 8-50 (1975).
\item \textsuperscript{68} Id. at 4.
\end{itemize}
keys" and the feminine "Oh, dear, I lost my keys"; regarding the mitigation of requests or commands, as in the difference between the masculine "Close the door" and the thrice mitigated feminine "Won’t you please close the door?"; and concerning levels of assertive certainty, as in the feminine use and masculine avoidance of tag questions, "He was out at third, wasn’t he?" As the Lakoff examples suggest, and as Lakoff asserted, patterns associated with female speech are consistent with a posture of subordination, while those associated with male speech are consistent with a posture of dominance.

Lakoff’s early work marked the beginning of a series of analyses of gender differences in conversation. Subsequent work has confirmed many of the correlations suggested by Lakoff, although scholars have questioned her assumption that the correlations could be explained solely in terms of gender-based dominance and subordination.

1. Talkativeness

Researchers found, for example, that although women are perceived to talk more than men, men usually were more talkative in examined, formal interactions. When women in relatively formal settings spoke half as much as men, they were perceived as dominating the conversation.

69 Id. at 8-19.
70 See id. at 4.
71 These consistencies may be deceptive. As the remainder of this Article demonstrates, masculine and feminine speech patterns can be understood in terms of less pejorative dichotomies. Patterns normally associated with subservience can facilitate interactions that “dominant” patterns block.
72 For a helpful summary of research that responds to the Lakoff hypotheses, see B. Priesler, Linguistic Sex Roles in Conversation 5-22 (1986).
73 See, e.g., D. Graddol & J. Swann, Gender Voices 70-71 (1989); B. Priesler, supra note 72, at 17-18. Researchers have replicated the finding of greater male talkativeness even in contexts in which the female had greater expertise than did the male with respect to the subject under discussion. See Leet-Pellegrini, Conversational Dominance as a Function of Gender and Expertise, in Language: Social Psychological Perspectives 97, 102 (H. Giles, W. Robinson & P. Smith eds. 1980). In less formal, mixed-gender settings, women have been found to be more talkative than men. See Edelsky, Who’s Got the Floor?, 10 Language in Soc’y 383, 415 (1981). It is commonly believed that women are more talkative in intimate settings. See D. Tannen, You Just Don’t Understand 77-79 (1990).

Among the more disturbing studies of male and female talkativeness in formal settings are studies of coeducational classrooms, in which researchers find male students invariably more likely to volunteer and, among volunteers, more likely to be called upon to speak. In a study of over 100 classes in both arts and sciences, boys were found to “dominate[ ] classroom communication,” calling out answers eight times more frequently than did girls. Sadker & Sadker, Sexism in the Schoolroom of the 80s, Psychology Today, Mar. 1985, at 54, 56. This pattern has been attributed both to the greater assertiveness of male students and to greater teacher responsiveness to male students (even among some teachers who tried consciously to correct an acknowledged male preference). See de Nys & Wolfe, Learning Her Place—Sex Bias in the
Findings that men speak more in formal settings have been taken as confirmation of the male-dominance hypothesis, but findings that women speak more in less formal settings have led linguist Deborah Tannen to propose that the gender patterns of talkativeness and reticence reflect, not simple dominance and subordination, but rather a difference in the functions for which men and women use conversation. Tannen argues that women use conversation as a means of establishing and maintaining rapport, while men see conversation as a way to "negotiate and maintain status in a hierarchal social order." Tannen's view, which has the advantage of accounting for the different patterns observed in formal and informal interactions, is not inconsistent with the hypothesis that men dominate through, and women are subordinated by, male talkativeness in formal settings.

2. Interruptions

If talkativeness has a dominating effect in conversation, interruption of a conversational partner can facilitate that domination. Interruption also may have an independently dominating effect. Explications of the conventions of turn-taking in conversation have made it possible to conduct sophisticated analyses of conversational interruption. Although there is no strong evidence that men are more frequent interrupters in single-sex conversations, some researchers have found interruptions to occur with strikingly disproportionate frequency in male speech directed at women. There has been debate as to whether this pattern is a func-

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75 See, e.g., D. Graddol & J. Swann, supra note 73, at 70-72.
76 See D. Tannen, supra note 73, at 76-77.
77 Id. at 77.
78 Some utterances that can be classified as interruptions are nonintrusive; indeed, some are supportive. These utterances are like other interruptions in that they involve simultaneous talk or talk that occurs before a conversational partner has yielded the floor (or signaled her intention to do so), but they constitute either a signal of responsiveness or an unobtrusive error in transition timing, not a premature seizing of the floor. Careful researchers therefore do not classify them as interruptions. See West, When the Doctor Is a "Lady": Power, Status and Gender in Physician-Patient Encounters, 7 Symbolic Interaction 87, 90-92 (1984); Zimmerman & West, Sex Roles, Interruptions and Silences, in Conversation in Language and Sex: Difference and Dominance 105, 108-09 (Thorne & Henley eds. 1975).
79 See D. Graddol & J. Swann, supra note 73, at 77-80; Zimmerman & West, supra note 78, at 115-17. Although the literature takes this finding to be well established, other researchers have been unable to replicate it. For a helpful critique of the evidence, see Bilous & Krauss, Dominance and Accommodation in the Conversational Behaviors of Same- and Mixed-Gender Dyads, 8 Language & Comm. 183, 183-84 (1988). In their own research,
The work of Candice West provides an analysis of interruptions that is pertinent to the study of behavior within the professions and sensitive to the interaction of social role and gender. In a study of doctor-patient interactions, West found that male doctors were responsible for 67% of all interruptions, and patients were responsible for 33%. When the doctor was female, patients were responsible for 68% of the interruptions, doctors for 32%. West's data suggest "that gender can have primacy over status," for they are inconsistent with the conventions of assertion and deference associated with the medical profession. She quotes medical authorities to establish a belief within the profession (and, perhaps, within the culture) that "[t]he practitioner must have control over the interaction with the patient, ensuring that the patient will comply with the prescribed regimen. If patient compliance is not ensured, then the ability of the practitioner to return the patient to a normal functioning state is undermined." As West notes, "[i]n this view, patients' situational dependency on physicians, physicians' professional prestige and their authority over patients all ensure physicians the necessary leverage for controlling interpersonal encounters." The pattern of interruption identified by West suggests that gender is a "master status" that overwhelms this traditional convention of physician dominance. West does not, however, purport to answer the question whether the more frequent interruption of female doctors signaled disrespect by patients or a choice by female doctors to yield authority in favor of being better listeners.

3. **Topic Control**

When a state of talk exists between or among people, the participants are obliged not only to manage the taking of turns, but also to

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80 See D. Graddol & J. Swann, supra note 73, at 79-80.
81 West, supra note 78, at 94-102.
82 Id. at 92.
83 Id.
84 Id. at 102.
85 Id. at 94.
86 Id. at 95 (emphasis added).
87 Id. at 102.
88 Id.
control the flow of topics. A relatively greater quantity of topic initiations, like a relatively greater quantity of talk, can be indicative of conversational dominance. Just as interruption of speech thwarts an utterance, failure to sustain a previous speaker's topic thwarts conversation.

Some conversation analysts have found a more frequent occurrence in female talk of expressions that support or otherwise respond to a previous speaker's utterances. Others have found greater frequencies of assertive and directive talk among men. These findings have led theorists to propose that women's talk is more likely to have a socio-emotional function while men's talk is more likely to have a task-oriented function. This proposition generates an image of men as conversationally purposive or goal oriented and women as conversationally expressive and interpersonally focused, and therefore carries a prediction of male topic dominance.

It is not clear, however, that goal orientation and interpersonal fo-

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89 See E. Goffman, Forms of Talk 18 (1981) ("In addition to making sure someone (and only one) is always at bat, there will be the issue of sustaining whatever is felt to be appropriate by way of continuity of topic and tone from previous speaker's statement to current speaker's, this out of respect both for previous speaker . . . and, vaguely, for what it was that had been engrossing the participants.").

90 Two examples from a study of domestic conversation illustrate the point:
M: I saw in the paper where Olga Korbut
F: Yeah
M: Went to see Dickie
F: You're kidding (pause) what for?
M: I don't know (pause)
F: I can just imagine what she would go to see Dick Nixon for. I don't get it (pause)
M: I think she's on a tour of the United States (pause)
F: Has he sat down and talked to her?
M: Shows the picture in the paper

... F: They have this many publications in women's studies received every month. It's one of these. In oth-
M: Uhm
F: In other words—about um (pause) well at this rate (pause) you know about (pause) two thousand a year
M: It's a lot
F: And Carol said that they found out that there were four hundred applications from graduate students doing PhDs in women's studies
M: [Over word "studies"] Hmh

D. Graddol & J. Swann, supra note 73, at 75-76. The study from which these passages are taken found that women raised 62% and men 38% of all topics. Every topic raised by the men, save one, survived as a topic of conversation. Only 36% of the women's topics survived.


91 See B. Priesler, supra note 72, at 15-16.

92 Id. For empirical evidence that women are more likely to assume a socio-emotional role, see notes 104-05 and accompanying text infra.
cus are mutually exclusive. Tannen has suggested that when a subject involving conflict is raised, men are more likely to talk in ways geared to removing the conflict, while women are more likely to treat discussing and working through the conflicting feelings generated by the conflict as a task of conversation. Thus, if discomfort about doing tedious research is raised, a man is more likely to talk of ways of hiring research assistants, and a woman is more likely to talk about the tedium and its effect upon the quality of the research. Somewhat similarly, the work of Carol Gilligan suggests that if a question of propriety arises, a young boy will quickly identify a principle that dictates a choice, and a young girl will probe contextual factors and the consequences of alternative courses (or of adherence to alternative principles). These nuanced interpretations of gender patterning reinforce the hypothesis that men and women differ, not in the presence or absence of commitment to tasks or goals, but in the definition of conversational tasks or goals. They suggest that men in conversation will seek more quickly to identify means of resolving conflict, while women will seek more thoroughly to consider what resolution entails. They are consistent with expectations of more frequent male imitations of topic shifts and more frequent female participation in topic maintenance, but they alter the implications drawn from those patterns.

4. Uncertainty Signs

The most frequently discussed difference between male and female speech is the tendency of women and the disinclination of men to use language that indicates tentativeness or uncertainty. Uses of tentative speech have been closely examined in legal contexts. In research conducted in the 1970s, John Conley, William O’Barr, and E. Allan Lind identified two presentational styles apparent in the testimony of trial witnesses, styles that they termed “powerful” and “powerless.” Powerless styles were characterized by signs of tentativeness or uncertainty—abundant use of hedges (“I think it’s red” or “It seems to be sort of red”); hesitation forms (“Well, uh, mmmh, red”); question intonation (“It’s red?”); and intensifiers (“It’s really red”)—as well as by polite forms (“It’s red, sir”). Powerful style was characterized as having no independent characteristics; it is marked by the absence of lin-

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93 See D. Tannen, supra note 73, at 49-61.
94 See C. Gilligan, In a Different Voice 32-33 (1982).
95 See, e.g., D. Graddol & J. Swann, supra note 73, at 83-88.
97 Intensifiers were read to denote uncertainty when they were “so overused that they suggest that the speaker is not to be taken seriously in their absence.” Id. at 1380.
98 Id.
guistic devices associated with powerlessness. Conley, O'Barr, and Lind found—consistently with the work of conversational analysts working in other settings—that female witnesses used the powerless or tentative style more frequently than did male witnesses.

Brent Preisler has done the most elaborate analysis of uses of linguistic signs of tentativeness. Preisler analyzed cross-sex and same-sex group discussions of a set of social problems. The groups were drawn from forty-eight men and women, half over age forty-five and half under age twenty-five, who worked in managerial, clerical, and manual labor categories in six manufacturing firms. Each group was homogenous with respect to age-group and employment category. In addition to categorizing the participants with respect to gender, age, and type of employment, Priesler tested for, and categorized his subjects with reference to, their tendency to take “socio-emotional” and “task-oriented” roles in the discussions. He found women substantially more prone to take “socio-emotional” roles.

Preisler analyzed the discourse of these groups in terms of a lengthy set of tentativeness markers. He characterized his results as establishing “beyond doubt that linguistic tentativeness signals are correlates of sex and/or interactional role. In other words, women and/or...[socio-emotional role-takers] have been shown to be linguistically tentative, relatively speaking and on the whole, in comparison with men and/or...[task oriented role-takers].” Although the Preisler study found clear differences in male and female speech, its differentiated analysis of large numbers of precisely defined signs of tentativeness revealed that “feminine” speech patterns were at times put to the service of goal-directed activity. In Preisler's words, “the managerial decision-makers tended to manifest their task-orientation through some of the very tentativeness signals otherwise prevailing among women and...[socio-emotional role-

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99 See id. at 1381 (describing powerful style as "exhibit[ing] relatively few features of the powerless style"). But see B. Preisler, supra note 72, at 88-95 (identifying lexical features associated with assertiveness).

100 Conley, O'Barr & Lind, supra note 96, at 1380 n.16.

101 See id. at 1380. Conley, O'Barr, and Lind also found “with a generally high degree of certainty, that in comparison to those who heard [a] witness give...testimony in the powerless style, those who heard her use the powerful style indicated that they believed the witness more...found her more convincing...and thought that she was more competent...more intelligent...and more trustworthy.” Id. at 1386. Moreover, they found that “[w]itnesses of low social status—the poor and uneducated—were most likely to use...[the powerless] style of testimony.” Id. at 1380 (emphasis added).

102 See generally B. Preisler, supra note 72.

103 Id. at 38-44.

104 Id. at 65-71.

105 Id. at 203.

106 Id. at 75-117.

107 Id. at 284 (emphasis omitted).
takers] in the 'lower-status' strata."\textsuperscript{108}

In the case studies described in Part III, identification of patterns of talkativeness, interruption, topic control, and tentativeness facilitates exploration of questions associated with role and dominance in the performance of lawyering tasks. As the preceding discussion indicates, researchers have not established that any one of these patterns is unambiguously indicative of dominance and subordination. Accordingly, identification of these patterns will not be used as a litmus test to signal hierarchical behavior within a lawyering activity. Rather, the patterns will be interpreted in context with the understanding that their meanings and uses will vary.

\textbf{C. The Speech Acts of Requesting and Challenging}

As students of language moved from analysis of words as symbols to analysis of speech as a social act, they began to develop tools for identifying the intended and perceived interactive functions of utterances.\textsuperscript{109} Speech-act theory suggests interpretive possibilities of examining lawyering texts at three levels: to discern what words were said; what was meant by the words; and what was accomplished—what act was performed—in the saying. Interpretation of this sort builds upon the work of those who have identified and catalogued conventions surrounding the performance of speech acts.\textsuperscript{110}

It is, for example, a convention of request-making that reference to the listener’s capacity to perform an act, in the right circumstances, will constitute a request.\textsuperscript{111} It is also a convention of request-making that politeness requires indirection.\textsuperscript{112} The statement, “Can you manage that box?” (literally, an inquiry about the hearer’s ability to carry a box) therefore may mean “I need and want your help and believe that you are able and obliged to help me by carrying the box” and constitute a polite (for its indirection) request to carry the box.\textsuperscript{113}

The making of requests—or the issuance of directions—is a delicate matter in conversational interaction. The demands of politeness (indirection and other forms of mitigation) are in tension with the need for clarity. Status differences between conversational parties may affect the

\textsuperscript{108} Id. at 288.
\textsuperscript{109} See generally S. Levinson, Pragmatics 226-83 (1983) (describing and analyzing this development).
\textsuperscript{111} That is, where the speaker believes, and believes that the listener believes, that the act needs doing; the listener is able to do it; and it is appropriate that the speaker make the demand and that the listener perform the act. See W. Labov & D. Fanshel, supra note 65, at 78-82.
\textsuperscript{112} See id. at 82.
\textsuperscript{113} See id.
degree of mitigation that will be expected and further complicate the bal-
ancing of politeness and clarity.\footnote{See id. at 84-86.}

Gender patterns have been identified in connection with the speech
act of requesting. Some research indicates that, at least in single-sex en-
counters, males are less likely to employ mitigation in the making of re-
quests. Consider these words of children at play:

\textit{Male Children:}

Gimme the pliers!
All right. Give me your hanger, Tokay.
Get off my steps.
Get away from here, Gitty.

\textit{Female Children:}

Let's go around subs and suds.
We could go around looking for more bottles.
Maybe we can slice them like that.
We gotta find some more bottles.\footnote{D. Graddol & J. Swann, supra note 73, at 81; Sachs, Young Children's Language Use in Pretend Play, in Language, Gender, and Sex in Comparative Perspective 178 (S. Philips, S. Steele & C. Tanz eds. 1987).}

Labov and Fanshel point out that requests often function as chal-
lenges. If, for example, a person is asked to do something that the person
should have done without being asked, the request may be taken as a
criticism. In the language of Labov and Fanshel's rules of speech acts:
"If A makes a request for B to perform an action X in role R, based on
needs, abilities, obligations, and rights which have been valid for some
time, then A is heard as challenging B's competence in role R."\footnote{W. Labov & D. Fanshel, supra note 65, at 94.} Similarly, a repeated request functions as a challenge.\footnote{See id. at 95.} When a request con-
stitutes a challenge, the absence of mitigation sharpens the implicit
accusation.\footnote{See id.}

In the analysis of lawyering texts reported in Part III, patterns of
requesting and challenging reflect the parties' sense of role and suggest
corresponding patterns of domination and of expectation.

III

THE LAWYER-CLIENT INTERVIEW: A CASE STUDY

A. The Text

The first-year curriculum of New York University School of Law
includes courses organized around the laws of contracts, torts, crimes,
civil procedure, and property, as well as a course organized around the analysis and development of lawyering skills. The last of these, Lawyer- ing, takes students through a series of simulations in which they perform as lawyers, identifying issues and goals, gathering facts, planning, preparing documents, counseling, negotiating, arguing in formal and informal settings, and presenting evidence to a tribunal. Students also perform in simulations as clients and witnesses. The central learning experience in each exercise is a critique session during which a student work product or videotaped performance is taken as text. Faculty work with students in groups of two, three, or four, helping the students to examine their own performances and discover what happened—to expose, and then to find systematic ways of studying and improving, analytic skills that are important to working in the law.

In a Lawyering exercise focused upon the counseling process, students are paired in lawyer-client teams. The lawyer is told only that s/he must interview and counsel a new client, a bank executive with an unspecified legal problem. The client is given a detailed role description. S/he is to portray a recently divorced single parent whose children are adjusting with difficulty to a new community and school. To address the children’s difficulty in making neighborhood friends, the client has purchased and installed a back yard trampoline. S/he also has hired a babysitter so that the children might spend the after-school hours in their new community rather than at a day-care center.

The trampoline has succeeded in attracting children to the client’s home, but a minor accident on the trampoline has made the babysitter concerned about the risk of liability for future accidents. The sitter has threatened to quit. The client seeks means to reassure the sitter and persuade her to stay. The client comes to the meeting with the lawyer with two ideas for resolving the problem: posting signs saying, “Jump at Your Own Risk,” or words to that effect; and soliciting waivers of liability from the neighbors. Lawyer and client complete an initial interview within the space of up to thirty minutes. The interview is videotaped. Tapes and transcripts of two videotaped interviews form the texts for this case study.

B. The Analytic Approach

The two interviews are critiqued with the goal of raising consciousness about role and hierarchy in an episode of “lawyering” and “client- ing” as understood by conscientious and capable students at the beginning of their training in the law. The focus on role and hierarchy was chosen to foreground matters that might illuminate the mechanisms by which lawyers’ and clients’ conceptualizations are mediated. The in-
tent was to make visible the ways in which attorneys and clients impose, modify, or abandon the perspectives with which they enter an interaction, and to trace the patterns of mutual influence as roles are defined, issues are framed, and courses of action are chosen.

The critique employs tools described in the foregoing section. First, an interpretive analysis of the orientation and coda of each client's opening narrative facilitates exploration of the initial stances of the parties and the early determinants of interactive postures and tone. Next, interactive characteristics of the interviews are explored through a computer assisted analysis of patterns that have been examined in gender research and thought to reflect interactive dominance or subordination. Finally, an analysis of the speech acts of requesting and challenging is used to measure the extent to which each lawyer and client was able to assert control over the developing lawyer-client relationship.

In several respects, the analyses were drawn, and are reported, in terms of conceptualizations that have evolved from attempts to contrast and explain feminine and masculine speaking styles. These conceptualizations proved useful in thinking through the effects of interactive style upon the interview dynamic. However, the use of the conceptualizations in the analysis should not be taken to imply confirmation of the gender correlations with which they are sometimes associated. The research was not designed to support generalizations concerning the speech patterns of men and women functioning in the roles of lawyer or client. Indeed, the data would not allow such a test, for there was no attempt to examine a sample of any size. The lessons of the analysis are interpretive and anecdotal, testing the value of close, hermeneutic study of two interactions and utilizing for their explanatory power categorizations that other scholars have associated with gender, class, and social status. The caution against generalization from the results of this case study extends beyond the issue of gender. Since the texts are drawn from simulations undertaken by first-year students, they provide clues about, but do not support, generalizations concerning behavior in the world or the behavior of experienced practitioners.

In one of the exchanges chosen for this first-cut study, both lawyer and client are women. This lawyer-client pair is referred to as Team A. In the second exchange both lawyer and client are men. This pair is referred to as Team B. As the foregoing explanation of purpose implies, this choice was not made to test hypotheses with respect to male and female interactive styles. It was made because prior research, and life

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119 This analysis relies upon the Oxford Concordance Program (OCP) to provide word counts, tabulations, and contextualized listings of the occurrences of chosen words in the subject texts.
experience, suggested (but did not promise) that selection of male and female pairs would maximize the odds that the analysis would provide opportunities to compare interactive patterns and styles. The tapes were chosen at random from among competently completed single-sex pair interviews recorded in 1989. As it happened, each of the chosen interviews was unusually well-prepared and executed.

C. The Analysis

1. The Opening Narrative—Setting an Interactive Tone

Each of the interviews has an opening segment in which introductions are made and rules of play are established. Each interview then proceeds to the lawyer's invitation of a first, free-form telling of the client's trouble. This first telling is referred to as the opening narrative.

In Team A, the opening narrative begins with a brief, characterizing orientation:

Okay. Uh, basically, I'm having a little bit of an agitation, um, regarding—well, it has to do with my children.

It proceeds to a story, marked by predominant use of the past tense, that sets out an imperfect, but settled state:

Um, just briefly, I'll tell you that, um, I'm pretty recently divorced, and I just moved to this area about a year ago. And I have a new job, and I'm not home a lot. And, um, I was able, fortunately, to find a wonderful babysitter for my children. Um, because I didn't want them to stay in after-school programs. Um, but there was also a problem regarding my children's, uh, social abilities. That's the only way I can describe it. I think it was hard for them to move in the middle of the year. And, um so I really wasn't satisfied alone with the idea of having them have a babysitter so that they could be at home. So I also felt that I would think of a way to try and make their social lives a little better. And while they were away visiting their father over the summer I purchased a trampoline and installed it in my back yard.

The trouble, or disequilibrium, follows:

Um, now the problem, briefly, which I—I can get into afterwards, is that, um, I'm worried about the liability of the babysitter, um, because

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120 Early results of more extensive analyses of interview tapes suggest that the typical interview can be divided into five functional segments: introductions and parameter setting; solicited opening (free form) narrative; elaborative dialogue; problem defining and synthesis; and session coda. The interviews under study here were segmented accordingly to illuminate relationships between function and interactive patterns.


122 The process of moving from a state of open talk into a narrative and out again by manipulation of tense is described in Labov & Waletzky, supra note 59, at 438-39.

123 Transcript A, supra note 121, at 2-3.
she's there supervising, um, kids who use the trampoline. And she has told me that she's going to quit if I don't find some kind of solution.\textsuperscript{124}

And finally there is a coda, characterizing the client's feeling about the trouble and emphasizing the need for a solution:

Um, and I really, above all, do not want to lose this babysitter. Because I feel that she's really good for my children. And I work really hard. And I'm never home. And, you know, it's really important to me.\textsuperscript{125}

A long pause follows, during which it seems that the client has yielded her turn and expects a response.

The opening narrative of the client in Team B unfolds differently. It begins with an announcement that there is a discreet problem:

C: Okay. Um, okay, basically I have this one problem.
A: Okay.\textsuperscript{126}

As in the case of the Team A client, the first specific, orienting reference is to the children:

And it is that, um I have—I have two children, okay? I have, um, a—a girl who's twelve and, uh, and a boy who's nine.\textsuperscript{127}

At this point, the attorney interjects with a series of questions:

A: What's the girl's name?
C: Uh, Susan.
A: And the boy's name?
C: And the little boy is Danny.
A: I'm sorry?
C: Danny.
A: Danny.\textsuperscript{128}

The purpose of this interruption is ambiguous. An inquiry about the names of the client's children could be taken as a sign of interest in the children or as a sign that the attorney felt a need to record the names of all parties importantly involved in the matter. Whatever its purpose, the interruption serves to derail the orientation. The client moves to what happened, filling in "why's" only as they are necessary to make the "what-happened" and the resulting trouble comprehensible:

And, um, okay, basically what, uh, what happened is this. Um, I got my kids, um, trampoline.\textsuperscript{129}

Instead of an orienting description of the client's trouble, the client offers

\textsuperscript{124} Id. at 3-4.
\textsuperscript{125} Id. at 4.
\textsuperscript{126} Transcript from Interview of Team B, at 1 (1989) [hereinafter Transcript B] (on file at New York University Law Review).
\textsuperscript{127} Id. at 2.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 2.
a factual description. Early interruptions for factual details recur.\textsuperscript{130} As a result, the interview takes on characteristics of what Goffman refers to as a “state of inquiry,”\textsuperscript{131} directed by the professional, rather than a mutually directed “state of talk.”\textsuperscript{132} The client does not reach anything that can be called a coda until page 40, at which we find his first request. It begins with “and that’s why,” a classic transition out of a tale and a natural introduction to evaluative commentary.\textsuperscript{133} Yet this coda contains little evaluation or commentary:

C: And that’s why I came over just to see if, you know, if you could sort of like help me to find a solution—
A: Mm-hmm.
C: —That, you know, that, um, that is not too much of a hassle for me.\textsuperscript{134}

In the orientation of each client, there is evidence of breadth, and of ambivalence, in the client’s thinking about the lawyer’s role. Each introduces the problem as having to do with the client’s child. Neither says—and no client in his or her role has ever said: “I want to know whether a household child care worker might be liable for injuries suffered on a backyard trampoline on the employer’s premises.” It is not shocking to hear an opening such as this one, taken from a tape of a simulation recorded one year after those under study:

I need an attorney to assist with some legal matters. Hopefully, it will have a positive impact on my homelife, my kids and my job. I just need an attorney to help me put things back together.\textsuperscript{135}

When the members of Team A talked, a range of concerns associated with the legal “core” of the problem arose promptly and without interruption, and the coda reflected the client’s desire for a full solution. When the members of Team B talked, the attorney’s early use of a question and answer format led discussion away from a free-ranging intro-

\textsuperscript{130} The attorney inquires about the names of the children, id. at 2; the hours the children are with the sitter, id. at 4; and the details of the trampoline accident, id. at 10-16.

\textsuperscript{131} E. Goffman, supra note 89, at 143.

\textsuperscript{132} Id. at 142-43. Goffman illustrates the “state of inquiry” by reference to a study of words exchanged between a pediatrician and the mother of a patient:

[S]ocial and professional status allow [the doctor] to be very businesslike; he is running through the phases of an examination, or checklist, not a conversation . . . . [T]he mother may not know with any specificity what any of the doctor’s acts are leading up to or getting at, her being “in on” the instrumentally meaningful sequence of events in no way being necessary for her contribution to it.

Id. at 142.

\textsuperscript{133} Use of the word “that,” as in “And that is why we say that curiosity killed the cat” represents a manipulation of tense as transition out of the narrative. “[I]t has the effect of standing at the present moment of time, and pointing to the end of the narrative, identifying it as a remote point in the past.” Labov & Waletzky, supra note 59, at 439.

\textsuperscript{134} See Transcript B, supra note 126, at 40.

\textsuperscript{135} Author’s notes, Lawyering, Exercise 3, 1991 (on file with author).
duction of the problem and its context. This format permitted the attorney to steer conversation according to his sense of relevance. Analysis of the opening narrative yields, then, an impression of contrasting interview styles, one less directive and more open to exploration of a range of possibly relevant concerns, the other more directive and more controlled by the attorney’s early judgments about what was and was not relevant. Each attorney immediately assumed a dominant role in that he or she set the rules by which the interview would proceed. But the approach of the Team A attorney during the invited opening narrative is more contextual and exploratory, reminiscent of earlier analytic descriptions of women’s discourse, while the style of the Team B attorney, characterized by more rapid intervention and focus, is reminiscent of that associated with men’s discourse. Although both attorneys have established a posture of dominance, the style of the first leaves more room for expression of the perspectives and concerns of the client. But the analysis yields no more than an impression. The differences in the opening phases of the interviews are not dramatic, and these small segments of the interviewees are not determinative. The differences do provide, however, a backdrop against which additional data can be examined.

2. Uses of the “Feminine” and “Masculine” Voice

a. Dominating Talk: Topic Control, Interruptions, and Loquaciousness. Patterns of dominance in an intake interview can be imagined at two poles. One might focus on the facts that the exchange occurs on the attorney’s turf; that the attorney knows, and the client does not know, the procedures by which the attorney operates; and that the attorney knows, and the client does not know, what rules of law constrain formulation of a legal response to the client’s problem. With this focus, one would expect the attorney to control the flow of talk. On the other hand, one might focus on the facts that the client is the party to be served; that the client knows, and the lawyer does not know, the facts of the client’s situation; and that the client knows, and the lawyer does not know, what assistance is desired. With this focus, one would expect the client to control the flow of talk. Previous studies of the relationships between members of the professions and their clients suggest that the first model more accurately describes typical patterns of dominance in profes-

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136 Judgments of relevance are crucial to formation of legal conceptualizations that incorporate or exclude perspectives and concerns. See text accompanying notes 37-47 supra.

137 See text accompanying notes 93-94 supra.

138 See text accompanying notes 91-92 supra.
sional-client interactions.\textsuperscript{139}

Patterns of topic control in the interview transcripts are consistent with this suggestion. As the following chart indicates,\textsuperscript{140} the attorneys initiated new topics more frequently than did the clients. Once a topic was on the floor, conversational moves that focused discussion on a particular facet of the issue always were made by the attorneys. The attorneys also were far more likely to initiate returns to topics of earlier discussion. Only in expansion of topics did clients take more frequent initiative.

Despite the consistent patterns of attorney dominance, the Team A and Team B interviews were markedly different with respect to topic control. The client in Team A had six new topic initiations to the Team B client's one. The Team B client acted only once to expand a topic; the Team A client did so three times. Overall, the Team A client was more than twice as active in terms of topic control. An additional difference between the attorneys bears on the hypothesis that the conversation of Team A was more ranging: the Team A attorney expanded topics on two occasions, whereas the Team B attorney never did.\textsuperscript{141}

The patterns of interruption in the two attorney-client pairs also are different. The Team A attorney did not interrupt the client at all, but was interrupted several times, both by brief responses and by longer, floor-seizing initiatives; the members of Team B interrupted each other frequently and seized the floor by interruption with nearly equal

\textsuperscript{139} See R. Merton, Social Research and the Practicing Professions 115-16 (1982); H. Stein, American Medicine as Culture (1990).

\textsuperscript{140} See note 141 infra.

\textsuperscript{141} Topic initiations were divided into four categories: new subjects; expansions of the pending topic; conversational shifts that served to focus upon an aspect of the pending topic; and returns to topics previously discussed.

<table>
<thead>
<tr>
<th>Team B</th>
<th>attorney</th>
<th>client</th>
</tr>
</thead>
<tbody>
<tr>
<td>new subjects</td>
<td>14</td>
<td>1</td>
</tr>
<tr>
<td>expansions</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>focusing shifts</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>returns</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>totals</td>
<td>24</td>
<td>4</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Team A</th>
<th>attorney</th>
<th>client</th>
</tr>
</thead>
<tbody>
<tr>
<td>new subjects</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td>expansions</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>focusing shifts</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>returns</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>totals</td>
<td>21</td>
<td>9</td>
</tr>
</tbody>
</table>
frequency.\footnote{142}

A straightforward viewing of the two tapes does not leave an observer with the impression that either attorney is overbearing or passive. Each attorney seems concerned and competent, and each client seems appropriately comfortable. The analyses of interruptions and topic management reveal, however, that the Team B attorney controls more closely, and the Team A attorney leaves more open, the range of topics and the flow of talk. If we imagine a state of inquiry and a state of open talk as two poles,\footnote{143} the Team B interview, measured by initiatives to control talk and topic, reinforces the impression left by the interrupted orientation in that it is more directed by the attorney—more like an inquiry—than the Team A interview.

Loquaciousness was analyzed by utilizing the Oxford Concordance Program to extract word counts and word frequencies, segregated by speaker and functional segment. Dominance in the form of loquaciousness is not apparent in the overall totals for either interview. In each, the client holds the floor approximately two-thirds of the time.\footnote{144} Client dominance is pronounced in each case as a consequence of the length of each client’s opening narrative. In the other major interview segments,\footnote{145} the lawyers were often dominant, and in each of these segments, the Team B lawyer was responsible for a substantially higher proportion of

\begin{tabular}{|c|c|}
\hline
\textbf{Team A:} & \\
\textbf{attorney:} & minimal utterance interruptions - 0 \\
 & nonminimal utterance interruptions - 0 \\
\textbf{client:} & minimal utterance interruptions - 9 \\
 & nonminimal utterance interruptions - 5 \\
\hline
\textbf{Team B:} & \\
\textbf{attorney:} & minimal utterance interruptions - 23 \\
 & nonminimal utterance interruptions - 16 \\
\textbf{client:} & minimal utterance interruptions - 49 \\
 & nonminimal utterance interruptions - 13 \\
\hline
\end{tabular}

Overlaps at transition points were roughly equal for attorneys and clients, but occurred much more frequently in the Team B interview (53 times, as opposed to 13 in the Team A session).\footnote{143} See notes 131–32 and accompanying text supra.

The Team B client speaks 6623.4 words of each 10,000 in his interview, while the Team A client speaks 6752.6 words of each 10,000 spoken in hers.\footnote{145} See note 120 supra.
talk than was the Team A lawyer. In introductions and parameter setting, the Team B lawyer spoke 92% of the time, the Team A lawyer, 85.4%. In elaborative dialogue, the Team B lawyer spoke 49.6% of the time, the Team A lawyer, 14.4%. In problem defining and synthesis, the Team B lawyer spoke 73.9% of the time, the Team A lawyer, 52.8%. In the coda, the Team B lawyer spoke 73.9% of the time, the Team A lawyer, 52.8%. Indeed, the pattern of relatively greater Team B attorney participation by segment held even in the solicited free form narrative, during which each client spoke at sufficient length to assure overall dominance in terms of quantity of talk. In that segment, the Team B attorney spoke 4.7% of the time; the Team A attorney did not speak.146

b. Signs of Uncertainty or Tentativeness. The two interactions under study involved “clients” who had been given detailed descriptions of the problem they were to present. The materials from which they prepared for the interview were designed to anticipate, and provide answers for, any significant question that might arise. The “lawyers,” on the other hand, had no advance knowledge of the problem or the surrounding facts and only the most general knowledge of applicable law. Nonetheless, the pattern of linguistic signs of tentativeness or uncertainty is consistent with an expectation of dominance based upon professional role. Uncertainty signs are significantly higher for clients in both pairs, and highest for the Team B client.

In order to conduct an analysis of expressions of uncertainty, it was necessary to compile a catalogue of conversational makers of tentativeness. Literature concerning the tentative, feminine, or powerless speaking style has searched for expressions and linguistic forms hypothesized or established in prior studies as characteristic.147 From studies of tentativeness, a list was developed of more than one hundred relatively unambiguous expressions of uncertainty. These expressions fall into five categories frequently recognized in prior analyses: hesitation signs (including filled pauses and false starts); intensifiers that add relatively little to the meaning of an utterance; tag questions; hedges; and mental verbs.

146 The differential between the proportions of Team B lawyer and Team A lawyer talk by segment and the overall proportions is accounted for by the fact that the Team B client’s opening narrative was more than four times as long (1283 words) as the Team A client’s opening narrative (276 words).

147 Works consulted in this process included J. Coates, Women, Men and Language: A Sociolinguistic Account of Sex Differences in Language (1986); B. Eakins & G. Eakins, Sex Differences in Human Communication (1978); D. Graddol & J. Swann, supra note 73; R. Lakoff, supra note 67; B. Priesler, supra note 72; Conley, O’Barr & Lind, supra note 96; Edelsky, Acquisition of an Aspect of Communicative Competence: Learning What It Means to Talk Like a Lady, in Child Discourse 225 (S. Ervin-Tripp & C. Mitchell-Kernan eds. 1977).
The definition of each category was refined, and computer-generated compilations of words appearing in the two interviews were reviewed to assure that each word fitting a category definition and appearing in the transcript appeared on the list of uncertainty signs. The Oxford Concordance Program was used to extract from the transcripts each use of a listed uncertainty sign and its context. A contextualized print-out was used to exclude uses of listed words that did not, in context, signify uncertainty or tentativeness. The results follow.

Hesitation signs occurred in the Team B transcript at a rate of 176.2 per 10,000 words for the attorney and at a rate of 836.6 per 10,000 words for the client. In the Team A transcript, they occurred at a rate of 106.5 per 10,000 words for the attorney and at a rate of 359.6 per 10,000 words for the client. By this measure, then, client status is associated in each interview with greater tentativeness, and tentativeness is most frequently exhibited by the client in Team B. The Team B lawyer used hesitation signs with a greater frequency than did the Team A lawyer, but the lawyer-client differential was far greater in Team B.

Intensifiers were used much more frequently by clients than by attorneys. Like hesitation signs, they were used more frequently by the

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148 The categories were defined as follows:

**Hesitations:** Hesitation signs include false starts and filled pauses. A false start is a word or phrase that the speaker does not complete, either because she discontinues speaking, without having been interrupted, or because she switches to a new topic (other than an aside) or to a reformulation of the discontinued utterance (for example, “I want—I just want to know”). A filled pause is a hesitation, between speaker turns, or within a turn, during which the speaker makes an utterance that is not subject-specific and is not responsive to or encouraging of another's speech. Filled pauses are sometimes words (you know, well, like) and sometimes not (ur, uhm, uh).

**Intensifiers:** Words that intensify an utterance but add little or nothing beyond intensification to the meaning of the utterance and do not express certainty (for example, “That person is really tall”).

**Tag questions:** Questions appended to an assertion and seeking the listener's assent (for example, “You'll help me, won't you?”).

**Hedges:** Modifiers that make an assertion less certain or precise (for example, “I generally like ice cream”).

**Mental verbs:** Verbs used, in any tense, in positive or negative form, to refer to the speaker's state of mind with respect to an assertion or proposition, except where the referenced state of mind is certainty (for example, “I think the game was fixed.”).

149 More specifically, a program operator generated contextualized lists of each selected uncertainty sign. A second researcher reviewed the contextualized lists for words that did not, in context and in terms of the definitions set forth in note 148 supra, manifest uncertainty. Exclusions were checked by the author, and disagreements were resolved by consensus. The program operator tabulated corrected lists to determine frequencies by functional segment. These frequencies were expressed as raw numbers, as weighted percentages of 10,000 words, as percentages of the occurrence of the word within the relevant segment, and as percentages of the incidence of the indicator in the entire transcript.

150 The higher frequency of hesitation signs exhibited by the male client may be associated with the fact that although his command of English was excellent, English is not his first language.
Team B client than by the Team A client. The Team A and Team B attorneys, however, used intensifiers with remarkably similar frequency. In the Team B transcript, intensifiers were used by the attorney at a rate of 23.1 per 10,000 words and by the client at a rate of 146 per 10,000 words. The Team A attorney used intensifiers at a rate of 23.7 per 10,000 words and the client at a rate of 97 per 10,000 words. While the Team B client used intensifiers more than six times as frequently as the Team B attorney, the Team A client used them only four times as frequently as the attorney.

Tag questions did not occur in either transcript.

The pattern of greater use of uncertainty signs on the part of clients and of greatest and most asymmetrical use by the Team B client continued when hedges were considered. The Team B attorney used hedges 19.6 times per 10,000 words while the Team B client used them 106.8 times per 10,000 words. Comparable figures for Team A were 16.6 and 71.0.

Interestingly, the speakers' use of mental verbs fell into a different pattern. Although clients used more mental verbs than did lawyers, the Team A client exhibited the highest frequency of usage. Moreover, only in the category of mental verbs was the Team A attorney substantially ahead of the Team B attorney in the use of tentativeness markers. Despite the fact that the Team A attorney used mental verbs at a higher rate than did the Team B attorney, the asymmetry between lawyer and client was decidedly greater in Team A. The Team B attorney used 10.7 mental verbs per 10,000 words; his client used 16. The Team A attorney used 16.6 mental verbs per 10,000 words; her client used 66.2.

The disparity between the finding with respect to mental verbs and those with respect to other signs of tentativeness suggests that the use of mental verbs signifies something more, or different, than tentativeness. In another study of simulated interactions within the Lawyering Program, we found similar differences between uses of mental verbs and uses of other signs of uncertainty.151 In that study of an episode of informal advocacy, we found that mental verbs were used to manipulate perspective: an advocate who spoke to a decisionmaker in otherwise deferential terms showed a marked avoidance of mental verbs when he referred to facts, extralegal value judgments, and rules upon which he sought to rely.152 On the other hand, the decisionmaker seemed to use mental verbs to refer to matters that were negotiable, while using more positive forms of assertion with respect to fixed positions.153 Matters as to which

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152 Id.

153 Id.
the parties could not yield were expressed from the perspective of an omniscient narrator: "It is" or "She did." More open matters were expressed from a personal perspective, through mental verbs: "I think" or "It seems."

In the case of the interviews under study here, the more frequent use of mental verbs by the Team A client may be a product of the interactive pattern observed in the opening narrative. If the Team B client was more focused on facts and the Team A client was freer to present her perspective and explore context, greater use of mental verbs by the Team A client is understandable. In a state of open talk, as opposed to a state of inquiry, the currency of the realm includes ideas, thought experiments, and suppositions as well as "facts." It is legitimate to say "I feel that [the sitter] is really good for my children." In a state of talk, only facts are fully legitimate: "I have this one problem"; "I got my kids, um, a trampoline"; "I came over just to see if, you know, if you could sort of like help me to find a solution." The fact that the Team A lawyer used mental verbs more frequently than the Team B lawyer may have a similar explanation. In a state of open talk each party may be freer in the use of mental verbs than she would be in a state of inquiry. The analysis of information requests, reported below, provides further evidence that Team A dealt more extensively in opinions and feelings while Team B was focused more closely on facts.

3. Patterns of Requests

The speech act of requesting was analyzed in three categories: requests addressed to managing the flow of talk; requests for information; and requests for action. Requests designed simply to structure the flow of talk occurred in an interesting pattern. The first of these requests, the invitations of the opening narratives, were highly mitigated, making for decidedly polite exchanges during which the sense of hierarchy was minimized. The Team B attorney's invitation was:

I think, uh, the best place to begin would be with what it is that brings you in here.\textsuperscript{154}

The Team A attorney's invitation was:

So why don't we begin with you just telling me what caused you to contact us.\textsuperscript{155}

The Team B attorney characterized the beginning as the "what" that brought the client to seek help, while the Team A attorney proposed to begin with the client's telling. This subtle difference is interesting in that the Team A attorney describes her client in the active voice, foreshad-

\textsuperscript{154} Transcript B, supra note 126, at 1.

\textsuperscript{155} Transcript A, supra note 121, at 1.
owing the client’s more active role in the interview. It may also be significant that the Team B attorney begins with his thoughts about where to begin, whereas the Team A attorney begins with a question (albeit rhetorical) whether her proposed beginning point is appropriate. Nevertheless, these conversation starters are more similar than different.

After these similar beginnings, the attorneys’ approaches to structuring talk diverged considerably. The Team A attorney made no further requests explicitly addressed to controlling the flow of talk, whereas the Team B attorney gave seven, each less mitigated than the first: “Please continue”;157 “I just want to back up a little bit.”158 “Let’s hear them [your suggestions]”;159 “Well, let me ask you some specific questions about that”;160 “I’m sorry, go ahead”;161 “I just want to move along a bit”;162 “Let me just ask you a couple of other ideas.”163 It is possible to interpret some of these requests as courtesies designed to orient the client by explaining the attorney’s line of questioning. It is also possible to see their number and tone as enhancing the comparative sense of attorney domination in the Team B interview pair. This comparative analysis should not obscure, however, the fact of attorney dominance in both interactions; in neither interview did the client make a request designed to affect the flow of talk.

Each attorney also made requests for information, but as in the case of requests directing the flow of talk, the number and kind of requests differed dramatically in the two interviews. The Team A attorney made nineteen information requests, seven factual and twelve addressed to the opinions, feelings, and preferences of the client.164 The Team B attorney made forty-two information requests, all but eight of them factual. This pattern is consistent with the characterizations—suggested by analysis of the opening narratives and the patterns of interruptions, topic initiatives, talkativeness, and uncertainty signs—of the Team B interview as more rapidly and consistently focused by the attorney and the Team A interview as more probing of the client’s conceptualizations. The pattern also raises the question whether the broader focus and greater deference of

156 This difference suggests that the Team A attorney’s request is more mitigated than the Team B attorney’s request. See W. Labov & D. Fanshel, supra note 65, at 85.
157 Transcript B, supra note 126, at 4.
158 Id. at 10.
159 Id. at 27.
160 Id. at 36.
161 Id.
162 Id. at 49.
163 Id. at 58.
164 Two additional requests for information are excluded from this count because they were functionally equivalent to utterances classified in the Team B interview as requests for authorization to proceed or approval of proposed methods of proceeding. The requests for authorization or approval were likewise excluded from the analysis of requests for action.
the Team A attorney impeded the gathering of pertinent information.

The Team B client made no requests for information. The Team A client made three such requests—two for clarification of statements made by the attorney and one for the attorney's (nonlegal) opinion. Here, as in other contexts, analysis of the clients' actions indicates attorney dominance that is significant in both interviews, but more pronounced in the Team B interview.

The remaining requests are substantive. They are the speech acts that make it possible for the interaction to bear results. These requests are calls for action beyond the talk of the interview. Their impact upon the conversational dynamic is best seen when the speakers' words are charted to reveal their actions. There follows a charting, patterned after the methodology of Labov and Fanshel, of the Team A client's sixth request—a request for legal advice:

CLIENT SAYS:

If she heard it, you know, backed up with, "Well, you know, my lawyer found a bunch of cases. And the statute says this and that." I mean, that—that's your department, granted. But, you know, I—I do feel somewhat confident that if she heard something like that or something else, if you can think of something else as a solution, that would possibly entice her to stay and make her feel a little bit more comfortable.

MEANING:

For the sixth time, in order to make the sitter stay, I need you to provide certification of means to protect her against liability. You are (or should be) able and obliged to meet this need. I am entitled to ask this of you.

THEREBY

Making an aggravated (repeated) request.

Interpretation of this request relies upon the Labov and Fanshel assumption that reference to the speaker's need or desire for an outcome may be understood implicitly to call forth additional preconditions of valid requesting: the listener's capacity to effect the outcome; the speaker's entitlement to make the request; and the listener's obligation to comply.

165 See note 167 infra.
166 See W. Labov & D. Fanshel, supra note 65, at 117-20.
167 Because of the nature of the attorney-client interview, requests from the client for legal advice were classified not as simple requests for information, but as substantive requests.
169 See text accompanying note 116 supra.
170 This request also constitutes an aggravated (repeated) challenge of A's competence as an attorney. See note 179 infra.
171 This observation is a corollary of the more general proposition that reference to one precondition constitutes a request when the conversational parties know that the remaining preconditions exist. See W. Labov & D. Fanshel, supra note 65, at 82.
Substantive requests occur in interesting patterns in the two interviews, suggesting sharp differences in the dynamics of the interactions. In the Team B conversation, the attorney and client each make two substantive requests. In the Team A conversation, the client makes ten substantive requests; the attorney, two. Whether because of the tone set by the attorney or because of the client's greater assertiveness, the client in the Team A pair was able, not only to take a measure of control in the flow of talk, but also to make demands—to assert her expectations as a client.

The Team B client made only one request for legal advice.\(^\text{172}\) It did not occur until the middle of the transcript. It was direct in Labov and Fanshel's terms,\(^\text{173}\) but heavily mitigated:

I mean, and that's why I came over just to see if, you know, if you could sort of like help me to find a solution.\(^\text{174}\)

The client mitigates his request by embedding it in a story ("that's why I came over"); by wondering and watching rather than asking ("just to see"); by referring to capacity rather than to willingness ("if you could"); by retaining part of the burden of meeting the request ("help me to find a solution"); and by the use of uncertainty signs ("I mean," "just," "you know," "sort of," "like").

In contrast, the Team A client began to request legal advice early in the interview and did so repeatedly. Her first such request was indirect (a request by reference to one of the preconditions for a valid request—need for action—when the other preconditions were operative), but it was forceful:

The problem is can those rules be enforced, and also is there anything I can do to protect the babysitter—and myself, but even more so the babysitter—from possible liability if these rules are broken or even if they're not.\(^\text{175}\)

Forceful requests continued:

Well, I've had a couple of suggestions for her, and I really want to bounce them off of you. I'm kind of hoping that you'll tell me that they're okay, in fact.\(^\text{176}\)

And I was wondering if—if you felt maybe that was a—a decent solution. My babysitter wasn't really too inspired by any of them. But I think that if I had the sanction of an attorney, she might, you know, be more interested in—in accepting that.\(^\text{177}\)

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\(^{172}\) His other request was for a fee estimate. See Transcript B, supra note 126, at 74.

\(^{173}\) See notes 111-12 and accompanying text supra.

\(^{174}\) Transcript B, supra note 126, at 40.

\(^{175}\) Transcript A, supra note 121, at 12.

\(^{176}\) Id. at 17.

\(^{177}\) Id. at 19.
Basically, you know, I'm under a little pressure. You can see I have a little anxiety about this. Because, uh, she gave me kind of a time limit. Not a specific one, but said, you know, I need to have a solution pretty soon. So it's really in my hands. And yours.\textsuperscript{178}

The first eight of the Team A client's nine requests for legal advice went without immediate response, either in the form of an agreement to comply or a refusal and explanation. Accepting the Labov and Fanshel description of conventions with respect to polite requesting, the second through eighth client requests can be read as challenges, and the attorney's failures to respond can be read as impolite.\textsuperscript{179} The interpretation of impoliteness flows from acceptance of the convention that requests may not be ignored or refused with reasonable politeness unless an accounting is given for the refusal.\textsuperscript{180}

In the face of her client's repeated requests, the Team A attorney gave no accounting, but consistently offered probes, usually in the form of apparently deliberate expressions of uncertainty:

- I'm not certain what you mean when you say .... \textsuperscript{181}
- I'm not sure that I understand what you're telling me about this sort of interaction. \textsuperscript{182}
- I'm not sure exactly how you put it. \textsuperscript{183}
- I may be misinterpreting it. But it does seem to be that, although the trampoline is very important to you, the basic reason for having the trampoline could be fulfilled in a lot of ways. \textsuperscript{184}

The Team A attorney continued to probe in this way, showing no sign of concern that her competence was challenged by the client's repeated requests. These probes served as requests for information and, as such, they can be interpreted as putting off the client's requests with suggestions that the solicited information was necessary to formulation of a response.\textsuperscript{185} The number of requests and the length of time during which the requests remained unanswered nevertheless created an apparent ten-

\textsuperscript{178} Id. at 21.
\textsuperscript{179} The interpretation of challenge flows from acceptance of the convention that repetition of a valid request, before the addressee has given a response, aggravates or increases the force of the request and constitutes a criticism of the addressee. "Because repeated requests are an aggravated form of criticism, challenging the other's competence quite sharply, it is a common practice for speakers to mitigate their repetitions by varying their form. Though a challenge to competence is always present when a request is repeated, the more the surface structure is varied, the less strongly is this challenge felt." W. Labov & D. Fanshel, supra note 65, at 94-95.
\textsuperscript{180} See id. at 87-88.
\textsuperscript{181} Transcript A, supra note 121, at 5.
\textsuperscript{182} Id. at 15.
\textsuperscript{183} Id. at 22.
\textsuperscript{184} Id. at 44.
\textsuperscript{185} See W. Labov & D. Fanshel, supra note 65, at 86-87.
sion in the interactive dynamic. Then, there came a turning point in the interview. In a series of exchanges, the attorney acknowledged the value of the trampoline to the client; acknowledged a readiness to seek legal solutions to the problem; asked the client whether an alternative to the trampoline might be an acceptable solution; predicted that legal solutions would be incomplete; and raised the question whether, in light of the incomplete nature of legal solutions, legal assistance was worth its cost:

A: Obviously it's important to you to have the trampoline. I mean, you've said that to me several times.
C: Yeah.
A: But if there were another—another thing that could be in your house that would attract other children and that your kids would enjoy also, would that be another possible solution?
C: Hmm. Are you saying that you think something like a jungle gym or a volleyball court or something like that might be less dangerous and might, um, possibly have my babysitter and me incur less liability? Is that what you mean?
A: I—I don't know. I mean, I'll have to do the research on this—
C: Mm-hmm.
A: —before, you know, before I can give any sort of answer about that.
C: Right.
A: But I don’t know what's out there. I don't know what, if anything, could completely protect you without having supervision. I'm not sure if supervision could, you know—
C: Mm-hmm.
A: —if—if direct supervision by a babysitter could protect you from liability.
C: Mm-hmm.
A: And if that were a—an important concern to you, then it might be more efficient for you to consider replacing the trampoline with something else than spending a lot of time and money on my legal research and the remedies that I might come up with.  

At this point, the client's requests for legal advice had been acknowledged with an implicit promise to comply. Any tension that may have been generated by the client's string of unanswered requests was relieved. The client's requests did not abate, but they became more concrete, and she began to make requests for nonlegal as well as legal advice.

The Team B attorney responded differently to requests for legal ad-

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186 This interpretation is uncertain. To the extent that the client expected or approved of the more probing and less decisive stance of the lawyer, the implication of challenge would be reduced.
vice. The first expression of the Team A attorney’s readiness to respond to the client’s request for legal advice came at page 41 of the transcript and after the eighth request. The Team B attorney first expressed readiness to provide a legal solution at approximately the same point in terms of elapsed time (at page 42 of the transcript), but his expression came before it was clear that the client had relinquished the floor after his first—and only—request for such a solution:

C: [Discussing the question whether signs and waivers would protect against liability] it’s—it’s the kind of stuff that—
A: Well, um, we can certainly provide you, um, with an answer.
C: Mm-hmm.
A: With the result of some research—
C: Mm-hmm.
A: —that we’d have to put into this.
C: Mm-hmm.
A: To see legally what sort of protection both you and the babysitter would have.
C: Okay.
A: Uh, with either [of] the measures that you’re talking about.

The Team A and Team B attorneys differed not only in their responses to substantive requests but also in the manner in which they formulated requests of their own. The Team B attorney’s two substantive requests each called for the client to consider alternatives to the trampoline. As in the case of his requests concerning the flow of talk, the Team B attorney carefully mitigated his first request for action:

But perhaps something else for you to think about—as we look into some of the legal alternatives here—might be to give some thought about some other toy or something else that might be provided.

The second substantive request was more direct:

I do recommend that you give some thought to some sort of, uh, toy or jungle gym or—or something . . . that you might be able to use either in the back yard or elsewhere in the house that could serve the same function that the trampoline serves . . . for your kids and other kids in the neighborhood.

Like the repeated requests of the Team A client, both of the Team B attorney’s requests that the client consider alternatives can be read as challenges. Requests need not be repeated to be seen as challenges. Labov and Fanshel posit the following “rule”: “If A makes a request for B to perform an action X in Role R, based on needs, abilities, obligations,

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188 The Team A transcript is 57 pages in length; the Team B transcript, 78 pages.
189 Transcript B, supra note 126, at 42-43.
190 Id. at 50-51.
191 Id. at 72.
and rights which have been valid for some time, then A is heard as challenging B's competence in role R.”\textsuperscript{192} The Team B attorney's requests that the client consider alternatives present a challenge to the extent that they carry an implication that the client, as a good parent or as a good neighbor, should have considered alternatives earlier. It may have appeared that this work should have been part of the process of deciding whether to “go legal” with the problem. On that interpretation, the requests challenge the client’s competence as client. The Team B attorney made no opportunity for conversation about alternatives; their identification and appraisal was to occur outside the lawyer's office and outside of the lawyer-client relationship. After each request that alternatives be considered, the Team B attorney proceeded without breath to another topic:

A: [P]erhaps with some thought, and look, in, uh, look in some toy catalogs or whatever.
C: Mm-hmm.
A: Might be some—some thoughts about alternatives. In the meantime, it seems to me—and, uh, please clarify . . . for me if this seems to be what we're trying to find—is a legal device that we can explain in a way that the secretary [sic] can understand clearly . . . that would also clearly to her absolve her of responsibility . . . for any accidents.\textsuperscript{193}
A: Um, and I do recommend that you give some thought to some sort of, uh, toy or jungle gym or—or something—
C: Mm-hmm.
A: —that you might be able to use either in the back yard or elsewhere in the house that could serve the same function that the trampoline serves—
C: Yeah, yeah.
A: —for your kids and other kids in the neighborhood. Um, I want to tell you, um, about our fees.\textsuperscript{194}

The Team A attorney’s request for consideration of alternatives to the trampoline came after the attorney had raised the matter by posing a “what-if” question:

[I]f there were another . . . thing that could be in your house that would attract other children and that your kids would enjoy also, would that be another possible solution?\textsuperscript{195}

It was the client who first voiced the possibility:

Hm. Are you saying that you think something like a jungle gym or a

\textsuperscript{192} W. Labov & D. Fanshel, supra note 65, at 94.
\textsuperscript{193} Transcript B, supra note 126, at 52-53.
\textsuperscript{194} Id. at 72.
\textsuperscript{195} Transcript A, supra note 121, at 46.
volleyball court or something like that might be less dangerous and
might, um, possibly have my babysitter and me incur less liability?196

When the attorney subsequently voiced the subject of alternatives, she
did so in the context of a request, but she made the exploration of "non-
legal" solutions part of the work of the lawyer-client team. The request
that the client consider alternatives to the trampoline was paired with the
attorney's promise to do her own homework and tied to a proposal that
lawyer and client meet to pool their findings:

A: [M]aybe we ought to both do a little bit of homework. And I can
go and look up these specific things that I've written down.
C: Mm-hmm.
A: And you can investigate your option. And then we can meet later
to talk about what might be a more practicable solution than what we
have right now.197

The client responded with a signal of approval ("Okay. I think that's
good.")198 and two requests: that the attorney be judicious in running up
the bill and that she share the work of devising safeguards or
alternatives.199

As a person with specialized expertise, the attorney is able to justify
a range of relationships with the client. The attorney's role might be
restricted to responding to inquiries about legal rules that bear upon the
client's problem. Alternatively, the attorney's role might be imagined
more broadly to include participation in problem formulation, problem
analysis, and the choice and implementation of solutions. By placing ex-
ploration of alternatives to the trampoline in the client's court, without
discussion, the Team B attorney made a choice to decline certain of these
possible roles.

The Team A attorney assumed a somewhat broader role. Although
she displayed some ambivalence when the client sought her more active
participation in the process of identifying or choosing among alternative
solutions,200 she facilitated thinking and talking through alternatives to
the trampoline, thereby participating in the processes of problem analysis

196 Id.
197 Id. at 51.
198 Id. at 52.
199 Id. ("[A]s I said, if you see anything in your research that you think pertains to my
situation, including your suggestions for how I might remedy it, I would definitely appreciate
hearing about it."). The ambiguity of this request is resolved by reference to a request made by
the client after the attorney's "what-if" question concerning alternatives: "perhaps the kinds
of—of research that you do will—will yield some information regarding other back yard
equipment. Um, and obviously I'd ask you to pass that along to me." Id. at 49.
200 The attorney did not respond to either of the client's requests that she assist in the
search for alternatives to the trampoline, and, despite the client's pointed requests, she avoided
explicit mention of the search for alternatives when, at the end of the session, she recited the
tasks that she had agreed to undertake. See id. at 51-54.
and identification of solutions. The breadth of the attorney’s role is related to the issue of client autonomy, but the relationship between role definition and client autonomy is ambiguous. Respect for client autonomy can lead an attorney either to avoid delving into arguably nonlegal issues or to probe those issues. This is so because client autonomy is enhanced both by the ability to avoid involving the attorney in discussion of aspects of the client’s situation and by the opportunity to entertain legal (and nonlegal) solutions that do not occur unless the context is probed fully. The lawyer who asks about a client’s landscaping or risk tolerance may be thought meddlesome, yet the lawyer who fails to explore the possibility that fencing will substantially reduce the risk of liability has constrained the client’s choices. As the lawyer chooses to expand or restrict the conversation, s/he simultaneously chooses where to draw the line between the personal and the legal and whether to conceptualize the problem as the existence of an attractive nuisance or risk management in the lawful enjoyment of property. This is to say that the implications of the stances taken by the two attorneys are murky. The contrast between their stances is clearer: with respect to the single issue that caused the lawyers to direct their clients to act, the Team A lawyer facilitated a greater degree of contextual analysis and collaborative action, while the Team B lawyer facilitated quicker resort to legal categories and clearer separation of problem-solving and expert functions.

Interpretive work with two interview transcripts has shown a strong pattern of dominance based upon role, with the attorney taking the interactive lead in each interview. Beyond that, it has suggested two methods of carrying this interactive lead. The first is a method of inquiry, in which facts are elicited by questions framed largely on the basis of the lawyer’s sense of relevance to the end of facilitating legal problem-solving. The other is a method of conversation or collaboration, in which problem context and client perspective are probed to an end of broader problem-solving. Neither of the interviews provides a pure version of either method, but the differences between the two interviews are sufficient to suggest the opposing methodological possibilities. Implications of recognizing these two possibilities, and of seeing the mechanisms by which they are chosen (or unreflectively assumed), are discussed in Part IV.

IV
THE GATEKEEPER’S OBLIGATION: CONSEQUENCES OF THE CHOICE OF INTERACTIVE STYLE

Analysis of the trampoline interviews exposed two models of lawyering that differ in subtle but important respects. Team A represents
attention to a broader range of client concerns; participation in problem-solving, broadly defined; and less certain or quick resort to conceptual frames associated with expertise. Team B represents early reliance upon the conceptual frames associated with expertise; thorough attention to facts made relevant by reference to those frames; and a relatively narrow interpretation of the expert's role in problem-solving. Each has its virtues, but here, in the pages of an issue commemorating the inclusion of the woman's voice in the lawyering process, I offer reflections that emphasize the virtues of the model that has been associated with that voice. Specifically, I argue that the Team A style of lawyer-client interaction is not only conducive of cooperative problem solving, but also conducive of representation by which the client's voice "signifies" in the conceptualization of legal issues and in the mediation of legal norms.

John Conley and William O'Barr pioneered the exploration of male and female discourse styles in conversations within the law when they identified "powerless" and "powerful" speaking styles and found that the "powerful" style was more credible to juries. The Conley and O'Barr definition of "powerless" style was consistent with what has been identified in other contexts as "feminine" style and it was found by Conley and O'Barr to be more frequently used by women. In a more recent contribution to the ethnography of lawyering, Conley and O'Barr expanded their definition of "powerful" and "powerless" styles to include the powerful speaker's focus upon rules and the powerless speaker's focus upon relationships, speculating that "the burden of stylistic powerlessness... is compounded on the discourse level by the tendency among the same groups to organize their legal arguments around concerns that the courts are likely to treat as irrelevant." They described "powerless" discourse as tentative, supplicative, and oriented to human interaction and contrasted it with "powerful" discourse that is certain, assertive, and grounded in principles. This expanded definition also is consistent with earlier descriptions of "feminine" style.

In a study of small-claims court litigants, Conley and O'Barr found "powerless" speakers ineffective in two respects. First, like the witnesses of earlier studies, these speakers lacked credibility because they

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202 See notes 101-02 and accompanying text supra.
204 See id. at 66-67.
205 See notes 102-08 and accompanying text supra.
206 J. Conley & W. O'Barr, supra note 203, at 67.
207 Id.
failed to speak in certain terms.208 Second, their plights seemed irremediable because they failed to create rule-based story lines—stories of villainous opponents who had caused injury by failing to follow the rules.209 Powerless speakers talked of “status and social relationships”210 rather than in terms of rules. They reported “the details of their social lives.”211 They seemed to believe that law can “assign rewards and punishments according to broad notions of social need and entitlement.”212 They therefore lost at lawyers’ games built around theories of prohibited harm and recovery.

The gendered dichotomy used by Conley and O’Barr has deep roots. It stems from traditional imagery of the male and the female. It recurs regularly in the history of ideas and has come to prominence most recently in Carol Gilligan’s ethical models of justice and care.213 Feminist legal scholars have been at odds as to whether this gendered dichotomy leaves women occupying higher moral ground, or simply leaves us victimized by continued subordination.214 Scholars concerned with other outsider groups must face similar questions. The question is not, of course, answered here, but the interpretative results of the study of interview dynamics do suggest that the effects of what has been referred to as a “feminine” or “powerless” style in a lawyering context are not predicted easily, nor are they uniformly negative.

The interview analyses suggest that the Team B attorney more quickly socializes the client into conceiving of a problem in terms of readily apparent legal categories. By contrast, the Team A attorney operates more consistently from an assumption of cooperation with what students of conversation describe as the maxim of relevance.215 That is, she operates with a presumption that everything the client says is relevant—that it makes sense in terms of norms that might be recognized in law, or in a more broadly conceived problem-solving context. The Team A attorney holds open the possible applicability of a variety of norms and therefore interferes less with the client’s ways of conceptualizing a prob-

208 See id. at 67.
209 See id. at 172-73.
210 Id. at 58.
211 Id.
212 Id.
213 See C. Gilligan, supra note 94, at 18.
215 See P. Grice, Studies in the Way of Words 22-40 (1989); see also S. Levinson, supra note 109, at 102-03 (describing partially unpublished work of Grice); D. Sperber & D. Wilson, Relevance: Communication and Cognition 118-23 (1986) (describing similar “principle of relevance”).
lem. These interactive differences create different possibilities for interpretation, at the brink of a legal matter, of lay discourse.

From the perspective of a Team A lawyer, the litigant whom Conley and O'Barr characterize as powerless and relational is not an ineffectual actor in the legal system, but a potential partner in an interactive process of interpreting problems and negotiating norms. When uttered by a Team A lawyer, "powerless" speech can be seen as a necessary condition for an interactive process in which facts are explored and norms are negotiated. This exploratory, negotiatory process can be illustrated in the context of the Conley and O'Barr small-claims court study.

The typical small-claims litigant is unrepresented and uneducated in the law. Like the client at an intake interview, the small-claims litigant must go through a process of interaction with a representative of the legal system—lawyer or judge—in which the story of a trouble involving the opponent can be translated into a legal claim. To recognize the lay status of the small-claims litigant is to conceive a gatekeeper's obligation. It is an obligation to hear a trouble, to understand it from the claimant's perspective, and to examine the normative presuppositions that make the trouble into a claim. In one of the Conley and O'Barr cases, a plaintiff describes an accident in indirect style and without explicit attribution of blame or articulation of a rule:

[We were turning into a parking lot and] first thing I know of something hit me behind, the arm, pushed my arm up into the mirror, my arm come [sic] back into the car, and then maybe I looked back to see what was going on and here's this lady on a moped all over us.

As Conley and O'Barr point out, in ordinary conversation, this kind of statement is an invitation to "an interactive search for responsibility or blame." "[A] speaker reporting that his car blew up is asked what he did to it. . . . [A] woman complaining that her face hurts is asked what another person did to cause her face to hurt." The moped story is well-crafted for ordinary discourse. The listener vicariously experiences the teller's surprise upon finding a moped on his hood and is implicitly invited to join in solving the mystery of what happened and figuring out who is to blame. Every human trouble brought to the gate of the legal system presents a similar invitation. It is an invitation to search out meaning and to juxtapose norms in a process that can be appropriately

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216 For a thoughtful description of the process by which a lay person decides that a trouble is of the sort appropriately brought to court, see S. Merry, Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans 37-63 (1989).

217 J. Conley & W. O'Barr, supra note 203, at 43.

218 Id. at 49.

219 Id. (citing examples from Pomerantz, Attributions of Responsibility: Blamings, 12 Sociology 115, 115-21 (1978)).
halting, appropriately deferential, and appropriately uncertain.

A landlord-tenant dispute from the Conley and O'Barr small-claims study provides a context for extending the analysis of the gatekeeper's obligation to encompass the canvassing, comparison, interpretation, and modulation of legal rules. Broom, the landlord, is characterized as rule-oriented (and effective) for his capacity to structure a story of entitlement based on rules found in the terms of a written lease, to back rent, late charges, and the cost of removing certain improvements.\textsuperscript{220} Grumman, the tenant, is characterized as relationship-oriented (and ineffective):

Instead of being oriented to the specifics of his written lease with the plaintiff, he presents a case that focuses on his own personal problems and the consequent reasons why he did not pay the rent that the plaintiff alleges is owed. The details of the lease are of relatively less concern to Grumman than are the details of his relations with Broom and how these relations bear on the manner in which he behaved in this dispute.\textsuperscript{221}

The judgment that Grumman's story is relational rather than rule-oriented contains a buried judgment of legal relevance. Grumman tells of installing a furnace in the leased space, at great expense to himself. He tells of repairing a leaking roof, repairing a leaking toilet, and hauling away piles of trash before moving in. He tells of having leased the space from a tenant of Broom and of being "forced," after cleaning and repairing the property, to enter a new lease with the plaintiff. He tells of a settlement negotiated by lawyers representing both parties in which Broom agreed that he was not entitled to the relief he seeks in small-claims court.\textsuperscript{222} Decisions about the relevance of these facts presume the existence or nonexistence of applicable norms. All of Grumman's facts are arguably irrelevant in a story shaped by the terms of the purportedly arm's-length, written lease offered by Broom. But, as Conley and O'Barr tell us, many of Grumman's facts are relevant in a story of unjust enrichment.\textsuperscript{223} They also are relevant in a story of an implied warranty of habitability; or in a story of reliance; or fraud; or duress; or in a story structured around the terms of the first lease. Grumman's story can be fairly characterized as relational, rather than rule-oriented, only in the style of its telling. For it is tellable, with all of its details, in the context of a differently conceived rule-based tale.

Indeed, it is ambiguous whether Grumman's telling represents a story based on relations rather than rules, or a story based upon the embedded structure of a rule different than that posited by the landlord.

\textsuperscript{220} Id. at 70.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 71-74.
\textsuperscript{223} See id. at 78.
Grumman's language is tentative and indirect, but his presumption of entitlement implies presuppositions about norms. The challenge of genuine representation is to explore those presuppositions and make them—and the story in which they are embedded—a considered part of legal discourse. Discourse that has been labeled "powerless," "relational," and "feminine" serves well in the dialogues that make genuine representation possible by making room for conversations in which both parties can remain tentative and exploratory as relevance is considered against a variety of norms.

The argument for this kind of open and explanatory lawyering discourse is meaningful with respect to most lawyer-client relationships, but has special meaning for clients holding the outsider perspectives that motivate conceptual and contextual criticism. Conceptual critics exploded the illusion of inevitability in legal process. It is against the stabilizing sense of inevitability and power that outsider discourse struggles. The "feminine" voice can reflect a negotiatory stance from which meaning and result remain tentative while alternative norms are considered and new perspectives are explored. When the "feminine" voice is used in this way, expressing openness and creativity, rather than simple deference, it facilitates lawyering that is predominantly representational, rather than predominantly socializing. And it resonates with scholarship that "goes meta" to shake the sense of inevitability of legal outcomes and interpretations.