

# Characterization and Legal Discourse

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It's tough being married to a lawyer. Rhetorical skills, refined in law school and practiced daily, stand ready for service in marital discourse. One technique my lawyer-husband has used stands out as particularly effective. It emerged early in our marriage and to this day remains a potent instrument of "negotiation" through the various disagreements that encumber a modern family.

I call the technique "characterizing," but other labels are appropriate as well. "Spinning" and "frame-shifting"<sup>1</sup> also come close to capturing the wordplay: reframing a dispute on terms favorable to the speaker.<sup>2</sup> Here's an example:

*Wife (newly married):* We've been living together for several months and I've restrained myself from nagging about housework. But I can't take it any longer. I am doing the shopping, cooking, dishwashing, tidying, scrubbing, bill paying, and most of the laundry. You're not doing your share.

*Husband:* This is a marriage, not a checklist. You can't "keep score" in a mature relationship. You must have faith that everyone is doing their best. You will undermine us if you insist on running a tally.

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I, of course, owe special thanks to my husband, Richard Barrett, for his creative arguments that inspired this essay and his gracious permission to use them as the centerpiece of my study. For helpful comments, ideas, and encouragement, I thank Scott Burris, Finbarr McCarthy, Richard Greenstein, Muriel Morisey Spence, Theresa Glennon, Nancy Knauer, Katherine Hatton, Edward Ohlbaum, Jane Baron, and Jeffrey Dunoff. Carolyn Parisot and Keri Kellerman provided excellent research assistance. Financial support from Temple Law School also made this article possible.

<sup>1</sup> The term is from Jennifer Jaff, *Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning*, 36 J. Legal Educ. 249 (1986).

<sup>2</sup> More technically, some scholars may call this method a subset of "legal semiotics." See, e.g., Duncan Kennedy, *A Semiotics of Legal Argument*, in 3 *Law & Semiotics* 167, ed. Roberta Kevelson (New York, 1989), reprinted in 42 *Syracuse L. Rev.* 75 (1991) [Subsequent page references are to *Law & Semiotics*]; Jeremy Paul, *The Politics of Legal Semiotics*, 69 *Tex. L. Rev.* 1779 (1991).

Perhaps the most skillful part of my husband's rejoinder here is his success in dodging my formulation of our housekeeping dilemma. Had he not done so, he surely would have lost the argument. If one were to look at who in the household was doing the shopping, cooking, dishwashing, tidying, scrubbing, bill paying, and most of the laundry, the facts were simply not on his side. By recharacterizing my complaint in terms of the gestalt of mature relationships, he avoided admitting fault and kept open the possibility of resolving the dispute on favorable terms.<sup>3</sup>

My husband's characterization technique holds many lessons for legal education. Indeed, the device is indispensable to the job of lawyering. Although many rhetorical devices are useful and common in legal discourse,<sup>4</sup> this one pops up everywhere—in and out of formal legal venues.<sup>5</sup> Lawyers characterize in court papers, oral argument, negotiations, mediations, counseling sessions, lobbying, and media relations. The technique thus calls out for someone to analyze it, to catalog a cross-section of examples, and to study how best to teach it to others. To this task I devote the first part of this essay.

My research canvassed wildly varying sources and, as it turns out, I found help all over: rhetoricians, educators, historians, linguists, psychologists, and philosophers have all offered analyses that—intentionally or not—illuminate the mechanics and ramifications of characterization.<sup>6</sup> I share below “the best”

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<sup>3</sup> Some who know us both are surprised that my husband survived at all after delivering his checklist argument. Nevertheless, we have found an equilibrium on the housekeeping issue, and both he and our marriage appear to be thriving.

<sup>4</sup> I use *discourse* as a term of art, meaning “an organization” of utterances “which progresses across time” and “aims to achieve a particular goal.” Jean Caron, *An Introduction to Psycholinguistics*, trans. Tim Pownall, 153 (Toronto, 1992).

<sup>5</sup> For a diverse array of contexts in which this subject arises, see Elizabeth Kolbert, *Shifting Public Opinion by a Turn of Phrase*, N.Y. Times, June 5, 1995, at A1; Arnold Hauser, *Mannerism: The Crisis of the Renaissance and the Origin of Modern Art*, trans. Eric Mosbacher & Arnold Hauser, 121 (New York, 1965).

<sup>6</sup> Of all the disciplines that I surveyed, rhetoric is perhaps the most pertinent to my study. Having observed this, I note that the term *rhetoric* means different things to different people. Plato's dialogs record Gorgias's definition of rhetoric as “the art of persuading the people about matters of justice and injustice in the public places of the state.” James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684, 684 (1985) (citing Plato, Gorgias 452e, 454b). White summarizes two modern views of rhetoric: “the art of establishing the probable by arguing from our sense of the probable” and “the ignoble art of persuasion.” *Id.* at 687. Analyzing the discipline in light of the law, White offers a third view, his own:

The establishment of comprehensible relations and shared meanings, the making of the kind of community that enables people to say “we” about what they do and to claim consistent meanings for it—all this at the deepest level involves persuasion as well as education, and is the province of what I call constitutive rhetoric.

*Id.* at 693. For other studies of the connection between rhetoric and the law, see Austin Sarat & Thomas R. Kearns, Editorial Introduction, in *The Rhetoric of Law*, eds. Austin Sarat &

of my survey—with an eye toward synthesizing the diverse knowledge I encountered.

This piece proceeds by staking out new ground, using original terminology, models, and analysis spun from the wisdom of an eclectic collection of scholars. I begin by probing characterization as an important rhetorical technique of our craft.<sup>7</sup> Accordingly, I first study how to conceptualize characterization skills and then discuss models I have developed for teaching those skills.

But mastery of characterization technique may bring an alienating sense that the law is but a game of battling characterizations, deployed ruthlessly until a winning characterization ultimately emerges.<sup>8</sup> My study is not complete, then, without attention to the dangers of characterization, ideas about responsible use of the technique, and the light that it sheds on the nature of law. In discussing these concerns in the latter part of the article, I explore other pedagogical implications of characterization technique. In particular, I submit that study of characterization not only offers an opportunity to understand and refine an important skill, but also reveals a more general message for lawyering and legal education. Because characterization appears outside the lawyer's "job"—in all aspects of life—study of the technique can help show how "legal" arguments reflect our daily life outside the law.<sup>9</sup>

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Thomas R. Kearns, 1, 3 (Ann Arbor, 1994) ("It may be that analysis of law's rhetoric is more than aesthetic self-indulgence, but rather is part and parcel of a political and ethical project whose object is the transformation of law in the name of a justice all too rarely spoken about in the profession of law."); Peter Goodrich, *Legal Discourse: Studies in Linguistic, Rhetoric, and Legal Analysis* 88 (New York, 1987) (exploring proposition that "legal discourse" is "preeminently the discourse of power"); Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 Va. L. Rev. 1545, 1555 (1990) (propounding the thesis that "law *is* rhetoric but the particular rhetoric embraced by the law operates through systematic *denial* that it is rhetoric").

<sup>7</sup> Of all the "jobs" lawyers perform, I focus primarily on advocacy, rather than counseling or judging. See generally Karl Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 Yale L.J. 1355, 1373–75 (1940). I also note that my discussion of advocacy may appear more oriented to adversary litigation than to sophisticated negotiation technique. See Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* 14 (Boston, 1981). Nonetheless, because one cannot approach a legal question without characterizing, my observations are obviously relevant to all the jobs a lawyer may be called upon to do. See also Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 121–62 (Cambridge, Mass., 1993).

<sup>8</sup> See Duncan Kennedy, *Note, How Law School Fails: A Polemic*, 1 Yale Rev. L. & Soc. Action 71, 76–78 (1970); Patrick Wiseman, *Legal Education and Cynicism About the Law: Practicing Ethical Jurisprudence in the Classroom*, 25 Cumb. L. Rev. 1, 5 (1994).

<sup>9</sup> Others share this intuition. See, e.g., Julius G. Getman, *Voices*, 66 Tex. L. Rev. 577, 579 (1988); White, *supra* note 6, at 699; Gerald P. López, *Lay Lawyering*, 32 UCLA L. Rev. 1, 2 (1984).

For law students, judges, and lawyers generally, this connection is a crucial part of understanding how the law business works. This may especially invigorate newcomers to law study, when they realize that techniques they have already refined in order to please, to evade, to cajole, and to persuade others are also important to skillful lawyering. Similarly, understanding the connection between “personal” life and the law can help students overcome the apparently wooden formality of the law and sensitize them to the true impact of the law on people’s lives. Once students appreciate *this* connection, they may more fully appreciate the importance of their future legal work and their responsibility toward others. For it is not, after all, a mere word game we lawyers are involved in, but a grave human activity with serious consequences.<sup>10</sup> My most ambitious hope is therefore that characterization study will bear benefits not only for the practice of law but, more significantly, for the society that lawyers serve.

## I. What Is This Characterization Thing and How Do You Do It?

Patricia J. Williams describes a childhood debate with her sister over the color of sunbaked asphalt. Williams saw it as black, her sister saw it as purple. Williams ultimately persuaded her sister to admit the road was black, although their father “gently pointed out” that the sister still actually saw it as purple. From this experience, Williams tells us she learned “that it really is possible to see things—even the most concrete things—simultaneously yet differently; and that seeing simultaneously yet differently is more easily done by two people than one, but that one person can get the hang of it with time and effort.”<sup>11</sup> For Williams, this skill is crucial to bridging gaps of perception, to hearing alternative voices, and to celebrating differences among people. Her story, however, holds meaning for the more mundane project I present here.

First, Williams’s story drives home the idea that different characterizations emerge from a given set of circumstances. I don’t struggle here with the question whether these characterizations somehow reflect the “essence” of the circumstances or are simply the result of perception differences. What is important to my project is Williams’s suggestion that different perspectives on the same occurrences are an unavoidable part of life.<sup>12</sup> Her story goes even further, however, by valuing the ability to perceive

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<sup>10</sup> Jeremy Paul, *A Bedtime Story*, 74 Va. L. Rev. 915, 925 (1988); see Robert Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1986); Wetlaufer, *supra* note 6, at 1545.

<sup>11</sup> *The Alchemy of Race and Rights* 149–50 (Cambridge, Mass., 1991).

<sup>12</sup> Complex philosophical questions, it seems, are imbedded in this suggestion. For example, Williams’s suggestion reflects one of the starting points of postmodernism. See Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. Cal. L. Rev. 2505, 2508–09 (1992) (venturing a definition of postmodernism, including recognition that “[t]here can be no such thing as knowledge of reality” and “all propositions and all interpretations, even texts, are themselves social

the different perspectives. She thus sees characterization as both a phenomenon (part of the nature of things) and a skill (a process). Mindful of this complexity, I begin this part by exploring precisely what I mean by “characterization” and by probing different examples.

Williams’s story also holds out hope that we can develop and sharpen our ability to perceive different characterizations or viewpoints. In the second section of this part, I draw on this hope, expounding models for developing new views and perceptions of a given set of circumstances. Finally, I conclude this part with a few guidelines for an advocate deciding which characterization among several serves her ultimate goal.

### ***A. Characterization: A Description***

Williams’s story differs from my opening story in one noteworthy respect: the operative characterization takes place at a different point in the dispute’s structure. My husband’s characterization occurred at the foundational level of our dispute, focusing on the formulation of the problem between us. The Williams sisters appeared to agree on the problem’s formulation (that is, what was the color of the road?) and instead disagreed only on the problem’s answer. Despite this difference, the two stories both illustrate that people can derive different perceptions from the same set of facts or circumstances. The term *characterization* embraces the many possible permutations on this process of developing and appreciating different perceptions.

#### ***1. Constructive and Destructive Characterization***

Characterization includes both constructive and destructive forms of argument. Constructive characterization presents a fresh angle on a given set of facts, an angle that differs from one’s opponent’s.<sup>13</sup> Destructive characterization is an attack technique focusing on the opponent’s presentation and showing why the presentation is unworthy of credit.

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constructions”). In that regard, the suggestion also appears to reject traditional objectivism. See George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal About the Mind* at xii (Chicago, 1986) (describing objectivism as assuming that “rational thought consists of the manipulation of abstract symbols and that these symbols get their meaning via a correspondence with the world, *objectively construed*, that is, independent of the understanding of any organism”). Similarly, controversial questions regarding the relationships among language, thought, and perception are implicated here. See Clyde Kluckhohn & Dorothea Leighton, *The Navajo* 253–93 (Cambridge, Mass., 1974) (studying Navajo language and its effect on “positive predispositions and . . . negative restrictions” on the meanings Navajo people “find in their experience”); Allan Paivio & Ian Begg, *Psychology of Language* 253–68 (Englewood Cliffs, 1981) (discussing different approaches to the relation between language and thought, including Aristotle’s copy theory and Whorf’s relativity theory). While these debates are clearly relevant to my project, I do not purport to resolve them here.

<sup>13</sup> Although I rely on the terminology of an adversarial model, I suggest below that understanding of characterization is useful in pursuing alternative dispute resolution forms.

Most, if not all, characterizations include both constructive and destructive elements. For example, the wordplay between Pat Williams and her sister is a predominantly constructive interchange, since the sisters offered two different views of the same phenomenon: the street is black versus the street is purple. Yet the interaction also included destructive elements, since the assertion that the street is purple implicitly denies that it is black.

Sometimes an attack is even more difficult to pigeonhole as predominantly constructive *or* destructive. For example, my husband's characterization in our division-of-labor dispute is destructive because it casts my approach as immature and harmful to our marriage. On the other hand, his argument is constructive because it proposes a new angle on the dispute, suggesting that we should concern ourselves with nourishing a mature human relationship, not keeping track of who does what around the house. (Of course, even from this perspective, the constructive characterization has destructive undercurrents to the extent that it rejects my original perspective on the dispute or can be interpreted as a disrespectful power play.)

Although the two characterization techniques are often difficult to segregate, an advocate can often sort various arguments according to whether they reflect predominantly constructive or destructive attitudes and techniques for formulating and disposing of problems. The advocate will likely find the constructive/destructive distinction useful in formulating her strategy. Indeed, she will discover that constructive characterization is by far the more likely to persuade. First, constructive characterization honors the principle that an advocate should select the most congenial (or least disagreeable) approach to the case.<sup>14</sup> In so doing, the advocate maintains the good will and positive energy that may be essential for achieving a desired result. Even more important, constructive characterization offers an alternative resolution to the problem. This is obviously more appealing than destructive characterization, which—if successful—simply undermines the proffered resolution of a problem. For these reasons, I focus my efforts here on constructive characterization.

I do not mean to suggest that destructive characterization is a weak rhetorical tool. In many of life's occasions, one can "win" simply by showing that one's opponent has performed pitifully—or, to use a legal analogy, has not met her burden of proof.

Within law practice, many tasks actually *formally require* an advocate to press into service her destructive characterization skills. For example, in cross-examining and impeaching witnesses, the advocate tries to undermine her opponent by exposing such things as a witness's inconsistencies, suspect demeanor, incompetency, bias, corrupt motive, prejudice, or prior bad acts.<sup>15</sup>

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<sup>14</sup> See Edward D. Ohlbaum, Basic Instinct: Case Theory and Courtroom Performance, 66 Temp. L. Rev. 1, 21 (1993).

<sup>15</sup> For testament to the destructive quality of these trial techniques, see Lawrence A.

Even outside the courtroom, destructive characterization techniques are useful for obtaining strategic advantage, casting a shadow over one's opponent and—perhaps most important—creating an atmosphere receptive to a new perspective on the dispute. Indeed, an advocate preparing to ready the field for a fresh characterization may benefit from the devastation resulting from destructive characterization.<sup>16</sup>

## 2. *The Temptation of Direct Negation*

There is one type of confrontational argument that's arguably not a form of characterization at all. I call the argument "direct negation" and discuss it early because it helps to define effective characterization technique. When deploying the direct negation tactic, an advocate simply insists on the opposite of what her opponent offers. That is, in words or spirit, the advocate shouts "NOT!" in response to her opponent.<sup>17</sup> In my opening example, my husband would be using this tactic if he claimed I was wrong about the amount of work he was doing around the house.

Unlike characterization, direct negation has limited persuasive power. Chances are decent that one's opponent would not venture a particular proposition unless it had at least some foundation and a possibility of

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Dubin & Thomas F. Guernsey, *Trial Practice* 123 (Cincinnati, 1991) ("The purpose of impeachment is to convince the trier of fact not to believe the witness."); Sonya Hamlin, *What Makes Juries Listen* 221 (New York, 1985) ("[C]ross-examination should make the jury begin to question or doubt what was said on direct examination."); Richard D. Rieke & Randall K. Stutman, *Communication in Legal Advocacy* 170 (Columbia, S.C., 1989) ("In order to impeach the witness, counsel designs questions that will demonstrate the oath, the perception, or the recall of the witness is suspect.").

Many recognize, however, the constructive work these techniques can accomplish. See Hamlin, *supra*, at 221 (suggesting that cross-examination should "redefine the story, or add ingredients or perspectives missing in the direct exam"); Lewis W. Lake, *How to Cross-Examine Witnesses Successfully* 109 (Englewood Cliffs, 1957) (admonishing lawyers to develop the ability to see benefits that you can develop for your case from statements made against your client); Steven Lubet, *Modern Trial Advocacy: Analysis and Practice* 55 (Notre Dame, 1993) (arguing that cross-examination can enhance your case, repair damage, and establish foundation). For a linguistic analysis of cross-examination, see Paul Drew, *Strategies in the Contest Between Lawyer and Witness in Cross-Examination*, reprinted in *Language in the Judicial Process* 39, eds. Judith N. Levi & Anne Graffam Walker (New York, 1990).

<sup>16</sup> Cf. Eric Hoffer, *The Ordeal of Change* 56–57 (New York, 1963) (arguing that the dissatisfaction of intellectuals makes possible the creativity that "keeps the social order from stagnating," thereby promoting the advancement of civilization).

<sup>17</sup> The law of pleading provides an analog to direct negation in the concept of a denial. See Fed. R. Civ. P. 8(b) ("Denials shall fairly meet the substance of the averments denied."). Constructive and destructive characterization are analogous to an affirmative defense under Rule 8(b). See 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure*, 2d ed., § 1271 (St. Paul, 1990) (describing criteria for identifying an affirmative defense, such as whether the defense arises by logical inference from the complaint's allegations or whether the plaintiff will be unfairly surprised if the defense is not revealed until late in litigation).



success.<sup>18</sup> As an empirical matter, then, an argument based on direct negation may be unlikely to persuade. Characterization, by contrast, respects the opponent's chances of succeeding on her own terms—and instead concentrates on changing those terms.

Tactically, direct negation may also give unnecessary credence to the opponent's formulation of the problem giving rise to the dispute. As Duncan Kennedy explains, "Argument by denial means accepting the relevance of your opponent's argument but denying one of its factual and normative premises."<sup>19</sup> In contrast to many forms of characterization, direct negation thus must actually validate at least part of the opponent's perspective on the dispute.

Finally, the simplicity of direct negation may undercut its effectiveness. By painting a dispute in black-and-white terms, direct negation suggests that one frame of reference accurately describes the dispute and that—under that frame of reference—someone must win, and someone must lose.<sup>20</sup> Constructive characterization, on the other hand, broadens the range of circumstances under which one might get what one wants (or at least an approximation).<sup>21</sup> As an argumentation technique, characterization, rather

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<sup>18</sup> Cf. Edward de Bono, *Lateral Thinking: Creativity Step by Step* 120 (New York, 1970) ("No one is silly for the sake of being silly no matter how it might appear to other people.").

<sup>19</sup> Kennedy, *supra* note 2, at 173.

<sup>20</sup> In recent writings on legal argumentation, Duncan Kennedy and several scholars expounding on his work focus much analysis and criticism on pairings of legal arguments. The notion of argument pairings bears kinship to the technique of direct negation; both concepts embody the idea that for every proposition propounded in legal argument, there is a competing proposition. See Jack M. Balkin, *The Crystalline Structure of Legal Thought*, 39 *Rutgers L. Rev.* 1, 2–13 (1986) (introducing "dyadic" logic for analyzing rule choices); Kennedy, *supra* note 2, at 170–72 (discussing "argument by maxim and countermaxim"); Paul, *supra* note 2, at 1782 (discussing literature on competing argument pairs in legal reasoning).

The literature on argument pairs contributes invaluable to understanding the law. In addition, the literature avoids oversimplifying legal argumentation, reflecting sensitivity to the notion that legal arguments do not necessarily travel in perfect black-and-white opposites. See Balkin, *supra*, at 7 (analysis "does not assume that rules have a single, natural 'opposite' "); Kennedy, *supra* note 2, at 175–80 (discussing legal arguments that include argument pairings that are not necessarily in symmetrical opposition).

Acknowledging these virtues, I nevertheless believe that the literature's strong emphasis on argument pairings could—if misused—limit students to a bipolar view of available arguments, blinding them to fresh angles or perspectives on a dispute. Cf. Edward P. J. Corbett, *Classical Rhetoric for the Modern Student* 29 (New York, 1971) ("When men deliberate about a course of action, the choice is not always between a good and an evil; sometimes the choice is between two or more goods."). Overemphasis on argument pairings could also obscure the potential for successfully mediated resolutions of disputes.

<sup>21</sup> Cf. Kennedy, *supra* note 2, at 173:

When I say, "I am French," and you respond, "No, you are not French," there is less going on, less complexity to deal with, than if you responded, "I don't understand your agenda."



than direct negation, more closely tracks the vision of rhetoric originally propounded by Aristotle:

[The function of rhetoric] is not simply to succeed in persuading, but rather to discover the means of coming as near such success as the circumstances of each particular case allow. In this it resembles all other arts. For example, it is not the function of medicine simply to make a man quite healthy, but to put him as far as may be on the road to health; it is possible to give excellent treatment even to those who can never enjoy sound health.<sup>22</sup>

Just as my husband could not change the fact that I was doing most of the work around the house, he could not restore our relationship to perfect function. Nevertheless, his reframing of the housekeeping debate did considerable damage control and contributed significantly to his strategic position.<sup>23</sup> Greed (or impatience) might have encouraged him to try to obliterate my assertions with one swipe. Yet he was unlikely to succeed because the facts did not support this approach. He was well advised to suggest an entirely new perspective in order to soften the force of my argument.

It is the apparent promise of removing the opponent's argument swiftly and directly, I believe, that makes direct negation so alluring. Psychological theory supports this hypothesis, suggesting that most people are inclined to avoid ambiguity by reducing conflicts in their lives to one clearly right position and one clearly wrong position.<sup>24</sup> Interestingly, judicial opinions reflect this

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Kennedy argues that adding "not" to your opponent's statement performs "an operation" on the statement, but does not add an entirely new thought. *Id.*

<sup>22</sup> Rhetoric, in *9 Great Books of the Western World*, eds. Robert Maynard Hutchins et al., 587, 594–95 (Chicago, 1952) (reprinted from *The Works of Aristotle*, ed. William David Ross (Oxford, 1908)).

<sup>23</sup> Chaim Perelman echoes the notion that rhetoric does not necessarily focus on perfect results. See Chaim Perelman & L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, trans. John Wilkinson & Purcell Weaver, 4 (Notre Dame, 1969) (defining rhetoric as "the study of the discursive techniques allowing us to induce or to increase the mind's adherence to the thesis presented for its assent"); Allen Scult, *Perelman's Universal Audience: One Perspective*, 27 *Cent. States Speech J.* 176, 178–80 (1976) (explaining Perelman's position that complete persuasion is not possible).

Perelman further explains his view: "[A]rgumentation aims at a choice among possible theses; by proposing and justifying the hierarchy of these theses, argumentation seeks to make the decision a rational one." Perelman & Olbrechts-Tyteca, *supra*, at 62. Apparently in accord with this view is the instrumental approach offered by Kenneth Burke: "[T]he basic function of rhetoric [is] the use of words by human agents to form attitudes or to induce actions in other human agents." *A Rhetoric of Motives* 41 (New York, 1950).

<sup>24</sup> See Donald N. Levine, *The Flight from Ambiguity: Essays in Social and Cultural Theory* 12–13 (Chicago, 1985) (describing studies concluding that tolerance of ambiguity is highest among "creative individuals and the emotionally incapacitated"); 1 Jane Loevinger & Ruth Wessler, *Measuring Ego Development* 3–8 (San Francisco, 1970) (placing tolerance of

tendency, so often suggesting that the outcome of the case is clear-cut, without doubt or moral complexity.<sup>25</sup>

Although constructive characterization may not share the simplicity of direct denial, the technique can increase an advocate's chances for achieving something close to her goal. Constructive characterization can draw on a range of perspectives to a dispute and allow the advocate to identify the viewpoint most amenable to her position. In other words, she is not straitjacketed by a preconceived framework for argument, but can tailor her rhetorical strategy to the circumstances. Should she fail to persuade others that her characterization of the dispute is the one they should adopt, she at least has introduced the possibility that other perspectives on the dispute exist. The recharacterization can therefore serve as an antidote for gridlock, breaking up disputants' cemented positions by inviting yet another characterization that may resolve the conflict.

Persuasion, of course, focuses on the goal of convincing someone of a certain proposition.<sup>26</sup> The first lesson of characterization, however, is to avoid being rigid in one's choice of propositions or in the possible routes to those propositions. How then does one open up the possibilities? How does one develop the skills of refocusing, redefining, and recharacterizing?

### ***B. The Building Blocks for Characterization***

An advocate seeking to characterize a situation must first identify what I call the "impetus" for her rhetorical effort: the circumstances giving rise to a problem or dispute.<sup>27</sup> Using this springboard, the advocate can begin to refine alternative perspectives on a controversy.

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ambiguity at the highest stage of cognitive development—a level shared by fewer than one percent of people in most social groups).

Psychologists sometimes refer to the stark separation of phenomena into good and evil as "splitting," identified as a process used as a defense by persons with personality disorders. See Melanie Klein, *Envy and Gratitude and Other Works 1946–1963*, at 5–22 (New York, 1975).

<sup>25</sup> Scott Altman, *Beyond Candor*, 89 Mich. L. Rev. 296, 305–06 (1990); see Laura E. Little, *An Excursion into the Uncharted Waters of the Seventeenth Amendment*, 64 Temp. L. Rev. 629, 653 (1991) (noting common tendency of courts to avoid important and provocative arguments contrary to their ultimate decisions).

Wetlaufer argues that the rhetoric of law "operates by predisposing us to render as black and white that which is gray. However, our rhetoric of certainty and closure, which is always *useful*, is rarely *necessary*. It serves, perhaps falsely, to enhance the claim that we are right and they are wrong." Wetlaufer, *supra* note 6, at 1589–90.

<sup>26</sup> Cf. Goodrich, *supra* note 6, at 92 ("Rhetoric studies the linguistic means that allow a chosen end to be achieved."); Perelman & Olbrechts-Tyteca, *supra* note 23, at 4 (describing rhetoric as the study of methods of proof "allowing us *to induce or to increase the mind's adherence to the theses presented for its assent*").

<sup>27</sup> Lloyd F. Bitzer calls this the "exigence," which he defines as "something waiting to be done, a thing which is other than it should be." *The Rhetorical Situation*, 1 Phil. & Rhetoric 1, 6

I begin this section by exploring ways of defining the impetus for rhetorical effort. With this background, I turn to models for an advocate defining the impetus, planning a response, and searching for alternative visions of a controversy. The models focus on constructive characterization technique, exploring alternatives for creating a new definition of the controversy, rather than merely destroying the opponent's definition. I conclude this section by reviewing concepts to help an advocate select among alternative characterizations emerging from the models.

### 1. *Impetus*

Rhetorical discourse is generally reactive in the same way that "an answer arises out of a question."<sup>28</sup> Just as a question shapes the scope of an answer,<sup>29</sup> the impetus for rhetorical discourse should guide its response.<sup>30</sup> Accordingly, an advocate is best advised to reflect on the need for her rhetorical effort before proceeding.

I do not suggest, of course, that there exists a static and "true" set of facts and circumstances that one can discover and preserve with the label "impetus." In fact, an advocate will fail at characterization unless she is flexible in perceiving, defining, and redefining the impetus. In other words, a creative response to a situation calling for rhetorical effort begins with an advocate's understanding that she enjoys considerable latitude in interpreting, framing, and dividing the characteristics of a situation.<sup>31</sup>

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(1968). Things that cannot be changed—like "death, winter, and some natural disasters"—are not rhetorical exigencies for Bitzer, presumably because no amount of talk will eliminate them. *Id.* He adds that "an exigence which can be modified only by means other than discourse is not rhetorical." *Id.* at 6–7. Many, of course, would challenge Bitzer's suggestion that some phenomena have an essential core that cannot be influenced through rhetoric.

<sup>28</sup> Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. Legal Educ. 108, 115 (1993).

<sup>29</sup> Unless, of course, the context is one such as a presidential debate where the person answering the question has such a compelling agenda that she simply answers the question with a predetermined speech.

<sup>30</sup> What I call the "impetus" is similar to what Aristotle referred to as the acquisition or invention (*inventio*) of argumentative starting points. See Goodrich, *supra* note 6, at 92–93.

<sup>31</sup> I leave for another day what limits, if any, constrain the advocate in her construction of reality. As my colleague Scott Burris queries: "You can argue about whether *A* killed *B* in self-defense, but you can't say *B* is alive—right?"

One contemporary approach to the intractable problem of delineating the boundaries of "acceptable" and "unacceptable" perceptions focuses on social consensus or community as the guidepost. See, e.g., Mark Kelman, *A Guide to Critical Legal Studies* 14 (Cambridge, Mass., 1987); Owen M. Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739, 745 (1982); cf. Eleanor W. Myers, "Simple Truths" About Moral Education, 45 Am. U. L. Rev. 823, 856–57 (1996) ("[S]olutions to [professional responsibility] dilemmas may emerge from shared moral consensus. Where there is no consensus, we can still acknowledge that some answers are better than others." (footnote omitted)). For analysis of how shared consensus is constructed, *See generally* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1995).

This being so, the advocate still needs an appropriate place to start her creative effort.<sup>32</sup> One possibility is that her opponent has already fired a well-defined salvo, thereby providing a possible focal point for the advocate to begin her efforts. For example, in my opening scene, my husband treated my own formulation of the marital dispute—a fair-share-of-housework problem—as the impetus for his rhetoric. He responded by redefining the impetus as a part of the larger question of how to run a marriage.

In other disputes where no party has yet drawn a clear picture of the problem, the advocate may do her best to sketch an image of the problem that accommodates differing perspectives and then to focus her rhetorical effort on that image. In my marital example, she could define the dispute as a problem pertaining to household labor and married persons and proceed from that basis.

I emphasize, however, that the most important lesson for the advocate is to be open-minded in choosing her starting point. In fact, an advocate may conclude that it is best to avoid paying much attention to her opponent's initial salvo in the dispute, deciding instead to offer her own initial representation of the impetus for the dispute. In addition, the advocate undertaking the characterization process may want to target only a portion of what she perceives as the impetus. Similarly, she may even choose to emphasize a portion of the impetus that does not suggest itself as closely related to the dispute.

The models and techniques discussed below can help the advocate target an appropriate portion of the impetus. They are intended to serve the lawyer developing a strategy—whether or not an opponent has already spoken. But before considering the specific models, I offer the following introduction to piecemeal characterization strategy, which reflects specific advocates' assessments of what is most important to a dispute.

As media spin-meisters in the defense of O. J. Simpson, Simpson's lawyers began their work immediately after his arrest, trying to cast him in a human, sympathetic light. They trumpeted before the media details of Simpson's psychological turmoil, his sadness over passing Father's Day in jail, and his mother's despair.<sup>33</sup> The lawyers even made a motion in the public courtroom requesting that prison officials provide Simpson with a pillow.<sup>34</sup>

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<sup>32</sup> Cf. White, *supra* note 6, at 699 ("The rhetorician must first of all master the starting points from which he or she is to proceed, then the methods by which he or she can move, in one direction or another, from the point so established."); William Safire, *Dee-cline Dee-fense*, N.Y. Times, Jan. 22, 1995, § 6 (Magazine), at 14 ("What separates genuine phrasedicks from ordinary researchers? The ability not only to find the right book, but also to figure out what categories or entries to try.").

<sup>33</sup> See B. Drummond Ayers, Jr., *Prosecutor Sees Simpson Case as 'Solid' One*, N.Y. Times, June 20, 1994, at A1, A12.

<sup>34</sup> Jodi Enda, *In court, Simpson says he's innocent*, Philadelphia Inquirer, June 21, 1994,

In general terms, the impetus for Simpson was the accusation from officials that he murdered his ex-wife and her friend. Given this impetus, his lawyers no doubt turned immediately to murder-scene investigation and details of Simpson's alibi. Nevertheless, they confined their early *rhetorical* efforts to a less obvious, "humanizing" strategy; in so doing, they defined the impetus—for rhetorical purposes—as the "attack" on Simpson as a human being. They set aside, for later spinning, the broad range of details about the murders themselves.<sup>35</sup>

Slicing off only a portion of the problem facing their client, the lawyers placed primary importance on casting Simpson as a likeable man incapable of performing heinous acts of murder. This tactic apparently proved potent. Indeed, the not-guilty verdict may be rooted in a nice-guy aura that stuck to Simpson throughout the long, slow trial, preserving the presumption of innocence or, at least, instilling a reasonable doubt in the minds of the jurors.<sup>36</sup> In this way, his lawyers exerted some control over a process largely dominated by law enforcement, created their own image of O.J. Simpson, and eventually overcame the more general impetus—the murder charges against him.<sup>37</sup>

## 2. Constructive Characterization Models

To guide advocates in pinpointing the impetus and appropriate response to a dispute, I have developed four models of characterization technique. The models are not intended to compose a complete taxonomy of rhetorical schemes. Nor are they designed to provide discrete, mutually exclusive categories for analyzing disputes. In fact, with a mild dose of ingenuity and effort, one could manipulate a given characterization into each one of the models. The models instead are heuristics—that is, tentative forms for thinking about a set of facts and for laying out strategic alternatives that the advocate can try on for size as she is designing her rhetorical plan.<sup>38</sup>

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at A1, A6.

<sup>35</sup> For support for the assumption that Simpson's lawyers planned their strategy in order to influence media coverage of the case, see Robert L. Shapiro, *Using the Media to Your Advantage*, *Champion*, Jan.-Feb. 1993, at 7. In this article written before the Simpson murders, Simpson's counsel outlines strategies for defense counsel to manipulate the media in high-profile cases. Shapiro begins his article with the following advice: "The first impression the public gets [of a criminal case] is usually the one that is most important." *Id.*

<sup>36</sup> But see James S. Kunen, *My O.J. Problem: Just Who's the Underdog?* *N.Y. Times*, Oct. 8, 1995, at F10.

<sup>37</sup> Interestingly, Stephen Jones, the lawyer for Oklahoma City bombing suspect Timothy McVeigh, appeared to pursue the same strategy at the commencement of McVeigh's defense, seeking to present McVeigh as "the boy next door, the boy wonder." Pam Belluck, *McVeigh Says He'll Plead Not Guilty*, *N.Y. Times*, June 26, 1995, at A8.

<sup>38</sup> As I have said, this essay's focus is on advocacy. But the characterization models may be equally useful where a lawyer is engaged in other activities such as trying to understand a client's perspective or formulating alternatives in a counseling session.

I developed these models from my experience teaching constructive characterization technique.<sup>39</sup> Out of a lawyerlike respect for categories and affection for distilled explanations of complex concepts, my students responded well to the graphic illustrations of wordplay. Refining the outlines developed for class, I have engrafted some theoretical analysis of others—including, most notably, work on legal semiotics.

#### MODEL 1: THE EXPANDING OR CONTRACTING UNIVERSE

To introduce each model, I trace permutations of my housekeeping dispute with my husband. The model illustrated in Figure 1, for example, depicts my husband's approach in that opening dialog. In the dialog, my husband confronted my own characterization by expanding the universe of facts relevant to our problem. Under his scheme, we were not confined to the smaller circle of who did what around the house, but instead were struggling to reach equilibrium on a larger circle: our marriage relationship.

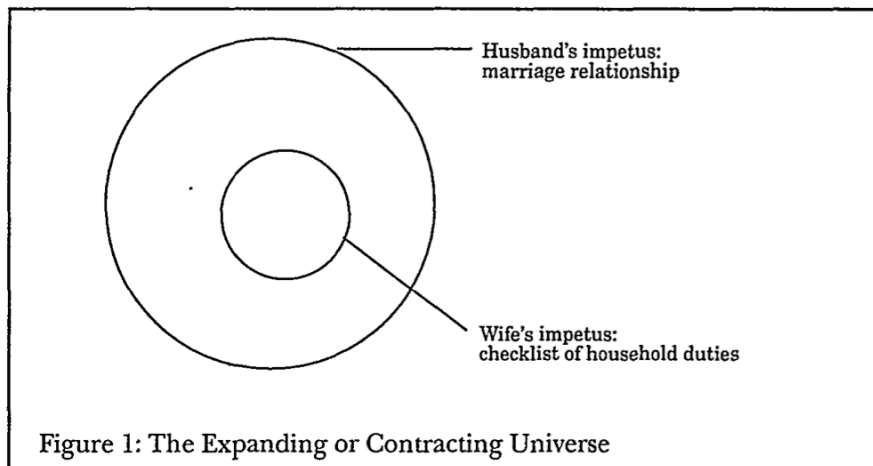


Figure 1: The Expanding or Contracting Universe

Nothing compels the advocate to follow my husband's example and expand the range of facts and concepts invoked in a dispute. Indeed, an advocate may conclude that *contracting* the relevant universe is rhetorically more effective.<sup>40</sup> For example, she may not challenge her opponent's

<sup>39</sup> I designed the models to depict constructive characterization strategies. Nevertheless, for the reasons discussed above constructive characterization will always include at least an implicit element of destructive characterization.

<sup>40</sup> A particularly skillful contraction of the relevant universe appears in the oral arguments before the U.S. Supreme Court in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Reminding the justices that the dispute concerned real injury to a real person, the attorney for respondent Alan Bakke attempted to focus the Court's attention away from the "social issue" animating the dispute and toward the individual white man who had suffered an injury because of his race. See *May It Please the Court*, eds. Peter Irons & Stephanie Guitton, 311–12 (New York, 1993). By contrast, counsel for the petitioner, University of California, maintained that the school was trying to fulfill a social purpose. *Id.* at 308.

definition of the relevant (larger) sphere, but may instead argue that a smaller sphere is more pertinent because of some particularity in the parties' dispute. Whether the advocate chooses to expand or contract the universe, the argumentation model remains essentially the same.<sup>41</sup> Moreover, the advocate will find the model useful whether or not her opponent speaks first; when an advocate uses the model before knowing what the opponent will say, the model simply serves as a basis for exploring whether a narrow or broad formulation best serves the advocate's identified goals.

#### MODEL 2: RIVAL COMPONENTS

Figure 2 illustrates a different approach to our household dilemma. Instead of arguing about the relevant universe of facts and concepts constituting our controversy, my husband and I disagree only about the most significant component of the universe. Specifically, we both accept a definition of the impetus as a problem of who does what on the household duties checklist. But we hold competing views about how much weight we should give different elements on the checklist.

He might argue, for example, that my characterization of our problem is blind to many jobs vital to our household—such as painting, fuse-replacing, and car maintenance—for which he is solely responsible. I, on the other hand, wish to convince him that he needs to contribute more to the more central tasks of cooking, cleaning, and laundry. Although I recognize that painting and car maintenance are parts of the entirety of our household duties, I wish

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For another legal example, see Keith Burgess-Jackson, *An Epistemic Approach to Legal Relevance*, 18 St. Mary's L.J. 463, 473–74 & nn.43–45 (1986) (describing case where prosecution contended “smuggling, nothing more” was involved and defense attorneys said moral and religious issues as well as safe haven purpose of immigration laws were important to case).

<sup>41</sup> This model would include the verbal operation Duncan Kennedy refers to as “refocussing on opponent's conduct,” which he describes as “particularizing within the general context of your opponent's argument.” Kennedy, *supra* note 2, at 178. Kennedy offers the following example of refocusing from general context to a particular disqualifying detail: “plaintiff has a right to security from (this kind of) injury vs. plaintiff has forfeited his rights by his conduct in this case.” *Id.* Kennedy might also associate this model with the verbal operation described within his lexicon as “level shifting.” He illustrates level shifting as follows: “I say your rule lacks administrability. You respond that your rule tailors liability to fault.” *Id.* at 180.

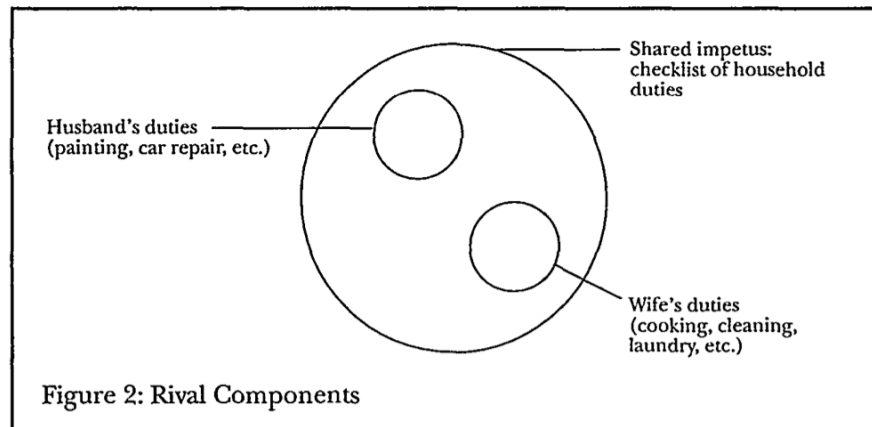
The model depicted in Figure 1 is also analyzed in Jennifer Jaff's work on frame-shifting. Jaff describes the process as follows:

[D]ecision makers shift their frame of reference from broad to narrow, narrow to broad, to construct rationales that justify differing results . . . . In a contracts, torts, or property case, one side might focus narrowly on the rights of the parties actually involved in the controversy, whereas the other side might adopt a broader perspective that generates arguments about the operations of the entire market.

Jaff, *supra* note 1, at 253–54; see also Pierre Schlag & David Skover, *Tactics of Legal Reasoning* 39–43 (Durham, 1986) (discussing movement among higher and lower levels of abstraction as an important legal argumentation device).



to discount these tasks so as to establish that he needs to do more of the jobs I emphasize. I accomplish this by suggesting that my components are more weighty, more central, more onerous, or simply more compelling than his.



This characterization technique resembles the wordplay that traditional rhetoricians have called “synecdoche,” where the speaker uses a part to stand for the whole.<sup>42</sup> Take the following synecdoche from daily speech: “She’s just a pretty face.”<sup>43</sup> Like my marital example, this statement does not literally assert that the part *is* the whole. Nevertheless, by emphasizing one part as a defining characteristic, synecdoche potentially obscures the complexity of the whole.<sup>44</sup> In other words, focus on the pretty face discounts the importance of the brain behind the face as well as other personal qualities.

Like synecdoche, the rival components model also may conceal large chunks of a dispute.<sup>45</sup> Although possibly deceptive, this potential to conceal gives the model significant persuasive value. Indeed, an advocate uses the technique in order to overshadow unfavorable attributes of the dispute and

<sup>42</sup> See Corbett, *supra* note 20, at 480–81.

<sup>43</sup> George Lakoff & Mark Johnson, *Metaphors We Live By* 37 (Chicago, 1980). Other examples include “The Giants need a stronger *arm* in right field,” *Id.* at 38, and “Give us this day our daily *bread*,” Corbett, *supra* note 20, at 480.

<sup>44</sup> Lakoff & Johnson, *supra* note 43, at 12–13 (“[M]etaphorical concepts . . . provide us with a partial understanding of what communication, argument, and time are and . . . in doing this, they hide other aspects of these concepts.”).

<sup>45</sup> For this reason, the technique is related to the argumentation approach, identified by Schlag & Skover, which focuses on the inappropriateness of an opponent’s frame of reference. See Schlag & Skover, *supra* note 41, at 50–51; *cf.* Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 2d ed., 24 (Chicago, 1970) (stating that paradigms can “force nature into . . . [a] preformed and relatively inflexible box,” blinding scientists to phenomena that do not fit into the box).

drive home those attributes likely to dispose a decision-maker favorably toward the advocate's position.<sup>46</sup>

In the universe of law, the rival components model shows up repeatedly when an advocate sorts a case into a particular legal category.<sup>47</sup> For example, if a dispute can be reasonably characterized as a contract or a property case, the skillful advocate will ascertain which legal category is most advantageous and highlight the portions of the controversy that trigger that category of rules. Even though the controversy has both property and contract components when considered as a whole, the advocate will argue that one set of components is so compelling as to provide the governing legal rules.<sup>48</sup>

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<sup>46</sup> The skillful opponent can, of course, try to neutralize the effects of the technique using a countermove: emphasizing the portion of the dispute that the initial characterization overlooks. The strategy of Alan Bakke's lawyer—focusing the Supreme Court away from the social issues implicated in the case and toward the individual injury suffered by his client—illustrates a counter-synecdoche maneuver. See *supra* note 40.

The decision-maker may also be engaging in this shifting emphasis. Catharine Pierce Wells describes how a judge may use the rival components model in decision-making:

The decisionmaker will investigate the case by paying particular attention to the factual issues that seem relevant under the normative theory (s)he has selected. (S)he will thus treat certain details of the situation as central to the normative problem and marginalize or disregard the remainder. For example, suppose the situation involves a deceptive representation made to a member of the green team by a member of the blue team. The decisionmaker could focus on the case either as an instance of a deception or as an instance of blue/green interaction. If the chosen normative theory permits clear conclusions about the utility of deceptive practices but does not speak clearly about the effects of favoring one team over the other, a structured approach requires treating the case as an instance of deceptive conduct rather than as a question of blue/green interaction.

Situated Decisionmaking, 63 S. Cal. L. Rev. 1727, 1732 (1990).

<sup>47</sup> It appears to be this technique that Jeremy Paul is alluding to when he uses the term "category characterization" in his inventory of legal reasoning techniques. Paul, *supra* note 10, at 930. For a thorough study of the classification of legal doctrine, see Jay M. Feinman, The Jurisprudence of Classification, 41 Stan. L. Rev. 661 (1989); see also James Boyle, Anatomy of a Torts Class, 34 Am. U. L. Rev. 1003, 1054 (1985) (suggesting that, in manipulating precedent, lawyers make factual and legal recategorization of circumstances in case at hand "so as to make other cases more or less relevant").

<sup>48</sup> See, e.g., Edward Chase & E. Hunter Taylor, Jr., Landlord and Tenant: A Study in Property and Contract, 30 Vill. L. Rev. 571, 617–26 (1985).

Other examples of this "sorting" phenomenon in legal doctrine appear not only broad-ranging, but limitless. See, e.g., *Heck v. Humphrey*, 114 S. Ct. 2364, 2373 (1994) (holding that the exhaustion requirement for habeas corpus petitions is not mandated in § 1983 actions); *Commissioner v. Sunnen*, 333 U.S. 591, 607 (1948) (holding that collateral estoppel applies for questions of law but not questions of fact); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 752 (3d Cir. 1974) (holding that mandamus is appropriate if lower court acted outside of its jurisdiction, but is not appropriate if lower court acted within its jurisdiction); *Educ. Testing Servs. v. Katzman*, 670 F. Supp. 1237, 1243 (D.N.J. 1987) (concluding that, under the 1976 Copyright Act, judge decides equitable matters such as statutory remedies and jury decides all "legal"

Sometimes this process is not only an argumentative strategy, but is explicitly integrated on the face of legal doctrine. A prominent illustration comes from a choice-of-law technique that itself is sometimes called characterization. This technique requires a court confronting a choice-of-law question to sort the case into a legal category such as “tort” or “contract” in order to identify the appropriate set of choice-of-law rules.<sup>49</sup>

Choice-of-law doctrine is not alone in its unequivocal mandate to sort the case according to dominant characteristics.<sup>50</sup> For my purposes, however, it is not this clarity that is most instructive for an advocate. Rather, it is the law’s invitation to resolve disputes by identifying a dominant legal category reflected in the dispute instead of by reshaping legal categories to fit more closely with the dispute.<sup>51</sup> In this way, the law legitimizes the process of choosing among

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matters); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 401–02 (Cal. 1988) (holding that bad faith employee discharge case is a “contract” and not “tort” case, so that only contract damages are available); 3A Arthur L. Corbin, *Corbin on Contracts* §§ 719–20 (St. Paul, 1952) (stating that time may be “of the essence” in sale of goods contracts, and that time is “commonly not of the essence” in building contracts); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *Yale L.J.* 997, 1014 (1985) (arguing that when courts maintain private label on contract law they can excise regulated and compulsory contract from the corpus of labor law doctrine altogether); Phyllis Maza Parker, *Recent Decision, Second Circuit Extends Double Jeopardy Clause to Prohibit Prosecution of Criminal Conduct Used Previously to Enhance Sentence*, 67 *Temp. L. Rev.* 1387, 1415 (1994) (discussing distinction between judicial action that triggers double jeopardy prohibition because multiple punishment results and judicial action that merely results in punishment enhancement).

<sup>49</sup> This process is most often associated with the methodology established in the Restatement (First) of Conflict of Laws. See Lea Brilmayer, *Conflict of Laws*, 4th ed., 124–25 (Boston, 1995). Modern choice-of-law approaches, however, do not wholly eliminate the characterization technique. See *id.* at 330–31. Choice-of-law characterization directs the legal analyst to evaluate what portion of a problem most prominently colors the whole. The advocate must maintain such strict focus on that choice that the initial characterization itself is often dispositive of the case. For analysis of characterization in choice of law as a “metonymic escape,” see Judith A. Harris, *Recognizing Legal Tropes: Metonymy as Manipulative Mode*, 34 *Am. U. L. Rev.* 1215, 1222–27 (1985).

<sup>50</sup> Another prominent context where analysis of component parts is actually embedded in the doctrine itself is the series of Supreme Court cases struggling to pinpoint a test for determining whether a case has sufficient federal components to “arise under” federal law for the purpose of 28 U.S.C. § 1331. E.g., *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 189 (1921) (“[W]here . . . right to relief depends upon the construction or application of the Constitution or laws of the United States and . . . such federal claim is not merely colorable, and rests upon a reasonable foundation,” the claim arises under federal law.); *Moore v. Chesapeake & O. Ry.*, 291 U.S. 205, 216–17 (1934) (no jurisdiction where federal law “touched the duty of the [defendant] at a single point and . . . the right of the plaintiff to recover was left to be determined by the law of the State”); *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (“A suit arises under the law that creates the cause of action.”). The cases are remarkable in their self-conscious recognition that a claim can have both state and federal character and their persistent search for a way of determining which of the two predominates.

<sup>51</sup> The distinction I make here is similar to the distinction between structured and contextual decision-making developed by Catharine Pierce Wells: “Structured decisionmaking

competing components of the dispute and allowing the chosen component to color the entire dispute—precisely the process embodied in the rival components model. The prevalence of the model in advocacy and in the structure of the law presumably reflects the human tendency to cope with complexity through the process of classification.<sup>52</sup> Significant rhetorical benefit flows from the model's appeal to this tendency.

### MODEL 3: THE COMMON DENOMINATOR

In Figure 3, my husband and I propound overlapping characterizations. For me, the dispute concerns who does what in the home; for him, the dispute concerns how we each spend our time. These characterizations intersect with at least one common denominator: personal toil of each partner is necessary to a smooth-running relationship. We disagree, however, on which types of personal toil should count. Although we both have careers outside the home, my husband may for many reasons conclude that his hard work to further his career is so necessary to the financial and psychological well-being of our partnership that he is excused from performing a full half of the household duties.<sup>53</sup> By contrast, I maintain that introducing notions of toil outside the home obscures our problem. In other words, I want to banish professional toil from the equation.<sup>54</sup>

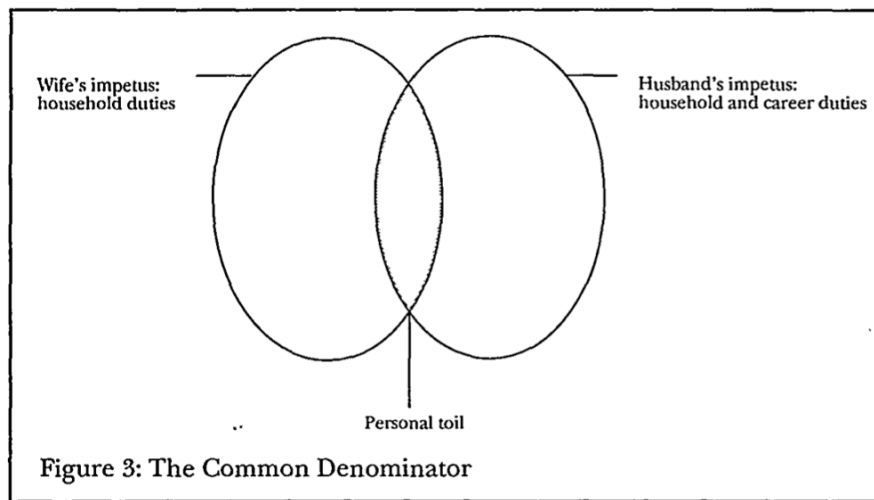
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treats each individual normative problem as a token that is to be understood in terms of its type." Wells, *supra* note 46, at 1731. Contextual decision-making, by contrast, "treats a case as an individual set of circumstances that requires resolution upon its own terms." A contextual decision-maker does not fit "the facts to preconceived categories of legal significance," but rather "focuses upon the parties' own characterizations of what happened." *Id.* at 1734. The sorting phenomenon I describe in the text is aligned with the structural model Wells describes.

<sup>52</sup> See Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 Harv. L. Rev. 10, 34 (1987). In a similar vein, Jay Feinman argues that "there are two reasons to classify legal doctrine: to get things done (an instrumental reason) and to get things right (an analytical reason)." Feinman, *supra* note 47, at 672; see also Lakoff, *supra* note 12, at 6 ("An understanding of how we categorize is central to any understanding of how we think and how we function, and therefore central to an understanding of what makes us human.").

<sup>53</sup> This characterization can be reformed into Figure 1 by arguing that work on my husband's career is part of the wider "marriage relationship." Likewise, the characterization can be shoehorned into Figure 2 by redefining the larger circle to represent a "checklist of duties, in general" and to include "career duties" as a smaller circle representing duties that count in the checklist.

<sup>54</sup> My three-year-old daughter Caitlin offered another example of the common denominator model. After observing a photograph in a New Age children's book of a small boy playing with a doll, Caitlin rejected the photograph's suggestion that the doll was the boy's prized possession and instead declared, "That boy is playing with some girl's doll." Caitlin seems to have accepted the "reality" that the boy enjoyed the doll, but would not embrace the notion that a doll could actually "belong" to a boy. The common denominator between Caitlin and the book was therefore confined to the proposition that the boy enjoyed the doll. Otherwise, Caitlin embraced a characterization of the doll as the possession of "some girl" whereas the book embraced a characterization of the doll as the possession of the boy in the picture.



By identifying a common denominator, an advocate may increase the chances of settling a dispute with the other side.<sup>55</sup> A frequent strategy in mediation (and sometimes negotiation) is to identify overlapping interests, complementary needs, and points of agreement between parties to a dispute.<sup>56</sup>

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For another illustration involving a small child and the law, consider the following from conflict-of-laws scholar David F. Cavers:

Theories that explain how it is that a foreign rule isn't foreign law when it is used in deciding a case in another country might seem more useful if I could forget the way in which my son resolved a problem when, at the age of four, he encountered tuna fish salad. "Isn't that chicken?" he inquired after the first bite. Told that no, indeed, it was fish, he restored his world to order and concluded the matter by remarking to himself, "Fish made of chicken."

The Choice of Law: Selected Essays, 1933–1983, at 46–47 (Durham, 1985). Here the apparent common denominator between the boy's perception of the tuna and a consensus perception of tuna was the tuna's chicken-like qualities, such as its white meaty texture.

<sup>55</sup> Consider the following example concerning the abortion debate:

The new common ground [for the abortion debate] that the majority of Americans seek may indeed be emerging, . . . not from the middle of the abortion debate itself but rather from just a bit off center, around the issue of teen-age pregnancy. This is where the two sides have the greatest potential to converge, prompted by the recognition that neither women nor children will be protected if children continue to have children, dooming them equally to a life of poverty.

Madeleine M. Kunin, *The Big Divide*, N.Y. Times, May 15, 1994, § 7 (Book Review), at 29 (reviewing James Davison Hunter, *Before the Shooting Begins: Searching for Democracy in America's Culture War* (New York, 1994)).

<sup>56</sup> See, e.g., Patricia L. Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. Fam. L. 615, 638 (1980–81); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754, 769, 795–801 (1984); see also Fisher & Ury, *supra* note 7, at 23 ("[I]t is ultimately the reality as each side sees it that constitutes the problem in a negotiation and opens the way to a solution."); cf. Kennedy, *supra* note 2, at 176 (discussing a verbal operation named "mediation" which

While this process may be easier after the other party has spoken, a party can start the process of understanding the other's perspective and identifying overlap even before the other party has articulated her position.<sup>57</sup>

But the common denominator model in no way guarantees an easier dispute settlement. Indeed, the model can amount to no more than co-opting a portion of an opponent's argument and throwing it back in her face. Such a technique bears kinship to what postmodern theorists describe as "flipping," a technique which a lawyer can use in argumentation by appropriating "the central idea of [her] opponent's argument . . . and [claiming] that it leads to just the opposite result from the one she proposes."<sup>58</sup> The two techniques differ, however, in that flipping generally operates on the core of the

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"acknowledges a conflict of claims and proposes a way to resolve it on the arguer's side").

<sup>57</sup> See Fisher & Ury, *supra* note 7, at 22–24:

Understanding the other side's thinking is not simply a useful activity that will help you solve your problem. Their thinking is the problem. Whether you are making a deal or settling a dispute, differences are defined by the difference between your thinking and theirs . . . . The ability to see the situation as the other side sees it . . . is one of the most important skills a negotiator can possess.

<sup>58</sup> Kennedy, *supra* note 2, at 179. See J. M. Balkin, The Promise of Legal Semiotics, 69 Tex. L. Rev. 1831, 1834 (1991); Stephen M. Feldman, Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (With an Emphasis on the *Teague* Rule Against New Rules in Habeas Corpus Cases), 88 Nw. U. L. Rev. 1046, 1048 (1994). Among the examples Kennedy propounds are: "reverse fault: when a person who innocently injures another innocent refuses to compensate, he is at fault" and "reverse community expectations: following community expectations would be undemocratic because those expectations have been significantly formed by the prior course of judicial decision." Kennedy, *supra* note 2, at 179.

For an example of flipping from the popular press, see Phillip Pullella, Society Must Share Blame in Sex Abuse, Vatican Says, Philadelphia Inquirer, June 24, 1993, at A1 (responding to concern that sex abuse by priests is a significant social problem, Vatican spokesman says that society itself bears blame: "One would have to ask if the real culprit is not a society that is irresponsibly permissive, hyperinflated with sexuality [and] capable of creating circumstances that induce even people who have received a solid moral formation to commit grave moral acts."). An example reflecting legal advocacy appears in Peter Marks, When the Best Defense Is the Prosecution's Own Tapes, N.Y. Times, June 30, 1995, at D20 (describing criminal defense attorney's strategy of using prosecution tapes of accused in order to establish alternative explanation for accused's conduct).

A literary example of flipping comes from Fyodor Dostoyevsky's *The Brothers Karamazov*. After Ivan Karamazov shares the story of Grand Inquisitor with his brother Alyosha, Alyosha responds that although Ivan's story was meant to cast blame on Jesus, the story actually praised him. Trans. Constance Garnett, 269 (London, 1961).

For real-life judicial examples, see *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 829 (1986) (Brennan, J., dissenting) (although the majority cites "increased complexity of federal legislation" as militating against federal court jurisdiction, that factor actually "argues rather strongly in *favor* of recognizing federal jurisdiction"); *Lakeshore Hills v. Adcox*, 413 N.E.2d 548, 550 (Ill. App. Ct., 1980) (in injunction action seeking removal of bear from residential neighborhood, one could define "status quo" as retaining bear in neighborhood or one could define "status quo" as the natural state of people and bears living in separate locales).

opponent's argument, whereas an advocate following the common denominator model need share only a sliver of her opponent's approach.

#### MODEL 4: COMPETING WORLDVIEWS

The final characterization scheme represents dramatic constructive characterization. As illustrated in Figure 4, my husband could wholly reject my definition of the impetus, declaring that housework is not man's work and that his failure to do "his share" of household duties is not a problem at all. Duncan Kennedy calls this verbal operation "counter-theory" and defines it as "a response which simply rejects the normative idea" in the originally asserted argument.<sup>59</sup> Using the model, the advocate changes the perspective so radically that she embosses a new, different worldview on the controversy. Because this competing worldviews model involves direct confrontation rather than subtle shifting from one point of view to another,<sup>60</sup> it bears analytical kinship with the destructive characterization techniques discussed earlier.<sup>61</sup> Nevertheless, the model can be effective in inspiring constructive thinking—especially in instances where the model emboldens an advocate to create a unique perspective on a situation before the other side has spoken.

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<sup>59</sup> Kennedy, *supra* note 2, at 175–76.

<sup>60</sup> *Id.* at 176. Kennedy suggests the following examples from legal argumentation:

no liability without fault

vs.

innocent victims should be compensated

the proposed rule corresponds to community practice

vs.

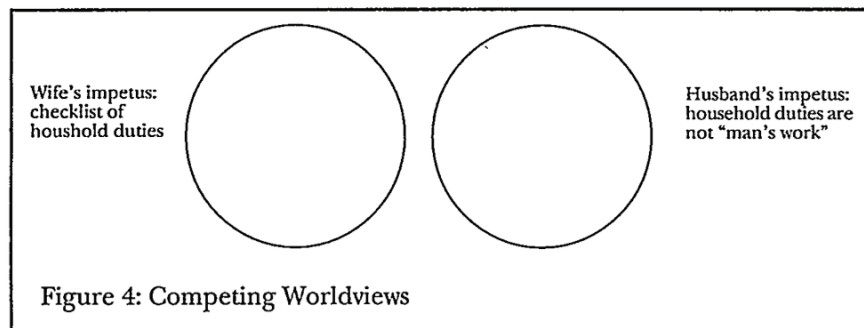
the law, not community practice, should determine the outcome

*Id.*

An advocate may sometimes have difficulty charting the line between competing worldviews and the overlapping perspectives of the common denominator model. For an example from Supreme Court case law that could reasonably fit into both models, see *Bowers v. Hardwick*, 478 U.S. 186, 191, 195–96 (1986), in which the Court grappled with the following dueling characterizations of the dispute over Georgia's sodomy law: the dispute presented a right to privacy question versus the dispute presented the question whether the Constitution prohibits a state from criminalizing homosexual sodomy occurring at home.

<sup>61</sup> Indeed, one could also argue that the recharacterization is so drastic that it resembles direct negation—a technique which arguably does not recharacterize the controversy at all.





The four models illustrate forms for advocates to trace in exploring alternatives to confronting a dispute. The advocate must search the corners of her opponent's universe and decide to reject her opponent's definition of that universe or to reconfigure its elements. She must not lose track of her ability to control the path of dispute resolution.

To assist in this task, the models provide the advocate with templates to spark inspiration and to reinforce self-determination. Using the models, the advocate knows that, at the least, she can expand or contract an opponent's characterization of a controversy, emphasize a new component of her opponent's universe, map a new universe that overlaps with her opponent's, or break a path entirely her own.

### C. Applying the Characterization Models: An Analysis of Audience

I discuss below a number of principles to guide the advocate in applying and choosing among the models outlined above. I structure my comments around the concept of understanding one's audience. I do not mean to cast a focus on audience as the exclusive constituent of an advocate's rhetorical effort,<sup>62</sup> but the concept of audience certainly is central to effective

<sup>62</sup> For discussion of other elements of rhetorical effort, see James R. Andrews, *The Practice of Rhetorical Criticism*, 2d ed., 16 (New York, 1990) ("In a speaking situation . . . there is always a speaker, a message produced by that speaker, an audience responding to that message, and a complex context made up of a multiplicity of factors ranging from prevailing ethical standards . . . to the size and temperature of the room . . ."); Bitzer, *supra* note 27, at 6 (elements of any rhetorical situation are "the *exigence*, . . . the *audience* to be constrained in decision and action, and the *constraints* which influence the rhetor and can be brought to bear upon the audience").

For lawyers, one element of context that is crucial to effective advocacy is timing. That is, an advocate will serve her client well by acting on an unfavorable occurrence before one of the parties has "named" the occurrence as an injurious experience or—even worse—transformed the experience into an actual grievance or claim. See William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *Law & Soc'y Rev.* 631, 633–37 (1980–81). If the advocate acts quickly enough, she might even stop the parties from perceiving the occurrence as a violation of their rights. Effective advocacy may reinforce the impression that the experience was simply a part of life for which it would not be

characterization technique. Equally important for my project: the process of understanding audience—with its emphasis on the human element of rhetorical exchange—also drives home how characterization technique can help law students appreciate the connection between legal craft and the interpersonal skills developed in contexts outside one’s professional life in the law.

### *1. Audience Impact on Characterization*

Jerry Frug speaks for many students of rhetoric when he declares that “the most important object of inquiry in a study of persuasion is not the author but the audience to whom the argument is addressed. After all, those who make arguments, whether manipulatively or with conviction, do so in order to influence others.”<sup>63</sup> Frug maintains that an advocate’s success in persuading depends on whether the audience identifies with the view of the world the advocate propounds.<sup>64</sup>

The notion of audience owes direct lineage to classical rhetoric and provides a focal point for contemporary rhetoricians and other scholars. Aristotle admonished the rhetor to choose speech with an eye toward “what is esteemed among the particular audience.”<sup>65</sup> Cicero, too, placed audience in a prominent position along with “context” and “speaker.”<sup>66</sup> Some modern analysts distinguish defining audience for the purpose of persuasion (the goal

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necessary or appropriate to seek remedy or redress. Characterization can be instrumental in preventing a potential opponent from interpreting an unfortunate event as a “wrong” done to her. The characterization, however, best comes at an early time before the occurrence has transformed into a dispute.

<sup>63</sup> *Argument as Character*, 40 *Stan. L. Rev.* 869, 881 (1988).

<sup>64</sup> *Id.* at 926–27.

<sup>65</sup> The “Art” of Rhetoric, trans. John Henry Freese, 99 (Cambridge, Mass., 1926). In the same passage, Aristotle provides an early recipe for achieving a positive “spin” on a given set of facts:

We must also assume, for the purpose of praise or blame, that qualities which closely resemble the real qualities are identical with them; for instance, that the cautious man is cold and designing, the simpleton good-natured, and the emotionless gentle. And in each case we must adopt a term from qualities closely connected, always in the more favourable sense; for instance the choleric and passionate man may be spoken of as frank and open, the arrogant as magnificent and dignified; those in excess as possessing the corresponding virtue, the fool-hardy as courageous, the recklessly extravagant as liberal.

*Id.* at 97, 99 (footnote omitted).

<sup>66</sup> See Marcus Tullius Cicero, *On the Character of the Orator*, in *Cicero on Oratory and Orators*, trans. J. S. Watson, 5, 255 (Carbondale, 1970):

[C]onsider who form the audience, whether the senate, or the people, or the judges; whether it is a large or small assembly, or a single person, and of what character; it ought to be taken into account, too, who the speakers themselves are, of what age, rank, and authority; and the time also, whether it be one of peace or war, of hurry or leisure.

of the classical rhetoricians) from the purpose of identifying with the audience (the goal of the “new rhetoricians”).<sup>67</sup> Because my project is focused on improving advocacy as well as enhancing the personal connection of students with the law, both the persuasion and identification components of audience are important here.<sup>68</sup>

Regardless of distinctions within the concept of audience, the concept has retained broad-based importance, even for language scholars outside the formal discipline of rhetoric. For example, Deborah Tannen refers to “audience as co-author,” arguing that a speaker’s “involvement” of her listener makes communication meaningful and potentially persuasive.<sup>69</sup> Only through engaging her listeners can the speaker ensure that they understand and embrace her discourse.<sup>70</sup> In the same vein, another contemporary linguist, Frederick Erickson, argues that “talking with another person . . . is like climbing a tree that climbs back.”<sup>71</sup>

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<sup>67</sup> Jerry Frug targeted the following (unusually accessible) quotation from the work of Kenneth Burke:

The key term from the old rhetoric was persuasion and its stress was upon deliberate design. The key term for the “new” rhetoric would be “identification,” which can include a partially “unconscious” factor in appeal. “Identification” at its simplest is also a deliberate device, as when the politician seeks to identify himself with his audience . . . . But identification can also be an end, as when people earnestly yearn to identify themselves with some group or other. Here they are not necessarily being acted upon by a conscious external agent, but may be acting upon themselves to this end.

Frug, *supra* note 63, at 872–73 n.13 (quoting Kenneth Burke, *Rhetoric—Old and New*, in *New Rhetorics*, ed. Martin Steinman, 62–63 (New York, 1967)); *cf.* Thomas B. Farrell, *Knowledge, Consensus, and Rhetorical Theory*, 62 Q.J. Speech 1, 13 (1976) (articulating a new rhetoric concept of identification: “Knowledge which is assumed to be held by other persons thus involves the rhetor with the complicity of *other knowers*, whose interests are now a factor for reasoned consideration.”).

The joinder of rhetoric with the process of identification with a community is reflected in the work of other legal scholars. *See, e.g.*, Sarat & Kearns, *supra* note 6, at 12; White, *supra* note 6, at 701.

<sup>68</sup> Accord, Frug, *supra* note 63, at 873 n.13 (finding little use for the persuasion/identification distinction); see also Goodrich, *supra* note 6, at 117 (finding a place for both identification and persuasion in analyzing the intersection of law and the new rhetoric: “The rhetorician . . . is . . . in pursuit of the agreements as to value, the consensus and the identifications which will allow the law to be portrayed as non-arbitrary, persuasive and . . . desirable.”).

<sup>69</sup> *Talking Voices: Repetition, Dialogue, and Imagery in Conversational Discourse* 12 (New York, 1989).

<sup>70</sup> To illustrate this point, Tannen draws from the tenet that students understand information best “if they have discovered it for themselves rather than being told it.” *Id.* at 17.

<sup>71</sup> *Listening and Speaking, in Languages and Linguistics: The Interdependence of Theory, Data, and Application*, eds. Deborah Tannen & James E. Alatis, 294, 316 (Washington, 1986). For reference to the importance of audience in related disciplines, see Andrews, *supra* note 62,

Identifying audience as a key concept, of course, actually says little about how an advocate can skillfully persuade or identify with her audience. My own instincts suggest starting a rhetorical strategy by thinking in widely accepted terms. By starting with widely accepted notions, the advocate simply increases her odds of choosing an approach persuasive to her audience. And if the audience is not strongly nonconformist or iconoclastic, the advocate also profits from the force of convention. Look, for example, at my husband in the opening story: he surely benefited from the common wisdom of his starting premise that building a functional marriage is an important and difficult task.

But finding a broadly attractive principle is not necessarily the most successful strategy.<sup>72</sup> As Anne Lamott advises, it is even more important that the advocate draw her principle from the right ballpark: “If your wife locks you out of the house, you don’t have a problem with your door.”<sup>73</sup> Part of identifying the appropriate ballpark is understanding *context*. In Lamott’s example, the context is marital discord, not disfunction of an inanimate object. Audience is also crucial to identifying the appropriate ballpark; the advocate must choose a characterization that actually resonates with her audience, even if the characterization falls far short of universal appeal.

My husband was skillful enough to find a widely appealing principle that also struck at the heart of his particular audience; indeed, his characterization sidled up to the sensitive young woman he was dealing with—a young woman conversant in the morality of care,<sup>74</sup> who had only recently embarked on a relatively unknown enterprise (marriage) which she deeply wanted to work.

Another noteworthy aspect of my husband’s characterization is his use of metaphor. In recent years, a number of scholars have documented metaphor’s significance in structuring human thought and culture—including

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at 28 (“The audience for any message is one of the most important constituents of the rhetorical act with which a critic must deal.”); Karl Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 Colum. L. Rev. 651, 658 (1935) (“[T]o fight wolves, you have to know wolves. And that wolf-study is a proper part of legal training.”).

<sup>72</sup> The limitations of universal principles in rhetorical wordplay are illustrated by the abortion debate. Standing alone, “life” and “choice” are values that most citizens support. Yet the terms *pro-life* and *pro-choice* do almost nothing to resolve the clash of the two values. See Alon Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech*, 65 S. Cal. L. Rev. 1887, 1926 (1992); Francis J. Mootz III, *Rethinking the Rule of Law: A Demonstration That the Obvious Is Plausible*, 61 Tenn. L. Rev. 69, 183 (1993); cf. Michael R. Hagan, *Roe v. Wade: The Rhetoric of Fetal Life*, 27 Cent. States Speech J. 192, 197–99 (1976) (noting *Roe* Court’s evasive treatment of the term life).

Another example of a conversation-halting truism that does little to advance or resolve debate is “We must support our troops”—a principle sometimes invoked in discussions whether a country’s involvement in military conflict is advisable.

<sup>73</sup> Bird by Bird: Some Instructions on Writing and Life 178 (New York, 1994).

<sup>74</sup> In evaluating the accuracy of this description, consider its source.

law and morality.<sup>75</sup> As an argumentation device, metaphor derives its strength from its ability to build on beliefs and emotions rooted in the audience. An apparently gentle metaphorical reference can release a surge of energy from concepts waiting to be triggered.<sup>76</sup> Indeed, my husband's phrase "this is a marriage, not a checklist" connected with a complex of negative associations within my mind: I was reminded of two very specific types of persons I had encountered in my life—cold and bureaucratic people who use checklists as a calculating strategy, and weak people who make checklists as a futile attempt to control their lives and others'. His metaphor worked well for him in persuading me that I was acting like someone other than the perceptive, sensitive, and intelligent person I wanted to be.

Although subject to significant abuse,<sup>77</sup> metaphoric technique like my husband's has significant advocacy potential for lawyers. In the creative process of pursuing their craft—naming parties, framing issues, identifying facts—lawyers encounter many opportunities to color their work with figurative references.<sup>78</sup> Like other aspects of a lawyer's rhetorical effort, the references must be tailored to the audience to enjoy their greatest force.<sup>79</sup>

Having lauded my husband's skill in engaging his audience, I note a number of potential pitfalls with his approach. First, an argument chosen so clearly to appeal to a particular audience may make an advocate appear sycophantic, pandering too closely to the audience's concept of itself. The

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<sup>75</sup> See, e.g., Haig A. Bosmajian, *Metaphor and Reason in Judicial Opinions* (Carbondale, 1992) (law); Lakoff & Johnson, *supra* note 43 (linguistics and philosophy); Mark Johnson, *Moral Imagination: Implications of Cognitive Science for Ethics* (Chicago, 1993) (ethics); Thomas Ross, *Metaphor and Paradox*, 23 Ga. L. Rev. 1053 (1989) (jurisprudence); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371 (1988) (jurisprudence).

Although much writing has focused on metaphor, other tropes—such as metonymy, simile, and synecdoche—are also an important part of this scholarly effort. Corbett defines these major tropes as follows:

Metaphor—an implied comparison between two things of unlike nature that yet have something in common

Simile—an explicit comparison between two things of unlike nature that yet have something in common

Synecdoche—a figure of speech in which a part stands for the whole

Metonymy—substitution of some attributive or suggestive word for what is actually meant

Corbett, *supra* note 20, at 479–81.

<sup>76</sup> Cf. Lakoff & Johnson, *supra* note 43, at 6 ("[T]he human conceptual system is metaphorically structured and defined.").

<sup>77</sup> Goodrich, *supra* note 6, at 106.

<sup>78</sup> Harris, *supra* note 49, at 1226.

<sup>79</sup> Cf. Aristotle, *supra* note 65, at 355 ("It is metaphor above all that gives perspicuity, pleasure, and a foreign air . . . ; but we must make use of metaphors and epithets that are appropriate. This will be secured by observing due proportion; otherwise there will be a lack of propriety." (footnote omitted)).

advocate then can look insincere and manipulating. An advocate may overcome this problem by including in her rhetorical effort a glimpse of her own character or that of her client. Sharing this glimpse of character, the advocate not only will be more believable, but will more likely transform the communication into a unifying exchange with her opponent.<sup>80</sup> Framed appropriately, an argument reflecting a slice of the advocate's (or client's) "self" can send the message: "This is *my* way; where is yours?"<sup>81</sup>

A second problem for the advocate trying to play to her audience is the significant possibility that she may oversimplify her conception of the audience. For example, my husband's audience (me) may indeed be a sensitive young woman with a well-developed morality of care, but she may possess other qualities—such as fear of adulthood or a fiercely individualistic spirit—that convulse at his exalting the importance of a "mature" marital union. The advocate should be mindful that human beings are complicated, full of ambiguities and contradictions.

Obviously, knowing the audience's complexities is the best way for the advocate to avoid oversimplification. Injecting some of her own or her client's "self" may also prevent the advocate's rhetorical effort from appearing to be based on a caricature of the audience. An unlikely source of guidance, earlier identified by Jerry Frug,<sup>82</sup> appears in the mannerism period in art history, which reflected the notion that "[a] character is . . . more convincing the less complete is the writer's picture of him and the more complex and the richer in surprises is his behavior."<sup>83</sup> Taking heed of this observation, the advocate should be mindful of the power of understatement, blurry lines, and irrational or conflicting joinder of qualities in a chosen characterization.<sup>84</sup> By including an unlikely element in the characterization or mixing two apparently competing characterizations, the advocate creates a result that not only is interesting enough to capture the audience's attention, but may also persuade them that the depiction comes close to the complexities of reality.

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<sup>80</sup> See *id.* at 169 ("The speaker should show himself to be of a certain character and should know how to put the judge into a certain frame of mind."); Paul D. Erickson, *Reagan Speaks: The Making of an American Myth 1* (New York, 1989) (stating that communication is not only the transfer of information, but also a unifying process of commitment to values and beliefs presented by the communicator).

<sup>81</sup> Friedrich Nietzsche, *Thus Spoke Zarathustra*, in *The Portable Nietzsche*, ed. & trans. Walter Kaufmann, 103, 307 (New York, 1954). Nietzsche explains "*the* way—that does not exist." *Id.*

<sup>82</sup> Frug, *supra* note 63, at 927.

<sup>83</sup> Hauser, *supra* note 5, at 121.

<sup>84</sup> See *id.* (arguing that mannerism movement in art created a method of characterization that depends on the inconsistency of character).

## 2. Audience Impact on Choice of Characterization Model

Though I have shown that audience should substantially dictate the precise characterization an advocate embraces, I have yet to tie the concept of audience with the particular model of characterization followed. Not surprisingly, I conclude that audience can also have an important influence on the choice of a characterization model. Obviously, an advocate will usually prefer a model most likely to yield a characterization her audience is tempted to embrace.

For the purpose of understanding the choice of a model, I differentiate between instances where the audience is an opponent (a term that I mean to encompass both an opposing attorney and her client) and instances where the audience is a third-party decision-maker such as a judge.<sup>85</sup> The advocate's approach may vary according to her audience.<sup>86</sup>

I start my analysis with opponent as audience. In such a case, human nature suggests against the competing worldviews model. I ground this observation on studies of human nature made by a number of thinkers and described (both powerfully and succinctly) by William James in *Pragmatism*.<sup>87</sup>

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<sup>85</sup> Interpreting the work of Chaim Perelman, Peter Goodrich says that the "new" rhetoric in law has three audiences: "the legal profession, the litigants and the public." Goodrich, *supra* note 6, at 117. Because I focus more narrowly on legal advocacy, I narrow my gaze to those directly involved in the legal process—lawyers, clients, and judges.

<sup>86</sup> Cambridge, Mass., 1975 (1907). Cf. Perelman & Olbrechts-Tyteca, *supra* note 23, at 21–22 (stating that where audience is diverse, advocate may have to use many approaches in order to win over audience).

<sup>87</sup> For other treatment of this notion, see Steven J. Burton, *An Introduction to Law and Legal Reasoning* 135 (Boston, 1985) ("[W]e are likely to select the alternative that requires the fewest adjustments to maintain the coherence of our webs of beliefs."); Kuhn, *supra* note 45, at 52–53 (arguing that scientific discovery "commences with the awareness of anomaly" and fine-tuning of theory so that "the anomalous becomes expected"); Michael Perry, *Morality, Politics, and Law* 28 (New York, 1989) ("A person revises one or more of her beliefs, which for some reason are in question, by reference to one or more of her beliefs not in question—that is, not then in question."); Hilary Putnam, *The Many Faces of Realism* 85–86 (LaSalle, Ill., 1987) (arguing that our moral images are in a process of development and reform, but there will be many instances where we will still say: "This is where my spade is turned."); W. V. Quine & J. S. Ullian, *The Web of Belief* 16–17 (New York, 1978) (stating that beliefs are changed when "a new belief, up for adoption, conflicts somehow with the present body of beliefs as a body"); Bernard Williams, *Ethics and the Limits of Philosophy* 113 (Cambridge, Mass., 1985) ("[S]ome beliefs can be questioned, justified, or adjusted while others are kept constant, but there is no process by which they can all be questioned at once, or all justified in terms of (almost) nothing. In von Neurath's famous image, we repair the ship while we are on the sea."); Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 Cal. L. Rev. 329, 363 (1994) (discussing Michael Perry's account of belief changing). Cf. Robert B. Barrett & Roger F. Gibson, Introduction, in *Perspectives on Quine*, eds. Robert B. Barrett & Roger F. Gibson, at xvi (Cambridge, Mass., 1990) (explaining Quine's and Ullian's notion of the web of belief, described as an integrated cluster of related



Analyzing how someone forms new viewpoints, James observes that a person begins with a stock of old opinions and somehow confronts an experience or assertion that puts them to strain. The person eventually recognizes that she must change her opinions, but she does so with extreme caution, modifying “the ancient stock [of opinions] with a minimum of disturbance.”<sup>88</sup> According to James, loyalty to old opinions is the crux of human reaction to new opinions.<sup>89</sup>

James’s analysis suggests a course of action for an advocate trying to persuade an opponent to change positions. Specifically, the analysis counsels the advocate to choose a characterization that substantially overlaps with her opponent’s perspective on a dispute.<sup>90</sup> The competing worldviews model is inadvisable because it wholly rejects the opponent’s definition of the impetus for the dispute. Like the strategy of direct negation, it declines to show respect for the opponent by adopting part of her impetus as a starting point. The model can seem confrontational and may alienate the opponent.

I do not intend to discount the potential power of the competing worldviews model. An entirely fresh perspective on a dispute may prompt the radical reorientation needed to jostle an opponent from a firmly entrenched position.<sup>91</sup> A new formulation, constituted with unfamiliar elements, may be just what is needed to make the opponent suspend judgment and ultimately come closer to the advocate’s point of view.<sup>92</sup> Accordingly, I do not argue for a presumption against the model. The advocate should nevertheless be wary of its substantial pitfalls.

Generalizations are even less helpful for an advocate evaluating the other three characterization models. Following my earlier emphasis on common ground, the advocate may assess how much each model promotes shared perspectives with her opponent.<sup>93</sup> Yet the model that generates the greatest

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sentences that we believe for the “long . . . haul”).

<sup>88</sup> James, *supra* note 87, at 34–35.

<sup>89</sup> Elaborating on this point, James maintains that in most cases loyalty to old opinions is “by far the most usual way of handling phenomena so novel that they would make for a serious rearrangement of our preconceptions.” *Id.* at 35.

<sup>90</sup> In choosing the area of overlap, the advocate should consider which portions of the opponent’s impetus are most important to the opponent, which portions are closest to the core of her web of beliefs. See Quine & Ullian, *supra* note 87, at 10 (“Some beliefs . . . we shall probably retain while we live. Some, like our belief in the dependability of our neighborhood cobbler, we may abandon tomorrow in the face of adverse evidence.”).

<sup>91</sup> Cf. John W. Cooley, Callaghan’s Appellate Advocacy Manual (Student) § 2:17, at 182 (Deerfield, 1989) (“By disrupting the original way of looking at the situation one frees information that can come together in a new way.”).

<sup>92</sup> See de Bono, *supra* note 18, at 107–11 (explaining how lateral thinking—the process of generating new alternatives to a set of facts—is closely akin to the process of suspending judgment and giving up “the need to be right all the time”).

<sup>93</sup> Cf. Mootz, *supra* note 72, at 183–85 (explaining the importance to critical hermeneutics

overlap between advocate and opponent may change with each new situation. For one set of facts, the rival components model may result in more significant overlap between the parties' positions than the common denominator model, but the opposite may be true for another set of facts.<sup>94</sup>

When the audience is a judge or other third-party decision-maker, new considerations emerge in analyzing the efficacy of the various characterization models. Significantly, the decision-maker is likely to adhere to a role morality that requires her to be impartial and detached.<sup>95</sup> Accordingly, she may be less open to a characterization approach built on forging personal bonds or mapping out common perspectives. Other institutional forces—such as justiciability restrictions<sup>96</sup> or norms associated with judicial restraint—may also dissuade the decision-maker from consciously reflecting on her own sense of self-definition in evaluating the advocate's chosen characterization. All this suggests the perhaps surprising conclusion that characterization models based on overlapping perspectives are less important when the audience is a third-party decision-maker than when the audience is opponent.<sup>97</sup>

For a decision-maker operating within an adversary system, the underlying principle of party autonomy may also reinforce her inclination to purge her "self" from the process. The adversary system places responsibility on the parties for beginning suit, shaping the issues, producing evidence, and financing most of the litigation.<sup>98</sup> Accordingly, characterizations of the dispute

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of recovering "the common ground of the language-in-play that is the basis for maintaining an ongoing conversation").

<sup>94</sup> The overlap in the rival components model derives from the shared impetus that both parties embrace, whereas the overlap in the common denominator model is the identification of a shared proposition relevant to the different definitions of the impetus held by the parties. To give a concrete example: in the context of my marital dispute, my husband may conclude that he would build a stronger bridge between us by embracing the impetus that I define (the course outlined by the rival components model) than he would by identifying a shared proposition between two otherwise divergent impetuses (the course outlined by the common denominator model).

<sup>95</sup> For general discussion of the impartiality ideal and its effect on decision-making, *See* Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 *Am. U. L. Rev.* 699, 749–54 (1995).

<sup>96</sup> By justiciability restrictions, I mean to include such things as a case or controversy requirement (and accompanying doctrines such as standing or ripeness) or principles of deference to another body of government.

<sup>97</sup> This conclusion and the reasoning that follows rest on the notion that the judge is able and willing to do her best to set aside her own worldview for the purpose of evaluating parties' competing characterizations.

<sup>98</sup> John J. Cound et al., *Civil Procedure*, 6th ed., 2 (St. Paul, 1993); *see* Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—"Much Ado About Nothing?"* 46 *Hastings L.J.* 679, 692 (1995).

frequently come from the parties rather than from the decision-maker.<sup>99</sup> A decision-maker strongly committed to the party-autonomy principle may therefore be more open to embracing a characterization proffered by an advocate than she would be were she an opponent.<sup>100</sup> For this reason, an advocate playing to the decision-maker may be less concerned with finding common ground with her opponent than in other contexts. In particular, the advocate may encounter greater success with the competing worldviews model.

Adding complexity, however, are countervailing forces at work when adversaries offer a decision-maker competing characterizations. Indeed, for several reasons the decision-maker may be inclined to embrace a position reflecting overlap between both sides. Where both parties pursue the competing worldviews model, the decision-maker may become aggravated, concluding that the parties are talking past each other. She may also find guidance from the congenial inclination to dispose of the case by giving something to each side.<sup>101</sup> Similarly, she may see a solution that reflects overlapping characterizations as consistent with the judicial restraint notion that courts should take as little action as possible to resolve a dispute.<sup>102</sup>

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<sup>99</sup> See *New Jersey v. T.L.O.*, 468 U.S. 1214, 1216 (1984) (Stevens, J., dissenting from order directing reargument) (“[T]he adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.”); cf. *Mazur v. Stein*, 347 U.S. 201, 206 n.5 (1954) (“We do not reach the constitutional questions not raised by the parties . . . . The fact that the issue was mentioned in argument does not bring the question properly before us.”).

Critics often fail to note that the reason a court may not have decided the case on what appears (in hindsight) to be the most logical basis is simply that the parties did not frame the dispute on that basis. See Eric E. Jorstad, Note, *Litigation Ethics: A Niebuhrian View of the Adversarial Legal System*, 99 *Yale L.J.* 1089, 1106 (1990).

<sup>100</sup> One could argue that this inclination is consistent with case or controversy restrictions binding federal court judges—as well as many state court judges.

<sup>101</sup> Cf. Julius Cohen, *Critiquing the Legal Order in the Name of “Critical Morality,”* 16 *Cardozo L. Rev.* 1599, 1618 (1995) (citing “Anglo-American judicial tradition of . . . compromise”); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View from the Trenches*, 28 *Ga. L. Rev.* 1, 82 (1993) (quoting a plaintiff’s lawyer who said that elected judges “often try to ‘split the baby’ ”); Dean B. Thompson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 *Hofstra L. Rev.* 137, 171 (1994) (noting often cited tendency of arbitrators to “split the baby” or render a compromise award); see also Ohlbaum, *supra* note 14, at 21 (arguing that a trial lawyer should choose a case theory that requires a jury to embrace “the least disagreeable explanation available”).

<sup>102</sup> See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341, 346–47 (1936) (Brandeis, J., concurring) (stating that courts are limited to deciding only those questions properly presented and necessary to dispose of the case); Alexander M. Bickel, *The Least Dangerous Branch*, 2d ed., 112–13 (New Haven, 1986) (explaining notion that the judicial doctrines governing “not doing” are the most important thing that federal judges do); cf. *The Federalist* No. 78 (Alexander Hamilton), ed. Clinton Rossiter, at 465 (New York, 1961) (“The judiciary . . . has no influence over either the sword or the purse; no direction either of the

## II. What Characterization Means for Pedagogy and Lawyering—and Beyond

Characterization study can lead a student on a round-and-round journey from what can be called “the personal” to “the professional,” then back to “the personal” and again to “the professional.” Starting with something as common as a marital dispute about household chores, the student observes how different perspectives can color the same set of facts. Applying this observation to the law, the student can better understand the rhetorical moves between advocate and opponent within the legal process. Once experienced in characterization within legal argument, the student then can reflect on the rest of her life (which—for rhetorical effect—I call “the personal”). With her formal experience with multiple perspectives in legal argument, she is better positioned to understand life’s contingency and to accept its ambiguities. She may also better appreciate that others have divergent viewpoints, and she may even become more tolerant of their positions. After getting this far, she turns back to “the professional” having increased her knowledge of others and expanded her ability to serve clients and society.<sup>103</sup>

The biggest trouble spot in this idealized journey is, I believe, the return to “the personal” after sharpening characterization techniques for legal argument.<sup>104</sup> That is, a law student may languish in her technical skill, cynically reducing the legal process to a game of competing characterizations.

I outline below some possible antidotes for this reaction to the law. First, the cynicism can serve as a vehicle for identifying law’s vulnerability to abuse

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strength or the wealth of the society; and can take no active resolution whatever.”). For appellate attorneys, this principle is reflected in the dogma that the appellant should frame her arguments so as to identify for the appellate court the narrowest possible ground upon which to reverse. *See* Frederick Bernays Wiener, *Essentials of an Effective Appellate Brief*, 17 *Geo. Wash. L. Rev.* 143, 173 (1949) (arguing that appellate advocate should avoid requests to overrule precedent).

<sup>103</sup> William James sheds light on the connection between “the personal” and everything else we humans do:

[Y]ou can’t weed out the human contribution. Our nouns and adjectives are all humanized heirlooms and in the theories we build them into, the inner order and arrangement is wholly dictated by human considerations, intellectual consistency being one of them. Mathematics and logic themselves are fermenting with human rearrangements; physics, astronomy and biology follow massive cues of preference. We plunge forward into the field of fresh experience with the beliefs our ancestors and we have made already; . . . so from one thing to another, altho the stubborn fact remains that there is a sensible flux, what is true of it seems from first to last to be largely a matter of our own creation.

James, *supra* note 87, at 122.

<sup>104</sup> See Chris Goodrich, *Anarchy and Elegance: Confessions of a Journalist at Yale Law School* 105 (Boston, 1991) (“[T]wo months of law school [gave me the] nagging feeling that my outward appearance had become disconnected from my inner self, that my new ability to put a rational veneer on anything had made me a stranger to myself.”).

and for driving home the importance of responsible lawyering. Second, the cynicism can dissipate in the face of the increased confidence and self-esteem made possible by characterization study. If achieved, either consequence is a welcome addition to legal education and lawyering. I emphasize that the following is a *sketch*—a sketch resulting from my inclination for the upbeat (i.e., optimistic spirit). I do not intend a deliberative weighing of the likely effect of characterization on all people.

### A. Abuse and Responsibility

How can cynicism about law lead to responsibility? I begin with the notion that cynicism most likely arises when—after observing multiple, apparently valid, characterizations of one set of facts—the student becomes disheartened with the lack of one fixed and true characterization. For contemporary lawyering, many factors already suggest an atmosphere of unfairness and hostility, particularly in adversary interactions: obfuscatory and dilatory strategies by counsel, inequality in parties' resources, and ambush techniques for catching opponents unprepared are a few examples. Battling characterizations emerge as yet another symptom of a legal system without an anchor.

The disillusioned student may conclude that propounding a particular point of view is ultimately an empty enterprise, since, after all, there will always be another perspective, another characterization of the controversy. The legal process appears as “just another example of relativism.”<sup>105</sup> Making matters worse, the student may observe others using characterization technique in a way the student believes is abusive, such as using the technique to reinforce negative stereotypes,<sup>106</sup> to advance a distorted metaphor or analogy,<sup>107</sup> to exaggerate

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<sup>105</sup> Frug, *supra* note 63, at 922.

This alienation may be similar to the reaction of some to postmodern analysis of law. See Gary Minda, One Hundred Years of Modern Legal Thought: From Langdell and Holmes to Posner and Schlag, 28 Ind. L. Rev. 353, 355 n.6 (1995) (citing Pierre Schlag, Values, 6 Yale J.L. & Human. 219, 231–32 (1994)) (“[F]or those who identify postmodernism with moral relativism or ‘nihilism,’ the arrival of postmodernism in legal studies may seem alien—indeed even frightening.”). Minda and Schlag maintain that “if there is something ‘frightening’ or ‘nihilistic’ about postmodernism, it is because a ‘frightened and weary perspective’—call it legal modernism, or a particular understanding of the ‘law’—feels threatened by its own state of development.” *Id.*

The alienation can also result from the perception that characterization is merely another weapon for legal actors giving utmost prominence to their own self-interest or that of their clients. Cf. White, *supra* note 6, at 687–88 (“Rhetoric, in short, is thought of either as a second-rate way of dealing with facts that cannot really be properly known or as a way of dealing with people instrumentally or manipulatively, in an attempt to get them to do something you want them to do.”).

<sup>106</sup> Muriel Morisey Spence, Teaching *Williams v. Walker-Thomas Furniture Co.*, 3 Temp. Pol. & Civ. Rts. L. Rev. 89, 90, 98–102 (1993–94) (arguing that legal educators’ use of facts about plaintiff in 1965 contracts case can perpetuate stereotype that “African-American women . . . are disproportionately on welfare, irresponsible with money and likely to raise large families as single parents”).

<sup>107</sup> See Winter, *supra* note 75, at 1386–93 (arguing that using metaphor “standing” to

unfairly only one component of a complex set of facts,<sup>108</sup> or to import misplaced emotions into the controversy.<sup>109</sup>

But ignoring characterization skills altogether is no way to eliminate alienation and cynicism or to eradicate abuse of the technique. To the contrary, characterization study can sensitize a student to the need for fair and responsible lawyering and may actually inspire corrective action. For example, a student observing how characterization can reinforce an inaccurate negative image of a demographic group may for the first time appreciate legal argument's potential to perpetuate intolerance and may respond by calling attention to the characterization's effect or by otherwise acting to correct the problem.

Even for those students who are not predisposed to use the legal process to further what they see as moral good, characterization study may help them find a rewarding personal and social context for their work.<sup>110</sup> Indeed, understanding the conditional nature of one's own perspectives and beliefs can be a powerful impetus to valuing the perspectives and beliefs of others and for better understanding ourselves. As Richard Rorty argues, this new insight on those who are strange or different builds solidarity: "This process of coming to see other human beings as 'one of us' rather than as 'them' is a matter of detailed description of what unfamiliar people are like and of redescription of what we ourselves are like."<sup>111</sup>

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explain the underlying legal concept distorted our ability to understand problem that concept was intended to embrace).

<sup>108</sup> An interesting example of the law struggling with this potential abuse is reflected in cases involving Federal Rules of Evidence 609 and 403. Rule 609 allows an advocate to impeach a witness under certain circumstances using evidence of the witness's criminal conviction. Rule 403 excludes the evidence where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 514, 527 (1993) (holding that Rule 609 (a)(1) requires judge "to permit impeachment of a *civil* witness with evidence of prior felony convictions regardless of ensuing unfair prejudice to the witness or the party offering the testimony" (emphasis added)).

Where the witness is a criminal defendant, Rule 609 provides a significant dilemma, since empirical work suggests that juries have difficulty confining their consideration of prior convictions to the accused's veracity. See Robert G. Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 Okla. L. Rev. 334, 351–53 (1979); see generally Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* § 6.44 (Boston, 1995).

<sup>109</sup> See *Rhodes v. Rhodes*, 449 S.E.2d 75, 78 (W. Va. 1994) (holding that concern about child being raised in a particular foreign country—Germany—rather than the United States is not an appropriate basis for a child custody award).

<sup>110</sup> On whether legal education can instill a missing sense of virtue in adult students, see Amy Gutmann, *Can Virtue Be Taught to Lawyers?* 45 *Stan. L. Rev.* 1759 (1993).

<sup>111</sup> Rorty explains the connection as follows:

In my utopia, human solidarity would be seen not as a fact to be recognized by clearing away "prejudice" or burrowing down previously hidden depths but, rather,

Within the personal benefits arising when an individual embraces contingency, Rorty therefore finds the possibility to contribute to the public project of human solidarity.<sup>112</sup> Making similar observations from their work on psychological growth, Jane Loevinger and Ruth Wessler describe how maturity brings “a feeling for the complexity and multifaceted character of real people and real situations,” which—in turn—fosters “a deepened respect for other people and their need to find their own way and even make their own mistakes.” According to Loevinger and Wessler, this awareness includes “the courage to acknowledge and to cope with conflict” as well as a broader concern with “social problems beyond [one’s] own immediate experience.”<sup>113</sup>

The work of Gerald Wetlaufer connects these observations to legal discourse. Wetlaufer analyzes the legal convention of “overclaiming certainty” about points of argument—a convention in tension with embracing contingency and appreciating multiple perspectives. Should our legal system abandon this convention of certainty, Wetlaufer maintains, “the lawyer and then, in his turn, the judge—would assume a less controlling and more vulnerable relationship to his audiences.” Wetlaufer predicts that “lawyers and judges would have a harder time sustaining the claim that they are not personally responsible for the positions they take, the judgments they make, the results they produce.”<sup>114</sup>

I have yet another claim to make about the connection between characterization study and responsible lawyering. I start with the notion that lawyers all learned to characterize before our legal education even began and should bring those experiences to the study of legal discourse.<sup>115</sup> To do so makes it much easier to grasp how to characterize in legal argument. Moreover, transferring a skill first learned in a personal context may make it easier for law students to perceive the human consequences of their legal

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as a goal to be achieved. It is to be achieved not by inquiry but by imagination, the imaginative ability to see strange people as fellow sufferers. Solidarity is not discovered by reflection but created. It is created by increasing our sensibility to the particular details of the pain and humiliation of other, unfamiliar sorts of people different from ourselves.

Contingency, Irony, and Solidarity at xvi (Cambridge, Mass., 1989).

<sup>112</sup> Rorty describes this journey as a bridge from “private irony” to “liberal hope.” The private ironist, in Rorty’s vocabulary, is someone saturated with characterization skill. *See id.* at 73 (arguing that ironists realize that “anything can be made to look good or bad by being redescribed” and are “never quite able to take themselves seriously because always aware that the terms in which they described themselves are subject to change”). With this skill, however, the ironist may be able to implement the principle of the “ideal liberal society” which consists of “little more than a consensus that the point of social organization is to let everybody have a chance at self-creation to the best of his or her abilities.” *Id.* at 84.

<sup>113</sup> 1 Loevinger & Wessler, *supra* note 24, at 6.

<sup>114</sup> Wetlaufer, *supra* note 6, at 1590.

<sup>115</sup> *See* Paul, *supra* note 2, at 1805 (“[T]he play of arguments often invoked in legal controversy resembles in crucial ways the play of arguments invoked in political debate.”).



arguments. The sting of cruelty and inhumanity is probably more readily perceived in personal settings than in more formal, detached professional contexts such as lawyering and judging. Yet if students inform their professional skills with techniques perfected within the personal realm, they may also transfer an improved ability to perceive the potentially hurtful consequences of their craft.

### ***B. Confidence and Self-Esteem***

I conclude with the proposition that characterization study provides a salve for those corroded by self-doubt. Although this claim may at first appear somewhat extravagant, there are—it turns out—a number of reasons why characterization technique builds confidence.

Many students begin law school questioning whether they can master the law with the same proficiency they demonstrated during earlier times in their life. Realizing that they have already refined a major skill needed for effective lawyering should buoy the students through other, less familiar challenges of law study. Moreover, students and lawyers who work on their characterization technique will bring their efforts to bear in lawyering and may thereby increase their abilities *and* confidence. Characterization technique not only will help legal analysts cope creatively with a set of facts, but will help them think across categories of doctrine and reject the artificial cubbyholes that the law makes for itself.<sup>116</sup>

The main source of increased self-esteem, however, derives from the nature of characterization technique itself. Learning that each set of circumstances can give rise to multiple characterizations has the potential of setting students adrift, uneasy with the realization that their personal take on a situation may not be the only appropriate perspective. Yet for those predisposed to self-doubt, the study of competing characterizations brings strength: if there are many valid perspectives on a set of facts, the student's own perspective has a good chance of being valid itself.<sup>117</sup>

Even more empowering is the message that the characterization offered by another is presumptively subject to *recharacterization*. Many people do not make a habit of questioning authority and normally accept others'

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<sup>116</sup> I acknowledge that the process of rejecting fixed rules and categories can for some students of the law be far more disorienting than empowering. With more exposure to the law, most students develop tolerance for its uncertainties and ambiguities. Characterization study can facilitate this development.

<sup>117</sup> Even the self-doubter must remind herself, however, that she may not "possess" all possible perspectives on a controversy. The humility to understand this will also include, I hope, the responsibility not to abuse her own power to menace others with her point of view and the flexibility to appreciate new perspectives.

The problem of distinguishing a "valid" characterization from an "invalid" one is particularly troublesome given my assumption that no static or true characterization emerges from a given set of circumstances. See *supra* note 31.

formulations of a problem. Characterization study may prompt them to think critically, to avoid being bullied, and to dispel the mystique that surrounds words simply because they are forcefully articulated.<sup>118</sup> This skill is particularly important in legal discourse, which so often overstates, oversimplifies, and falsely asserts certainty.<sup>119</sup>

A student may have lost the knack of trusting her instincts or first reaction to a situation. She may fail to give *herself* the presumption of credibility and accuracy she grants to others. Understanding that multiple characterizations can coexist may develop a habit of mind enabling her to give herself the credit she deserves.<sup>120</sup>

Most exciting of all, however, is the possibility that the process of questioning the formulations of others may prompt the mild-mannered to look inside themselves—even before others have spoken—to search for and express their own perspective. In other words, characterization study may enable some people to enjoy more fully their freedom to perceive and to create their identity without shackles imposed from without.<sup>121</sup> Heeding the admonition from a favorite children's book, they may even be inspired to share more of themselves with others:

“But tell me what you see? It's your dream—not mine!”<sup>122</sup>

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<sup>118</sup> On the need for lawyers to be flexible and adroit in reformulation, see White, *supra* note 6, at 690 (“[I]n speaking the language of the law, the lawyer must always be ready to try to change it: to add or to drop a distinction, to admit a new voice, to claim a new source of authority, and so on.”).

<sup>119</sup> See Wetlaufer, *supra* note 6, at 1590–91 (arguing that dispelling law's overemphasis on certainty diminishes lawyers' capacity “to read texts as what they really are—pots full of often conflicting possibilities that can be put to work for a wide range of purposes” (citing Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. Legal Educ. 518, 562 (1986))).

<sup>120</sup> Anne Lamott puts it like this:

When we listened to our intuition when we were small and then told the grown-ups what we believed to be true, we were often either corrected, ridiculed, or punished. God forbid you should have your own opinions or perceptions—better to have head lice. If you asked innocently, “Why is Mom in the bathroom crying?” you might be told, “Mom isn't crying; Mom has allergies.” Or if you said, “Why didn't Dad come home last night?” you were told brightly, “Dad did come home last night, but then he left again very early.” And you nodded . . .

Lamott, *supra* note 73, at 111. Gerry Spence shares this intuition. *How to Argue and Win Every Time* 13 (New York, 1995) (stating that permission to engage in argument is “permission to peer out of our closet, to look around, to ask questions, to demand respect, to share our creativity, our ideas, to speak out, to search for love, to seek justice”).

<sup>121</sup> See Jean-Paul Sartre, *Being and Nothingness: An Essay on Phenomenological Ontology*, abridged ed., trans. Hazel E. Barnes, 529 (Secaucus, 1956) (explaining the notion that “man [is] condemned to be free” and therefore “is responsible for the world and for himself as a way of being”).

<sup>122</sup> Laura Joffe Numeroff, *Dogs Don't Wear Sneakers* 27 (New York, 1993).

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Life is complicated. Those of us who reconcile ourselves to this—and even celebrate life’s complexities—are better able to reckon with what life hands us. So it is with lawyers, the law, and legal education. A lawyer who sees only one view of a set of facts is ill poised to solve problems, advocate for her client, and meet the challenges posed by her adversaries. Other legal actors, such as judges who must choose among many seemingly valid characterizations of a controversy, benefit from understanding how a dispute can generate many different perspectives. Characterization study is therefore an essential tool in preparation and appreciation for the complexities that make law (and life) so difficult and so stimulating.<sup>123</sup>

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<sup>123</sup> Those who know me—the author of this article—will see in the piece representative snippets of my life—my work as a law professor, wife, and mother of small children, my habit of reading old copies of the *New York Times* and the *Philadelphia Inquirer* each night, my eagerness for many different academic disciplines, and my mixed emotions about philosophical theory (in general) and postmodernist philosophers (in particular). Thus, in addition to outlining a How To of characterization technique itself, I’ve tried to make the article an example of my thesis: the power and importance of integrating personal skills and experiences into professional work.

Having said this, I make no claim to have discovered this enterprise. See, e.g., Charles Dickens, *Little Dorrit* 564 (Oxford, 1970) (1857) (“[W]e lawyers are always curious, always inquisitive, always picking up odds and ends for our patchwork minds, since there is no knowing when and where they may fit into some corner.”).