Fall 1996

The Polyphonic Courtroom: Expanding the Possibilities of Judicial Discourse

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ARTICLES

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> "[T]o get somewhere with the matter at hand is to intensify the suspicion, both your own and that of others, that you are not quite getting it right."[1]

I. Introduction

In a matter of such profound importance as the justification for imposing judicial power, few would deny the normative goal of maintaining as open a discourse as possible. As one means to an open discourse, scholars have increasingly turned to the transformative power of "dialogue" to explore new legal meaning.[2]

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* Instructor in Law, New York University School of Law. The author gratefully acknowledges the valuable contributions and insights of Anthony G. Amsterdam, Deborah A. Batts, Sarah E. Burns, Peggy C. Davis, Robert L. Levy and Andrea McArdle. The author would also like to thank Sarah Edenbaum for her superb research assistance. The author is also especially grateful to Randi E. Schwartz for her suggestions, encouragement and support.

1. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 29 (1973).

2. *See, e.g.*, Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L.J. 2243 (1993); Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 434 (1990).

However, the central instrument for elaborating legal doctrine, the judicial opinion, is a paradigm of closed discourse. As a general rule, judicial opinions embody what Robert Ferguson has called the "the rhetoric of inevitability."[3] In other words, the vast majority of opinions are written like briefs with the chosen result as a client. An opinion will perfunctorily dismiss or diminish alternative analyses, present facts as determinate and finite when in fact they are carefully chosen to present a given story, articulate standards in a manner favorable to the result and turn to other standard methods of advocacy that students learn in their first year of law school.[4] Stated more broadly, opinions are typically monologues which reject exploration of complex issues of meaning in favor of the simple exercise of justifying a result.[5]

The consequences of this cramped state of judicial discourse are profound and disturbing. The prevailing model offers judges no incentive to openly explore meaning because of the operating fiction that there is no meaning to be explored, only the "right" meaning to be articulated and explained.[6] Opinions thus ignore how adjudication often entails hard choices among multiple perspectives, each of which might have a vital, independent force.[7] As a result, the actual considerations and range of choices available

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3. Robert A. Ferguson, *The Rhetorics of the Judicial Opinion: The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 213 (1990).

4. For an extensive discussion by a judge of the techniques judges use to convince the reader of the inevitability of a result, see Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371 (1995).

5. *See infra* text accompanying notes 70-89.

6. *See, e.g.*, Wald, *supra* note 4, at 1417 ("while judges still typically write as if they were absolutely certain about the rightness and soundness of their analysis and decisions, everyone (including the judges) knows that's not necessarily the case"); Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1441 (1995). According to Posner,

> Judges are not comfortable writing opinions to the effect that, "We have very little sense of what is going on in this case. The record is poorly developed, and the lawyers are lousy. We have no confidence that we got it right. We know we're groping in the dark. But we're paid to decide cases and here goes." Nevertheless, this is the actual character of many appellate cases that are decided in published opinions.

Id. (citations omitted).

7. Robert Cover's work is particularly insightful in setting out ways in which judges avoid confronting painful choices their role demands of them. *See* ROBERT M. COVER, JUSTICE ACCUSED 232-36 (1975).

to judges remain concealed—a loss that impoverishes the elaboration of legal meaning.[8]

The consequences of the monologic tendency, however, run much deeper, extending even to the act of judicial decision-making itself. By failing to explore meaning, opinions do not merely conceal choices from readers, but mask (to quote Holmes) judges' own "instinctive preferences and inarticulate convictions" from the judges themselves.[9] In other words, monologic opinions promote monologic ways of thinking, and monologic ways of thinking inhibit discourse.

The working hypothesis of this Article is that this state of affairs is neither desirable nor inevitable. Another normative conception of judicial discourse, the "polyphonic model," holds that a judicial opinion is part of a continuing dialogue whose hallmark is exploration, not simplification. Under this model, opinions should embrace dialogue and complexity, and recognize the independent validity of multiple perspectives. Such opinions would elaborate, not restrict and reduce, meaning.

However, the recognition of the merits of this approach is only a first step towards realizing it. Obstacles remain because cognition itself simplifies meaning, and thus it takes more than simple will to write and think more polyphonically. Nevertheless, these cognitive constraints themselves suggest potential strategies that could intensify dialogue and thereby expand the scope of judicial discourse.

This Article explores these issues in four parts. Part II draws upon the writings of Mikhail Bakhtin in order to set forth a conceptual framework through which to examine judicial discourse. Part III conceptualizes judicial discourse as primarily monologic and develops polyphony as a more suitable normative goal. This part also examines representative judicial opinions which exemplify both monologic and polyphonic approaches to judicial discourse. Part IV explores cognitive obstacles to the recognition of a

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8. Indeed, there are increasing numbers of critiques of the "rhetoric" or "style" of judicial opinions. For an overview of recent scholarship in this area, see the Special Issue of the University of Chicago Law Review on "Judicial Opinion Writing." 62 U. CHI. L. REV. 1363-1520 (1995). *See also* Morton J. Horwitz, *The Supreme Court, 1992 Term Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 117 (1993).

9. OLIVER WENDELL HOLMES JR., THE COMMON LAW 35-36 (1881).

polyphonic ideal. Finally, Part V suggests approaches that would promote a more pluralistic, polyphonic model of judicial discourse.

Throughout this Article, I will focus my analysis on the adjudication of "hard cases"[10] in the United States Supreme Court. I emphasize opinions of the Supreme Court not because they present the only area where the scope of judicial discourse is limited, but because they present an area where polyphonic discourse is both distinctly lacking and urgently needed.

II. The Monologic and the Polyphonic

The work of Mikhail Mikhailovich Bakhtin (1895-1975) offers a powerful descriptive and normative framework through which to view the current state of judicial discourse.[11] Like many other modern and post-modern thinkers, Bakhtin was concerned preeminently with how language embodies and expresses meaning. What is especially striking about Bakhtin's work, however, and what renders it especially relevant to an examination of judicial discourse, is his "extraordinary sensitivity to the immense plurality of experience."[12] It is this understanding that forms the foundation for one of Bakhtin's central themes: meaning is in a perpetual

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10. *See* RONALD DWORKIN, LAW'S EMPIRE 39-40 (1986).

11. Bakhtin's influence extends to "philosophy, semiotics, cultural studies, anthropology, feminist and post-colonial studies, Marxism, [and] ethics." Pam Morris, *Introduction* to MIKHAIL MIKHAILOVICH BAKHTIN, PAVEL NIKOLAEVICH MEDVEDEV & VALENTIN NIKILAEVICH VOLOSHINOV, THE BAKHTIN READER 1 (Pam Morris ed., 1994). Surprisingly few legal scholars have explicitly drawn on Bakhtin's ideas. For some exceptions, see Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989); Ferguson, *supra* note 3; Charles Hersch, *Bakhtin and Dialogic Constitutional Interpretation*, 18 LEGAL STUD. F. 33 (1994); JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW 107-37 (1985).

Bakhtin's work has only become widely known since the late 1970's. This relatively recent discovery is due to, among other things, his imprisonment by Soviet authorities and his own persistent uninterest in preserving his work in book or article form. Michael Holquist, *Introduction* to M.M. BAKHTIN, THE DIALOGIC IMAGINATION, *xv, xxiv-xxv* (Michael Holquist ed., 1980). To add further complexity, it is unclear whether some important early writings are the work of Bakhtin or of two other thinkers, P.N. Medvedev and V.N. Voloshinov, in his circle. For a recent discussion of this controversy, *see* Morris, *supra*, at 2-4. For purposes of this article, I will cite to works which are provisionally attributed to Medvedev and Voloshinov, but I will continue to refer to the ideas as Bakhtin's in the text.

12. Holquist, *supra* note 11, at *xx*. This distinguishes Bakhtin from other influential participants—such as Wittgenstein—of the so-called "linguistic turn" of twentieth-century philosophy. *Id. See also* MIKHAIL BAKHTIN, PROBLEMS OF DOSTOYEVSKY'S POETICS 26 (Caryl Emerson ed. & trans., 1984) [hereinafter PDP].

state of "becoming."[13] Language is not the carrier of final truths, but a means to present "a working hypothesis for comprehending and expressing reality."[14]

A. The Process and Content of Dialogue

Bakhtin's famous elaboration of the terms "dialogue" and "dialogic" embodies the dynamic patterns of meaning that he envisioned. To Bakhtin, "dialogue" is much more than a conversation. Rather, all understanding is dialogic because understanding is by its nature responsive;[15] we elaborate meaning by "lay[ing] down a set of our own answering words" in response to the words of others.[16] This dialogic process not only describes social discourse, but also how we elaborate meaning in our own individual

13. PDP, *supra* note 12, at 251.

14. M.M. BAKHTIN, THE DIALOGIC IMAGINATION 61 (Michael Holquist ed. & Caryl Emerson & Michael Holquist trans. 1981) [hereinafter DI].

15. V.N. VOLOSHINOV, MARXISM AND THE PHILOSOPHY OF LANGUAGE 102 (Ladislav Matjejka & I.R. Titunick trans., 1973).

16. *Id.*

consciousness.[17] In this sense, dialogue is not merely a way *to* understanding, but *is* understanding.[18]

Given that understanding is dialogic, the elaboration of meaning is an extraordinarily complex process. Any utterance comes from "another's voice and filled with that other voice," and "enters [the hearer's] context from another context, permeated with the interpretations of others."[19] Stated another way, meaning "must find itself, reveal itself among other words, within an intense field of interorientations."[20]

Bakhtin links up this conception of the elaboration of meaning with the "immense plurality of experience." Individual experience, based upon, among many other things, "parent, clan, class, religion, country,"[21] is in flux over time and is unique at any given time.[22] While communication of course entails a measure of mutual

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17. PDP, *supra* note 12, at 18, 261. Bakhtin cites an example from the work of Dostoyevsky that illustrates the dialogic nature of individual consciousness. The text is from POOR FOLK, Dostoyevsky's first novel, and represents the internal thoughts of the narrator Makar Devushkin:

> A day or two ago, in private conversation, Yevstafy Ivanovich said that the most important virtue in a citizen was to earn money. He said in jest (I know it was in jest) that morality consists in not being a burden to anyone. Well, I'm not a burden to anyone. My crust of bread is my own; it is true it is a plain crust of bread, at times a dry one; but there it is, earned by my toil and put to lawful and irreproachable use. Why, what can one do? I know very well, of course, that I don't do much by copying; but all the same I am proud of working and earning my bread in the sweat of my brow.

Id. at 207. Bakhtin points out that this single voice contains "an overlapping and merging" dialogue and illustrates his point by transforming this "monologue" into a more conventional "dialogue":

> THE OTHER: One must know how to earn a lot of money. One shouldn't be a burden to anyone. But you are a burden to others.
>
> MAKAR DEVUSHKIN: I'm not a burden to anyone. I've got my own piece of bread.
>
> THE OTHER: But what a piece of bread it is! Today it's there, and tomorrow it's gone. And it's probably a dry one, at that!
>
> MAKAR DEVUSHKIN: It is true it is a plain crust of bread, at times a dry one, but there it is, earned by my toil and put to lawful and irreproachable use.
>
> THE OTHER: But what kind of toil! All you do is copy. You're not especially capable of anything else.
>
> MAKAR DEVUSHKIN: Well, what can one do! I know very well, of course, that I don't do much by copying, but all the same I am proud of it.

Id. at 210.

18. *Id.* at 40, 252.

19. *Id.* at 202.

20. *Id.* at 239.

21. Wayne C. Booth, *Introduction* to MIKHAIL BAKHTIN, *in* PDP, *supra* note 12, at *xxi.*

22. DI, *supra* note 14, at 271.

understanding, the plurality of experience insures that contradictions and complexities shoot through language:

> [A]t any given moment of its historical existence, language is heteroglot from top to bottom: it represents the co-existence of socio-ideological contradictions between the present and the past, between differing epochs of the past, between different socio-ideological groups in the present, between tendencies, schools, circles, and so forth.[23]

In other words, ideas from diverse sources interact both within individuals and among individuals, and it is this dialogue that elaborates meaning.[24]

Three important and related implications flow from this conceptualization of meaning. First, meaning is not unitary. Rather, it depends upon a unique set of conditions (i.e., the "context") which exists at the actual time of utterance. Context includes both a temporal dimension (i.e. the historical point in time of the utterance) as well as a synchronic dimension (for example, an individual's "parents, clan, class" at a given point in time). This complex array of sociological, ideological and historical factors determines the parameters of dialogue and thus informs meaning.[25]

Second, ideas are never "closed-off" or "finalized," but transform and renew themselves through a constant interaction with other ideas.[26] Finally, meaning cannot be "abstract" or

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23. *Id.* at 291. Bakhtin characterizes these processes as embodying a tension between centrifugal and centripetal forces. Centrifugal forces, originating in political and cultural influences, centralize and unify meaning. *Id.* at 271-72. Centripetal forces, originating in the "immense plurality of experience", decentralize meaning. *Id.* Meaning is thus dynamic:

> Alongside the centripetal forces, the centrifugal forces of language carry on their uninterrupted work; alongside verbal-ideological centralization and unification, the uninterrupted processes of decentralization and disunification go forward.

Id. at 272.

24. Stanley Fish's notion of "interpretive communities" captures something of the essence of this idea in a different way. Fish believes that "each of us is a member of not one but innumerable interpretive communities in relation to which different kinds of belief are operating with different weight and force." STANLEY FISH, DOING WHAT COMES NATURALLY 30 (1989). Fish describes this idea in relation to himself: "I am, among other things, white, male, a teacher, a literary critic, a student of interpretation, a member of a law faculty, a father, a son, an uncle, a husband (twice), a citizen, a (passionate) consumer, a member of the middle class, a Jew, the oldest of four children, a cousin, a brother, a brother-in-law, a son-in-law, a Democrat, short, balding, fifty, an easterner who has been a westerner and is now a southerner, a voter, a neighbor, an optimist, a department chairman." *Id.*

25. DI, *supra* note 14, at 271-72, 291.

26. *Id.* at 276. *See also* NIKOLAEAVICH & VOLOSHINOV, *supra* note 11, at 85-87.

"neutral" because all words are "shot through" with "context" and "intention."[27]

Thus, in Bakhtin's view, language cannot present immutable truths or finalized ideas. What we call "conclusions" are at best provisional and contingent hypotheses embodied in language.

B. Monologic and Polyphonic Discourse

In addition to describing the elaboration of meaning, Bakhtin's ideas have an intense normative dimension as well. In exploring this normative dimension, Bakhtin introduced two terms: the prevailing mode of approaching meaning is "monologic," while his normative ideal is "polyphonic."[28] These terms describe both ways of thinking and ways of expressing.[29]

A monologic view rejects the open-ended dialogic nature of meaning in favor of a unitary and finalized sense of the world. This sense of the world tends to be framed in terms of "the spirit of a nation, the spirit of a people, [or] the spirit of history."[30] Thus, monologism reduces multiple perspectives "to a single ideological common denominator."[31] For example, in a monologic novel, while characters might speak to each other or have distinct characterizations, they only interact "in the unified field of vision of author, director and audience, against the clearly defined background of a single-tiered world."[32] There is no "plurality of consciousness" and each character is "predetermined, closed-off, finalized."[33]

Bakhtin vividly describes the consequences of this regime:

> All that has the power to mean, all that has value, is everywhere concentrated around one center—the carrier. All ideological creative acts are conceived and perceived as possible

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27. DI, *supra* note 14, at 293. This idea highlights the difference between Bakhtin's thought and Jürgen Habermas' notion of "discourse ethics." While Habermas grounds discourse ethics on "intersubjective discourse," he ultimately seeks to create non-contextual, universal principles of morality. *See* Jürgen Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, 83 NW. U. L. REV. 38 (1989). Although Habermas expressly disclaims that his approach is monologic, in Bakhtinian terms, it is profoundly so, as would any attempt to ground meaning independent of context.

28. PDP, *supra* note 12, at 80-82.

29. *Id.* at 88.

30. *Id.* at 82.

31. *Id.* at 17.

32. *Id.*

33. PDP, *supra* note 12, at 17-18.

> expressions of a single consciousness, a single spirit. . . . Everything capable of meaning can be gathered together in one consciousness and subordinated to a unified accent; whatever does not submit to such a reduction is accidental and unessential. . . . Semantic unity of any sort is everywhere represented by a single consciousness and a single point of view.[34]

In contrast to the monologic mode, the ideal of "polyphony" performs "a small-scale Copernican revolution" by rejecting an abstract and fixed external position.[35] Instead, polyphony embraces "[a] plurality of independent and unmerged voices and consciousness, a genuine polyphony of fully valid voices."[36] For example, in a polyphonic novel, voices stand "alongside" that of the author and are not submerged within it.[37] In addition, "there are no detached, impersonal verities," no "thoughts . . . which, when removed from their context and detached from their voice, would retain their semantic meaning in an impersonal form."[38]

Moreover, polyphony entails an active embrace of dialogue and experience. "[T]o think" for a polyphonic author "means to question and to listen, to try out new orientations, to combine some and expose others."[39] This mode embodies a "distrust of convictions,"[40] a seeking out not only of "the loud, recognized, reigning voices of the epoch," but also "ideas not yet fully emerged, latent ideas heard as yet by no one but himself, and ideas . . . just beginning to ripen, embryos of future worldviews."[41] Thus, the

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34. *Id.* at 81-82.

35. *Id.* at 49.

36. *Id.* at 6.

37. *Id.*

38. PDP, *supra* note 12, at 95-96. Bakhtin cites many examples of polyphonic writing from Dostoyevsky. To take a brief example, in THE BROTHERS KARAMAZOV, Ivan experiences an internal dialogue regarding his father's murder. *Id.* at 258-59. One of Ivan's internal voices does not want his father murdered. Ivan's second internal voice, however, does want his father murdered, but only if it occurs against Ivan's will because then Ivan would not feel remorse. This second voice—hidden for the most part from Ivan himself—is in essence a rejoinder to the first voice. Another character, Smerdyakov, only hears Ivan's second voice. However, in Ivan's external dialogues with Smerdyakov, Ivan answers with his first voice, which Smerdyakov takes to mean the opposite of what this voice seems to be saying. But Ivan's "voice that answers Smerdyakov is interrupted here and there by the hidden rejoinder of [Ivan's] second voice." The rich and complex texture of these internal and external dialogues exemplify the dialogic interactions that are, to Bakhtin, the hallmark of a polyphonic novel.

39. *Id.* at 95. *See also id.* at 88.

40. *Id.* at 98.

41. *Id.* at 90.

polyphonic author replaces "the relationship of a single cognizant and judging 'I' to the world" with the "interrelationship of all these cognizant and judging 'I's' to one another."[42] Put another way, the

> participatory orientation [of polyphony] takes another person's discourse seriously, and is capable of approaching it both as a semantic position and as another point of view. Only through such an inner dialogic orientation can my discourse find itself in intimate contact with someone else's discourse, and yet at the same time not fuse with it, not swallow it up, not dissolve in itself the other's power to mean; that is, only thus can it retain fully its independence as a discourse.[43]

Polyphony thus rejects the misleading veneer of certainty embodied by the monologic tendency. The monologic mode does not merely constrict meaning into one perspective, but assumes that one perspective, that of the "carrier's", is the only right perspective. In contrast, by embracing polyphony and intensifying dialogue, discourse can become a rich medium "fraught with possibilities,"[44] a stance with a mission to "reveal ever newer ways to mean."[45]

III. The Polyphonic Model of Judicial Discourse

According to Bakhtin, *all* understanding is dialogic. The monologic mode rejects this idea and operates under the fiction that there is a single, all-encompassing perspective. The polyphonic mode embraces the dialogic nature of meaning and seeks to intensify the elaboration of meaning "through intimate contact with another person's discourse." These ideas are a powerful means to analyze the current state of judicial discourse.

A. The Judicial Opinion As Dialogue

As the central tool through which judges elaborate meaning, opinions are dialogic. Opinions engage in a dialogue which includes practitioners, litigants, scholars, law students, other governmental actors, the general public and, perhaps most conspicuously, other judges. For example, judges interpret other opinions, examine their stories and modes of analysis, while citing,

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42. *Id.* at 100.
43. PDP, *supra* note 12, at 64.
44. *Id.* at 91.
45. DI, *supra* note 14, at 346 (emphasis deleted). *See also id.* at 366-71.

limiting, overruling and otherwise commenting on what other judges have written.[46] Opinions thus become part of a complex web of writers and readers who elaborate legal meaning. How a given judge characterizes "the law" is the result of this dialogue.

Moreover, opinions embody a dialogue among parties. The adversary system presents judges with at least two perspectives which offer conflicting accounts of facts and law. Parties respond to adversaries and judges, and judges respond to adversaries. In this sense, litigation is dialogic. The parties and the judge or judges engage in a dialogue, with the judge assigned the role of bringing the dialogue to some sort of resolution which, under certain circumstances, is articulated in an opinion.

In addition, while a voluntary settlement or judicially enforced resolution terminates litigation, the judicial dialogue is never finalized. Doctrine evolves over time. Conceptions of, for example, the First Amendment, due process, the Equal Protection Clause and the evolving interpretations of statutes are all reconfigured and renewed under the power of historical change and shifting context—the essence of Bakhtin's "intense field of interorientations."[47] Thus, although definitive in form, opinions are exploratory in function.

Finally, the judicial dialogue is, at least in theory, a heavily contextualized process. The classic conception of the jurisdictional requirement of an actual "case" and "controversy," and the related doctrines of standing, ripeness and mootness derived from it, insure that litigation presents a judge with a unique factual matrix.[48]

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46. *See* James Boyd White, *What's An Opinion For?*, 62 U. CHI. L. REV. 1363, 1367 (1995) (a judicial opinion "connects cases across time and space" and "thus engages in the central conversation that is for us the law, a conversation that the opinion itself makes possible"). *See also* K.N. LLEWELLYN, THE BRAMBLE BUSH 49 (1930).

> *[N]o case can have a meaning by itself!* Standing alone, it can give you no guidance . . . . What counts, what gives you leads, what gives you sureness, *that is the background of the other cases* in relation to which you must read the one. They color the language, the technical terms, used in the opinion. But above all they give you the wherewithal to find which of the facts are significant, and in what aspect they are significant, and how far the rules laid down are to be trusted.

Id. (emphasis in the original).

47. *See supra* text accompanying notes 19-20.

48. For a general discussion of the operation of these doctrines as a limitation on federal jurisdiction, see Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case" or "Controversy" Requirement*, 93 HARV. L. REV. 297 (1979); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 67-69 (2d ed. 1988).

This coheres with the primacy of context in the dialogic elaboration of meaning.

B. Polyphony As A Normative Goal For Judges

Not only are opinions descriptively dialogic, but opinions, and the approach of judges who write them, should as a normative matter be more polyphonic. This is because polyphony addresses aspects of critiques of judicial decision-making and promotes the role opinions play in the legal system.

1. Polyphony and Critiques of Judicial Decision-Making.—Polyphony taps into recurring themes in both longstanding and current critiques of judicial decision-making.

First, many commentators have called for a greater understanding by judges of the importance of their own perspectives and assumptions.[49] Jerome Frank, in an oft-quoted passage, articulated this concern while a Second Circuit judge: "Much harm is done by the myth that, by merely putting on a black robe and by taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine."[50] In this sense, Bakhtin's rejection of an abstracted, monologic perspective offers a means for judges to move beyond the fanciful (and impossible) image of "a passionless thinking machine."[51] Polyphony is the antithesis of a false sense of a perspectiveless truth, and thus it promotes a greater sense of critical self-consciousness.

Second, Bakhtin's ideas resonate with the contemporary emphasis in feminist, critical race and postmodern theory on

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49. *See, e.g.*, Ferguson, *supra* note 3, at 216 (calling for "more concern for the projected assumptions in decision-making, and a deeper awareness of both the hidden perspectives and projected certitudes in the judicial voice"); Feldman, *supra* note 2, at 2278 ("critical theory must facilitate our penetration and understanding of . . . sedimented layers of tradition, thus raising to the surface of consciousness at least some of our tacit prejudices and interests").

50. *In re* J.P. Linahan, 138 F.2d 650 (2d Cir. 1943). The "legal realists" offered a particularly scathing and influential critique of a mechanistic view of the law. *See, e.g.*, LLEWELLYN, *supra* note 46; Jerome Frank, *What Courts Do In Fact*, 26 ILL. L.R. 645 (1932).

51. Although few scholars, judges, or practitioners would take seriously the ideal of "a passionless thinking machine," the equivalent of this image continues to be evoked without irony by the Supreme Court. For example, Justice Kennedy recently noted that judges have "the acquired skill and capacity to disregard extraneous matters" through the exercise of "wisdom and good sense." Liteky v. United States, 510 U.S. 540, 562, 565 (1994) (Kennedy, J., concurring).

distinct "voices" and perspectives of others.[52] Under this view, the judicial perspective is bounded by, among other things, class, race and gender. Given this limited perspective, judges tend to devalue unfamiliar perspectives. These unfamiliar perspectives, in turn, tend to belong to those groups who have been, and continue to be, underrepresented in the judiciary. Indeed, some commentators have noted that cases such as *Dred Scott v. Sandford*,[53] *Plessy v. Ferguson*,[54] *Buck v. Bell*[55] and *Korematsu v. United States*[56] all reduced the voice of oppressed groups into meaningless abstraction.[57] Polyphony addresses this concern by valorizing the intensification of dialogue with as many ideas and individuals as possible.[58]

Third, Bakhtin's vision vividly parallels Professor Robert Cover's characterization of law as either "jurispathic" or "jurisgenerative."[59] The "jurispathic" function of the law ends dialogue and destroys other normative visions,[60] precisely the impact of a

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52. *See, e.g.*, DRUCILLA CORNELL, THE PHILOSOPHY OF THE LIMIT 62 (1992) (an "ethical relation" is "a nonviolent relationship to the Other, and to otherness more generally, that assumes responsibility to guard the Other against the appropriation that would deny her difference and singularity"); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) ("those who have experienced discrimination speak with a special voice to which we should listen"). Carol Gilligan has, of course, been a particularly influential advocate of the notion of a distinct "voice" based on gender. CAROL A. GILLIGAN, IN A DIFFERENT VOICE (1982).

Interestingly, judges themselves have expressly asked for guidance on how the act of judging can accommodate the multiplicity of human voices. *See* Patricia Wald, *Human Voice in Legal Discourse: Disembodied Voices—An Appellate Judge's Response*, 66 TEX. L. REV. 623, 628 (1988).

53. 60 U.S. (19 How.) 393 (1857).

54. 163 U.S. 537 (1896).

55. 274 U.S. 200 (1927). This case sustained a state law providing for coerced sterilization of persons deemed mentally unfit. The opinion contains Holmes' infamous observation that "three generations of imbeciles are enough." *Id.* at 207.

56. 323 U.S. 214 (1944). For a detailed analysis of two of the opinions in *Korematsu*, see *infra* notes 92-113 and accompanying text.

57. *See* Richard Delgado & Jean Stefancic, *Norms and Narrative: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929 (1991). *See also infra* notes 97-99, 187-92 and accompanying text.

58. Feldman, *supra* note 2, at 2278 ("hearing the diverse voices of others encourages us to recognize the contingency of our own prejudices and interests, while on the other hand, we more easily appreciate the value of our own uniqueness in the community").

59. *See* Robert M. Cover, *The Supreme Court, 1982 Term Foreword: Nomos and Narrative*, 97 HARV. L. REV. 1, 4 (1983). For a more recent consideration of Cover's ideas, see Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441 (1990).

60. Cover, *supra* note 59, at 40-44.

monologic worldview. The notion of polyphony captures the essence of Cover's call for a "jurisgenerative" view that embraces other normative worlds.[61]

Fourth, Bakhtin offers a sophisticated notion of how experience influences meaning. While critiques of legal reasoning have long accepted life "experience" as an essential element of judicial decision-making,[62] polyphony transforms vague invocations of the importance of "experience"[63] into a set of concepts that leads to a vision of what judges can do to enrich their sense of meaning.

Finally, Bakhtin offers a constructive, practical response to the challenge posed by postmodernism.[64] It has often been noted that post-modernism deconstructs so thoroughly that it leaves only nihilism in its wake.[65] Polyphony draws upon the dialogic process, non-finalizable and intensified with as many voices as possible, as a vehicle to enrich possibilities in meaning.

2. Polyphony and the Need for Explanation, Guidance and Predictability.—Opinions, of course, function in the practical world of litigation. Three primary functions of opinions—explanation, guidance and prediction—would all be well served by polyphony.

First, opinions are preeminently explanatory tools that explain to the community of interested readers why a given resolution is fair and based on law.[66] Polyphony would enrich this explanatory

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61. *Id.* at 68.

62. *See* Smith, *supra* note 2, at 430-31.

> [O]ne must wonder . . . whether anyone could devise a theory that is not grounded in experience. Try it for yourself: invent a theory that does not arise from or relate to anything in your experience. What would such a theory even address? Distributive justice in the Martian economy? Sexual relations in the sixth dimension?

Id.

63. This idea is perhaps best evoked by recalling the seemingly endless repetitions of Holmes' famous aphorism that "the life of the law is not logic, but experience." HOLMES, *supra* note 9, at 1.

64. Although variously described, postmodernism generally "seeks to rethink problems from a perspective that is nonuniversalist or 'local' in character, holistic, and discursive." Patterson, *supra* note 2, at 269. The work of Steven Winter offers a particularly compelling view of postmodernism and the law. *See, e.g.*, Winter, *supra* note 59; Steven Winter, *Confident, But Still Not Positive*, 25 CONN. L. REV. 893 (1993).

65. A valuable summary and exploration of this dilemma is Feldman, *supra* note 2. *See also* Daniel Barbiero, *Agreeing To Disagree: Interpretation after the End of Consensus*, 78 GEO. L.J. 447 (1989).

66. *See* White, *supra* note 46, at 1366-67. *See also In Justice Breyer's Opinion, A Footnote Has No Place*, N.Y. TIMES, July 28, 1995, at B18 (quoting Justice Stephen Breyer as saying that "the major function of an opinion is to explain to the audience of readers why

function. It would resolve a given case with as great an understanding as possible of the complexity of perspectives and the consequences of potential outcomes. Polyphony would also elaborate doctrine with the understanding that a given decision is contingent on facts and history.[67]

In addition, explanation informed by polyphony might increase the legitimacy of the decision-making process both among litigants and among society at large. By embracing complexity and dialogue, both litigants and others might be less inclined to view opinions as embodying "winners" and "losers," or a "right" position and a "wrong" position.

The open texture of the polyphonic model might also enhance the second and third functions of opinions—guidance for judges in resolving controversies and prediction for attorneys in anticipating the likely outcome of litigation.[68] By revealing more of the competing concerns and modes of analysis entailed by decision-making, readers of a polyphonic opinion might be better able to glean what led a court to a given decision. This is in striking contrast to the current mode of opinion-writing which conceals complexity behind a smooth monologic surface.

In any event, the underlying assumption that opinions furnish rigid constraints as precedent is problematic. As Karl Llewellyn noted, "[t]here is no precedent that the judge may not at his need either file down to razor thinness or expand into a bludgeon."[69] Thus it is unlikely that a more polyphonic approach would be less constraining on future decision-makers given the minimal con-

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it is that the Court has reached that decision").

67. It should also be noted that while any explanation finalizes conclusions as to a given case, finality does not necessarily mean that *dialogue* is finalized. Indeed, the elaboration of doctrine through precedent comprised of concrete "cases and controversies" presupposes that dialogue will continue. *See* PDP, *supra* note 12, at 95 (in a polyphonic "world even *agreement* retains its *dialogic* character, that is, it never leads to a merging of voices and truths in a single *impersonal* truth, as occurs in the monologic world") (emphasis in original); Feldman, *supra* note 2, at 2273 ("[i]f we are concerned with promoting political dialogue, then consensus should be viewed as but one moment in dialogue, not its end"); JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 65-66 (1984) ("consensus is only a particular state of discussion"); RICHARD RORTY, *Pragmatism, Relativism, and Irrationalism*, *in* CONSEQUENCES OF PRAGMATISM 172 (1982) (conceiving of agreement as the goal of conversation "mistakes an essential moment in the course of an activity for the end of the activity").

68. These two functions are considered together because an attorney predicts the outcome of litigation by assuming the role of a judge who is guided by precedent.

69. LLEWELLYN, *supra* note 46, at 180.

straints that currently bind existing decision-makers. Indeed, polyphonic opinions might prove to be even *more* constraining since their greater openness could make them less susceptible to either filing down or bludgeoning.

C. The Judicial Opinion as Monologic Utterance

Despite the virtues of a polyphonic model of judicial discourse, the typical judicial opinion does not fare well when examined in light of the normative goal of polyphony. Indeed, as currently conceived, a judicial opinion typically acts like a monologic crucible combining multiple perspectives into a "unified accent" in order to reach a final result.[70] This unified accent subordinates not only the perspectives of the litigants, but the perspectives of other judges. Judicial opinions therefore do not invite debate but end it with authoritative finality.

The concurring opinion by Justice Scalia in the recent Supreme Court affirmative action decision, *Adarand Constructors, Inc. v. Pena*,[71] offers a virtually pure example of the genre. The majority in *Adarand* held that all racial classifications are subject to strict scrutiny under either the Equal Protection Clause or the Due Process Clause of the Fifth Amendment. Justice Scalia's concurring opinion is as follows:[72]

> In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction. Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as a creditor or debtor race. That concept is alien to the Constitution's focus upon the individual, and its rejection of dispositions based on race or based on blood. To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.[73]

The monologic qualities of Justice Scalia's opinion are legion:

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70. *See* Ferguson, *supra* note 3, at 204-08; Hersch, *supra* note 11, at 48.

71. 115 S. Ct. 2097 (1995).

72. I have omitted citations and a brief opening and concluding sentence that are not pertinent here.

73. *Adarand*, 115 S. Ct. at 2118-19 (Scalia, J., concurring).

1. It is decontextualized.—Justice Scalia is setting forth an abstract view of the Fourteenth Amendment applicable under all circumstances. In doing so, he invokes a single set of governmental "eyes" and a single constitutional "focus," metaphors that recall the unitary "spirit of a nation" and "spirit of a people" that Bakhtin cited as paradigms of an abstract, and therefore monologic, worldview.[74] However, there is neither one set of "eyes" that views all citizens as of one race nor a single constitutional "focus" on the individual.[75] In fact, the concept of "affirmative action" interacts with "equal protection of the laws" through a complex and inconsistent contemporary understanding contingent on source and perspective.[76] In light of this, Justice Scalia's ultimate conclusions are not necessarily wrong, but his profound reductionism cannot be right.

2. There is no recognition of the validity of alternative ideas.—Whatever one's personal opinion about affirmative action, as an issue, it is complex and vexing.[77] Nevertheless, Justice Scalia's concurring opinion ignores even the possibility that an exploration of the issue extends beyond how affirmative action is "alien" to the Constitution. In other words, there is one voice, the monologic voice, and it swallows up other perspectives into its own unified "accent."[78]

3. The right decision is a matter of compulsion, not discretion.—Justice Scalia is not choosing among reasonable alternatives. Any recognition that things could go either way is anathema. To Justice Scalia, there is one interpretation of

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74. PDP, *supra* note 12, at 82.

75. As Justice Ginsburg points out in her dissenting opinion in *Adarand*, "for most of our Nation's history, the idea that 'we are just one race' was not embraced." 115 S. Ct. at 2134 (Ginsburg, J., dissenting). *See also* Horwitz, *supra* note 8, at 68.

76. *See generally* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

77. Indeed, the sheer number of opinions filed in *Adarand*—Justices O'Connor, Scalia, Thomas, Stevens, Souter, and Ginsburg all filed separate opinions—demonstrates how difficult affirmative action cases are to resolve.

78. This is not to say that all monologic opinions wholly ignore points made in other opinions in any given case. However, in a monologic opinion, "[d]ifferences from the speaking voice in the judicial opinion are raised only to be answered by it." Ferguson, *supra* note 3, at 205. For an analysis of how this strategy operates in a monologic opinion, see *infra* notes 98-100 and accompanying text.

precedent and history, the right one, and this interpretation compels only one result.[79]

4. It is authoritarian.—Despite the prevailing conception of judge as neutral and detached decision-maker,[80] this concurring opinion is written from the perspective of an advocate. Justice Scalia's client is a bounded set of ideas about affirmative action. He has written about these ideas before,[81] and he is engaged again in writing what is tantamount to a polemic about them. His confidence in the accuracy of his own views is palpable.

5. It invokes a unitary past.—Justice Scalia's opinion invokes a unitary past, what Bakhtin called a single "spirit of history."[82] There is no sense "that the complexity of the past can justify a variety of conclusions."[83]

Indeed, events surrounding the adoption of the Equal Protection Clause are themselves a stark demonstration of the misleading historical reductionism of Justice Scalia's opinion. The history of the Clause is a muddled confusion that supports any number of conclusions.[84] One's view of the Clause's ambiguous history is contingent on a range of variables that contribute to a selective reading of the historical record.[85] These factors might be mutually inconsistent or they might reinforce each other. They might be shared or not shared with others. Any asserted "spirit of history" is thus a unique formulation by one individual in one context at one point in time.

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79. *See* Ferguson, *supra* note 3, at 207 (a judicial opinion "must . . . appear as if forced to its inevitable conclusion by the logic of the situation and the duties of office, which together eliminate all thought of an unfettered hand").

80. *See infra* notes 164-66 and accompanying text.

81. *See, e.g.*, Richmond v. J. A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring).

82. PDP, *supra* note 12, at 82.

83. Ferguson, *supra* note 3, at 214.

84. For example, one historian has noted that "[v]oluminous evidence has been presented in support of both the expansive and narrow readings of the Fourteenth Amendment" and concludes that "[c]onfusion and contradiction abound" in the ambiguous historical record about the Amendment. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 4 (1988).

85. Indeed, it is well established that individuals construe evidence to validate preexisting beliefs. *See infra* notes 142-44 and accompanying text.

Nevertheless, Justice Scalia conjures up an immutable past which trumps a messy contested present.[86] This invocation seeks to place the contested present beyond dialogue and thus is starkly monologic.[87]

6. It is finalized.—Justice Scalia does not recognize that discourse should continue on the issue of affirmative action. Rather he equates the holding of a case with finalization of dialogue.[88]

While Justice Scalia's opinion represents monologic opinion-writing in virtually pure form, its pervasive monologic qualities accurately represent the prevailing norm.[89] Opinions tend to be polemics in support of an idea or cluster of ideas. Few opinions embrace a true interplay of ideas or recognize that diverse and sometimes inconsistent conceptions have independent validity.

D. Elements of a Polyphonic Opinion

Although the monologic opinion typifies the current state of judicial discourse, some judges have written opinions which do embody elements of polyphony. Dissenting opinions from *Korematsu v. United States*[90] and *Callins v. Collins*[91] illustrate such a polyphonic approach.

1. Korematsu v. United States.—*Korematsu v. United States*, the majority opinion of which is now almost universally condemned,[92] presented the issue of whether the forced exclusion of

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86. DI, *supra* note 14, at 342-44. *See also* ERICH AUERBACH, MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE, 3-23 (1953). This aspect of Justice Scalia's monologic opinion recalls the use of history in epic literature, in which the world "was projected . . . into a valorized past of beginnings and peak times" which are "distanced, finished and closed like a circle." DI, *supra* note 14, at 19.

87. Invocations of "original intent" are another example of this type of monologic analysis. The concept of original intent presupposes that: (1) different framers all thought the same thing; (2) each individual framer had a single articulable "intent"; and (3) each intent—to the extent there was a unitary intent—remained constant over time. *See generally* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT (Jack N. Ralcore ed., 1990).

88. *See supra* text accompanying note 26. *See also supra* note 67.

89. *See* Ferguson, *supra* note 3, at 204-08; Hersch, *supra* note 11, at 48.

90. 323 U.S. 214 (1944).

91. 114 S. Ct. 1127 (1994).

92. *See, e.g.*, Wald, *supra* note 4, at 1379. *See also Adarand*, 115 S. Ct. at 2136 (Ginsburg, J., dissenting) (characterizing *Korematsu* as "yield[ing] a pass for an odious, gravely injurious racial classification").

Japanese-Americans from certain geographic areas during World War II violated the Due Process Clause of the Fifth Amendment.[93] The exclusion order had the effect of forcing affected persons from their homes.[94]

Elements of the familiar monologism of Justice Scalia's *Adarand* concurrence[95] are evident in Justice Black's majority opinion in *Korematsu*. Justice Black adopts almost exclusively the voice of "the properly constituted military authorities [who] feared an invasion of our West Coast."[96] These "authorities . . . felt constrained to take proper security measures."[97] The studied blandness of this monologic voice swallows up any hint of the pain felt by victims of the exclusion orders.

Moreover, the monologic voice which pervades *Korematsu* preserves its unitary character by dismissing discordant perspectives as irrelevant or misleading. For example, any investigation of the circumstances present at the "relocation centers" is unnecessary: "[r]egardless of the true nature of the of the assembly and relocation centers . . . we are dealing specifically with nothing but an exclusion order."[98] Any attempt to question the motives of the military authorities is an inappropriate use "of the calm perspective of hindsight."[99] In perhaps the most striking of all these monologic rejections, Justice Black wrote that "[t]o cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race."[100] The monologic voice, as the sole carrier of meaning in the opinion, cannot admit the validity of a discordant voice. Needless to say, this "confusing" voice happened to be that of the victims.

In fascinating contrast, Justice Murphy's *Korematsu* dissent approaches a polyphonic ideal.[101] As opposed to a monologue of military necessity, the dissent manifests a remarkable sensitivity to different perspectives.

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93. *See Korematsu*, 323 U.S. at 221.
94. *Id.* at 220.
95. *See supra* text accompanying notes 71-89.
96. *Id.* at 223.
97. *Id.*
98. *Id.*
99. *Korematsu*, 323 U.S. at 224.
100. *Id.* at 223.
101. *Id.* at 233 (Murphy, J., dissenting).

Like the majority, Justice Murphy hears the voice of the military. This dissent recognizes that there was "a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area."[102] He admits that the military's actions might have been "well-intentioned"[103] and were related to "matters . . . vital to the physical security of the nation."[104] He even admits "that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land."[105]

However, unlike the majority, Justice Murphy does not view the perspective of the military authorities as a unitary voice of concern speaking to the nation's security. To the contrary, he hears voices that "fall[] into the ugly abyss of racism."[106] For example, Justice Murphy quotes a report by the Commanding General which characterizes Japanese-Americans "as belonging to 'an enemy race' whose 'racial strains are undiluted.'"[107] Justice Murphy also cites the testimony of the military Commanding General before a congressional subcommittee:

> "I don't want any of them [persons of Japanese ancestry] here. They are a dangerous element. There is no way to determine their loyalty . . . It makes no difference whether he is an American citizen, he is still a Japanese. . . . [W]e must worry about the Japanese all the time until he is wiped off the map."[108]

In addition, Justice Murphy incorporates the perspectives of others who supported the relocation. For example, he quotes the president of a trade association that would have benefitted economically as a result of the internment: "'We're charged with wanting to get rid of the Japs for selfish reasons. . . . We do. It's a question of whether the white man lives on the Pacific Coast or the brown men.'"[109]

Finally, and perhaps most importantly, Justice Murphy individualizes the victims, many of whom were children and the

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102. *Id.* at 235.
103. *Id.* at 240.
104. *Korematsu,* 323 US. at 234 (Murphy, J., dissenting).
105. *Id.* at 240.
106. *Id.* at 233.
107. *Id.* at 236.
108. *Id.* at 236 n.2.
109. *Id.* at 239 n.12 (alteration in original).

elderly.[110] He recognizes that the supposedly menacing concentration of Japanese-Americans near "strategic points" was the result of "economic, social and soil conditions" including "[l]imited occupational outlets and social pressures . . . ."[111] He cites social science literature to conclude that fears about espionage were based on "misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices . . . ."[112]

Justice Murphy's opinion thus embodies a dialogue among voices. While, to be sure, he vigorously supports his position, there is a rich, multi-vocal quality to his narrative which is lacking in the majority opinion.[113] Such a multiplicity of perspectives approaches the polyphonic ideal.

2. *Callins v. Collins.*—Another illuminating contrast can be seen between the two opinions, one by Justice Scalia and one by Justice Blackmun, relating to the denial of certiorari in the capital case of *Callins v. Collins.* This case gained attention because Justice Blackmun, in his dissent, concluded for the first time that the administration of capital punishment violates the Eighth Amendment's prohibition against cruel and unusual punishment.[114]

The familiar monologism of Justice Scalia is once again apparent in his *Callins'* concurrence. Calling Justice Blackmun to task for his dissent, Scalia's concurrence invokes two voices that are consistent. One is the disembodied "text and tradition" of the Constitution which establishes "beyond doubt" that capital punishment is constitutional.[115] The other is the voice belonging to the victims of capital crimes.[116] All other perspectives are "false."[117] There is thus no hint of complexity or tension in the

110. *Id.* at 242.

111. *Id.* at 238 n.9.

112. *Korematsu*, 323 U.S. at 239.

113. *Korematsu* also illustrates that polyphony is not synonymous with "liberal." Polyphony is "liberal" only insofar as, at this moment in time, dominant monologic perspectives tend to be associated with "conservative" judicial philosophies, but this is not inevitably so. *Korematsu* itself is a good illustration: Justice Douglas, who is generally considered to be one of the most "liberal" Supreme Court justices of the twentieth century, joined the majority opinion written by Justice Black, a fellow "liberal."

114. *See* Callins v. Collins, 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting).

115. *Id.* at 1127.

116. *Id.* at 1128.

117. *Id.*

opinion. Indeed, like his *Adarand* concurrence and Justice Black's majority opinion in *Korematsu*, this opinion's simplicity is its most salient characteristic.

Justice Blackmun's dissent is strikingly different.[118] First, like Justice Murphy's *Korematsu* opinion, this dissent embodies a variety of voices, some of which are in tension with each other. Justice Blackmun alludes to society's legitimate "demand for punishment"[119] as well as public opinion in favor of the death penalty.[120] The dissent also recognizes, however, that these voices overwhelm those in society who "speak in too faint a voice to be heard . . . ."[121] Indeed, Justice Blackmun saves capital defendants from hazy abstraction by recalling the "staggering evidence of racial prejudice" in sentencing,[122] the images of an actual scene of execution[123] and the identity of the capital defendants (including those who have colorable claims to innocence,[124] the mentally retarded[125] and juveniles).[126]

Furthermore, Justice Blackmun openly acknowledges "struggl[-ing]" with the issue over time.[127] This openness translates into a recognition that this opinion is contingent on time and experience—two themes that constantly recur in the opinion.[128] Indeed, he admits that "[p]erhaps one day this Court will develop" a constitutionally permissible capital sentencing scheme[129]—a recognition of potential fallibility that is unthinkable in both Justice Scalia's concurrence and monologic opinions generally.

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118. *Id.* at 1128 (Blackmun, J., dissenting).

119. *Callins*, 114 S. Ct. at 1136.

120. *Id.* at 1131.

121. *Id.* at 1136 (quoting McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting)). This phrasing recalls Bakhtin's call to listen to perspectives beyond "the loud, recognized, reigning voices of the epoch." *See supra* text accompanying note 41.

122. *Callins*, 114 S. Ct. at 1135.

123. *Id.* at 1128.

124. *Id.* at 1138 (citing Herrera v. Collins, 113 S. Ct. 853 (1993)).

125. *Id.* at 1137 n.6 (citing Penry v. Lynaugh, 492 U.S. 302 (1989)).

126. *Id.* at 1137 (citing Stanford v. Kentucky, 492 U.S. 361 (1989)). This concretization extends beyond the identity of defendants to a vivid description of the responsibilities borne by all actors involved in the adjudication of capital cases, including judges, prosecutors, and defense attorneys. *Id.* at 1128-29.

127. *Callins*, 114 S. Ct. at 1130.

128. *See id.* at 1129-30, 1132, 1134. In the space of two pages, the opinion mentions four times how "[t]wenty years have passed since" Furman v. Georgia, 408 U.S. 238 (1972). The word "experience" recurs three times in the opinion. *See Collins*, 114 S. Ct. at 1129, 1132, 1134.

129. *Id.*, at 1138 (Blackmun, J., dissenting).

Finally, and perhaps most distinctively, Justice Blackmun makes no effort to hide from complexity. This is manifested not only in how he recounts his own, as well as the Court's, struggle to elaborate meaningful and fair guidelines for capital punishment, but also in his recognition of the turbulence and complexity of the decision-making process itself. As he puts it, "experience has taught" that capital sentencing decisions are "rife with all of life's understandings, experiences, prejudices, and passions . . . ."[130] This phrase not only describes the behavior of "the sentencer" at a capital trial, but also the complexity that Justice Blackmun acknowledges in his own decision-making.

Justice Blackmun has thus performed his own "small-scale Copernican revolution" by abdicating "an abstract and fixed external position."[131] Instead, he infuses his decision-making with understandings, experiences, prejudices, and passions—a polyphony of ideas and perspectives.

IV. The Cognitive Challenge of Polyphony

The opinions of Justices Murphy and Blackmun demonstrate that a polyphonic approach to judicial decision-making is attainable. However, the mere acceptance of polyphony as a worthwhile goal does not end the inquiry. To the contrary, profound challenges face any attempt to move beyond the monologic tendency because the act of cognition is itself a simplifying process. This does not mean, of course, that judges, or anyone else, are "biologically determined" to be monologic. However, it does mean that there is a wide array of cognitive processes which, often without our conscious knowledge, serve to reduce and stabilize meaning and inspire confidence that we are "right" and others are "wrong."

While these are obviously sobering conclusions, these processes also offer insights into how to approach polyphony. First, an understanding of how cognition simplifies meaning might diminish the certainty with which we hold to our own beliefs. This represents a necessary first step towards polyphony. Second, as discussed in Part V,[132] these processes themselves suggest possible strategies that judges can employ to become more polyphonic.

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130. *Id.* at 1134-35.

131. *See* PDP, *supra* note 12, at 49. *See also, supra* text accompanying notes 35-38.

132. *See infra* notes 169-86 and accompanying text.

A. Cognitive Conservatism

Without an ability to build upon preexisting interpretations of events, humans would expend vast amounts of mental energy interpreting anew each circumstance confronted or life would, in William James' phrase, be "'a bloomin' buzzin' confusion.'"[133] In order to avoid either of these fates, humans construct meaning through "knowledge structures."[134] These structures, which include schemata,[135] scripts[136] and narratives,[137] provide short-

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133. Quoted in THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 113 (Otto Nevrath et al. eds., 2d vol. 1970).

134. In a famous statement, Jerome Bruner in 1957 noted that a perceiver interprets meaning by "going beyond the information given." Jerome S. Bruner, *Going Beyond the Information Given, in* CONTEMPORARY APPROACHES TO COGNITION 41 (Howard E. Gruber et al. eds., 1957). This statement is often cited as the beginning of the "cognitive revolution." *See* Dale W. Griffin & Lee Ross, *Subjective Construal, Social Inference, and Human Misunderstanding, in* 24 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 319, 320-21 (Mark P. Zann ed., 1991). As later described by Bruner, the essence of the cognitive revolution "was to discover and to describe formally the meanings that human beings created out of their encounters with the world, and then to propose hypotheses about what meaning-making processes were implicated." JEROME S. BRUNER, ACTS OF MEANING 2 (1990).

135. RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 38 (1980).

136. Scripts are defined as background knowledge, the sort of "normal expectations" about people and experience that we all carry around in our heads. JEAN M. MANDLER, STORIES, SCRIPTS, AND SCENES: ASPECTS OF SCHEMA THEORY 94, 108 (1984). The seminal theoretical work positing the existence of scripts is ROGER C. SCHANK & ROBERT P. ABELSON, SCRIPTS, PLANS, GOALS AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURES (1977).

137. Recent scholarship explores how narrative operates cognitively. Although traditionally thought of as "representing" reality, narrative may also be a means "not only of representing but of constituting reality." Jerome S. Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 5 (1991). *See also* Katherine Nelson, ed., NARRATIVES FROM THE CRIB (Katherine Nelson ed., 1989); JUDY DUNN, THE BEGINNINGS OF SOCIAL UNDERSTANDING (1988).

There is now a vast literature exploring how narrative influences legal meaning. Some commentators have explored narrative in relation to advocacy. *See, e.g.*, Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9 (1994) (oral arguments); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681 (1994) (briefs). Others have focused on how judges and juries employ narratives to decide cases. *See, e.g.*, Peggy Cooper Davis, *The Proverbial Woman*, 48 REC. ASS'N B. CITY N.Y. 7 (1993); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991). Narrative has also furnished a foundation for how law is defined. *See* Cover, *supra* note 59. at 4. There has also been an explosion of the use of narrative as the form for legal scholarship, particularly among scholars identified with the critical race theory and feminist jurisprudence movements. *See e.g.*, Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

cuts and simplifications that avoid the necessity of analyzing every aspect of every situation presented for interpretation.[138] These presuppositions, or "heuristics", are comprised of cultural norms and individual experience.[139]

Such cognitive heuristics profoundly influence how we think. For example, people tend to overestimate the normativity[140] and accuracy[141] of their own beliefs. Through what is called "confirmation bias," we "manage knowledge in a variety of ways to promote the selective availability of information that confirms judgments already arrived at."[142] Through "biased fact assimilation," we interpret facts consistent with those we already believe.[143] Additionally, through "biased hypothesis testing" we subject evidence supporting hypotheses with which we do not agree to far greater scrutiny than evidence supporting hypotheses to which we are sympathetic.[144]

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138. For general applications of these concepts to judicial decision-making, *see* John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 NEW ENG. L. REV. 657, 691-94 (1994); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 8-20 (1994).

139. NISBETT & ROSS, *supra* note 135, at 34. *See also* DANIEL KAHNEMAN & AMOS TVERSKY, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982). The Nisbett & Ross and the Kahneman & Tversky resources are influential surveys of these heuristics. For a useful summary of more recent research in this area, see Griffin & Ross, *supra* note 134.

140. *Id.* at 337-38. One study showed "that in a survey of preferences and beliefs . . . the subjects who made a given choice estimated the commonness of that choice to be greater than did subjects who made the opposite choice." *Id.* at 337.

141. *See, e.g.*, Derek J. Koehler, *Hypothesis Generation and Confidence in Judgment*, 20 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 461 (1994); Asher Koriat et al., *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL.: HUMAN LEARNING & MEMORY 107 (1980).

142. Anthony G. Greenwald, *The Totalitarian Ego: Fabrication and Revision of Personal History*, 35 AM. PSYCHOLOGIST 603, 606 (1980). Studies have also shown that "even when the entire evidential base of newly formed theories is discredited the social theory is left virtually intact." Craig A. Anderson & Elizabeth S. Sechler, *Effects of Counterexplanation on the Development and Use of Social Theories*, 50 J. PERSONALITY & SOC. PSYCHOL. 24, 25 (1986) (citations omitted).

Some recent studies have reframed "confirmation bias" in terms of "positive test strategy," through which people "overweight confirming results and underweight disconfirming results." Derek J. Koehler, *Explanation, Imagination, and Confidence in Judgment*, 110 PSYCHOL. BULL. 499, 512 (1991).

143. Griffin & Ross, *supra* note 134, at 348-50. *See also* Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories On Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979) [hereinafter Lord et al., *Biased Assimilation*].

144. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1232 (1984) [hereinafter Lord et al., *Considering the Opposite*]; Mark Snyder & William B. Swann, Jr., *Hypothesis Testing Processes in Social*

The stereotype is another example of resource-preserving heuristics.[145] Stereotypes provide ready interpretations of the behavior of others without the necessity of analyzing individuating characteristics or circumstances.[146] Stereotypes are also another aspect of confirmation bias; we are likely to interpret evidence about people to conform with an implicated stereotype.[147]

These tendencies demonstrate, at a minimum, that humans are cognitive conservatives.[148] Humans reach conclusions on a variety of matters—legal, political and social—and adhere to them in order to avoid repeatedly having to think about them anew.[149] Once we reach conclusions, our mind acts to reaffirm what we already believe.[150] This extends to the retention of existing beliefs even after the invalidation of the original evidence that fostered these beliefs.[151]

B. The Interplay of Monologism and Cognitive Conservatism

There is a nexus between cognitive conservatism and the monologic tendency in judicial opinions. The stubborn persistence of beliefs reduces complexity into simple "truths," one of the essences of monologic opinions.[152] Moreover, cognitive conservatism inhibits the consideration of alternative ideas through the appearance that they are self-evidently "wrong." In other words, cognition simplifies meaning and then instills confidence that one's own simplification is "right."

Interaction, 36 J. PERSONALITY & SOC. PSYCHOL. 1202 (1978).

145. For an excellent recent summary of research on stereotypes, see Charles Stangor & James E. Lange, *Mental Representations of Social Groups: Advances in Understanding Stereotypes and Stereotyping*, *in* 26 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 357 (1994).

146. *See* Macrae et al., *Stereotypes as Energy-Saving Devices: A Peek Inside the Cognitive Toolbox*, 66 J. PERSONALITY & SOC. PSYCHOL. 37 (1994). In addition to preservation of cognitive resources, some researchers have also found that people tend to stereotype their own group positively and groups to which they are not a part negatively as a mechanism to enhance self-esteem. Stangor & Lange, *supra* note 145, at 357-58.

147. *See* Ronald A. Farrell & Malcolm D. Holmes, *The Social and Cognitive Structure of Legal Decision-Making*, 32 SOC. Q. 529, 532-33 (1991).

148. Greenwald, *supra* note 142, at 606.

149. *See id. See also* Anderson & Sechler, *supra* note 142, at 32.

150. For an influential account of how this principle applies to scientific inquiry, see KUHN, *supra* note 133.

151. Lord et al., *supra* note 144, at 1240; Koehler, *supra* note 142, at 501.

152. *See supra* text accompanying notes 142-44.

Moreover, there is a twist to the interplay of cognitive tendencies and judicial opinion writing: opinions promote as well as embody a monologic world view. The reason for this lies in the impact of opinion writing itself. Through a well-established process called "explanation bias," the very act of explaining a decision convinces the explainer of its accuracy and "truth."[153] Thus, as a result of writing an explanation, "a certain inertia sets in, which makes it more difficult to consider alternative hypotheses."[154]

This interplay between cognition and the monologic opinion has important consequences for attaining polyphony. Due to cognitive conservatism, people tend to be simplifiers and reducers who are then confident of the truth of their simplifications and reductions. The conventional monologic opinion further inhibits discourse by intensifying an unshakable belief in the truth of the written analysis and shutting down the consideration of alternative hypotheses. This is likely to carry over to future opinions addressing similar issues. Indeed, as one judge has noted, "[t]he same issues recur in cases over the years, and [judges] tend to think about them in the same ways."[155]

Thus, it is not surprising that unexamined assumptions about gender,[156] race[157] and economic status[158] have all profoundly influenced the development of legal doctrine. Similarly, it is hardly surprising that judges are typically writers of monologic opinions.

C. Polyphony in Light of Cognitive Conservatism

It is seductive to view cognitive conservatism as generating "distortions" which, like myopic vision, can be easily corrected. However, these processes are not distortions, but rather a "prerequisite to perception itself."[159] In other words, at least to a certain

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153. *See, e.g.*, Koehler, *supra* note 142.

154. *Id.* at 503. As Koehler explains, cognitive conservatism drives this heuristic as well: "Because of the practical limits on our processing abilities and on our time, we cannot continue indefinitely in an exhaustive search for all possible hypotheses." *Id.* at 512.

155. Wald, *supra* note 4, at 1385. Moreover, analyses of United Supreme Court opinions demonstrate how consistently voting patterns conform to preexisting ideological values. *See, e.g.*, Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

156. *See, e.g.*, Davis, *supra* note 137, at 7; Martha Minow, *The Supreme Court 1986 Term: Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

157. *See, e.g.*, Lawrence, *supra* note 76.

158. *See, e.g.*, Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (1991).

159. Kuhn, *supra* note 133, at 113.

extent, we are simplifiers not by choice, but because we are built that way.

Moreover, the unconscious nature of cognitive conservatism intensifies the difficulty of strategies designed to achieve greater polyphony.[160] As humans, we assume that what we see is the truth without any recognition that our "previous visual-conceptual experience" actually defines what we see.[161] Indeed, evidence suggests a built-in overconfidence factor through which we feel that others interpret the world subjectively, while our own interpretation is the "right one."[162]

This suggests that achieving polyphony requires more than an act of will. Even a sincere attempt to reach out to other perspectives might fall victim to unconscious tendencies that simplify meaning and reaffirm what we already believe. Indeed, studies have demonstrated that exhortations to be "fair and impartial" have little or no effect on the operation of cognitive heuristics[163] and, presumably, on the monologic tendency as well.

Thus, a judge would do well to avoid the classic ideal of "a detached magistrate presiding over a dispute in which he or she has neither personal interest nor predisposition."[164] This model presupposes that judges can simply "put aside . . . predispositions".[165] Yet, this is an impossibility in light of Bakhtin's dialogic model and current theories in social psychology.[166] Instead, judges should seek out creative ways to *reveal* presuppositions *as* presuppositions and thereby open up new possibilities of meaning.

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160. Stangor & Lange, *supra* note 145, at 357.

161. Kuhn, *supra* note 133, at 113.

162. Griffin & Ross, *supra* note 134, at 354.

163. Lord et al., *supra* note 144, at 1231. Indeed, conscious attempts to eliminate stereotyping result in a "rebounding" effect through which the stereotype reemerges with even greater force. C. Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808 (1994).

164. Jack Weinstein, *Limits on Judges' Learning, Speaking, and Acting: Part II Speaking and Part III Acting*, 20 U. DAYTON L. REV. 1, 5, n.16 (1994).

165. Yagman v. Republic Insurance, 136 F.R.D. 652, 656-58 (C.D. Cal. 1991). *See also* del Vecchio v. Illinois Department of Corrections, 31 F.3d 1363, 1372-73, (7th Cir. 1994) (although judges, "like all humans," have "their outlooks . . . shaped by their lives' experiences," they are nevertheless "capable of overcoming those influences and rendering evenhanded justice").

166. Most scholars also do not take this ideal very seriously. Robert A. Ferguson, for example, makes the point that the most radical critique of the image of the detached judge—that of the critical legal studies movement—manifests a "more general apprehension" about this concept in current models of judicial decision-making. Robert A. Ferguson, *Law and Political Culture: Holmes and the Judicial Figure*, 55 U. CHI. L. REV. 506, 513 (1988).

V. Life Drawn Out of Its Usual Rut: Judicial Calisthenics

The simplifying force of cognition throws into doubt the endlessly repeated convention that judges maintain an "open mind" as a means to administer "even-handed" justice. "Open minds" risk reaffirming and simplifying pre-existing "truths," the hallmark of closed discourse and the conventional monologic opinion.[167] The challenge, then, is to construct an alternative orientation that judges can pursue in order to embrace a more polyphonic approach to decision-making.

The idea of polyphony suggests an alternative, albeit an unconventional one. Instead of aspiring to a meaningless ideal of "detachment," judges can, as Bakhtin put it, promote "eccentricity, the violation of the usual and the generally accepted, life drawn out of its usual rut."[168] Such a strategy of destabilization would infuse decision-making with dialogue and experience and thus new possibilities of meaning.

The following proposals are, in a sense, destabilizing strategies for the intellect. They originate from diverse sources, including legal scholars, social psychologists, advocates and judges themselves. In the spirit of polyphony itself, the proposals are necessarily speculative and provisional. Their efficacy is contingent upon, among many other things, shifting context, individual frames of reference and practical constraints. Rather than being definitive, they are themselves a set of possibilities for encouraging a greater sense of possibility among decision-makers.

A. Considering the Opposite

Cognitive conservatism entails viewing facts in a manner congruent to existing beliefs—what social psychologists call "biased fact assimilation."[169] For example, as revealed in his *Adarand* dissent, Justice Scalia most likely evaluates arguments in favor of affirmative action with a hypercritical skepticism because they do not fit into his monologic view about history and the meaning of the Equal Protection Clause.

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167. *See supra* text accompanying notes 159-66.
168. PDP, *supra* note 12, at 126 (emphasis deleted). *See also id.* at 105.
169. *See supra* text accompanying notes 140-44.

One potential strategy to overcome this tendency is called "considering the opposite" or "counterexplanation."[170] The strategy promotes the systematic consideration of alternative ideas by turning rigid knowledge structures upside-down.

For example, in one experiment, subjects who had earlier expressed either support or opposition to capital punishment were given one study purportedly demonstrating the deterrent effect of capital punishment and another study purportedly demonstrating that capital punishment had no such effect.[171] Subjects were told that they should be "as *objective* and *unbiased* as possible" and to consider themselves "to be in the same role as a judge or juror asked to weigh all of the evidence in a fair and impartial manner."[172] Nevertheless, subjects interpreted the studies as well done and convincing in a manner congruent to their prior opinions on the issue.[173] Indeed, the subjects' review of the studies further polarized their attitudes.[174]

A "consider the opposite" instruction largely neutralized these effects.[175] This instruction asked subjects to appraise "at each step whether you would have made the same high or low evaluations had exactly the same study produced results on the other side of the issue."[176] Such an instruction significantly diminished attitude-congruent evaluations of the study[177] and attitude polarization after reading the study.[178]

In addition, "considering the opposite" not only undermines overconfidence in the rightness of one's own view, but also stimulates consideration of a range of alternative views, including ones not specifically considered in executing the strategy.[179] Thus, by destabilizing meaning and turning accepted ways of

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170. *See generally* Lord et al., *supra* note 144. The usefulness of this strategy is well established in the experimental literature. *See, e.g.*, Anderson & Sechler, *supra* note 142; Edward R. Hirt & Keith D. Markman, *Multiple Explanation: A Consider the Alternative Strategy for Debiasing Judgments*, 69 J. PERSONALITY & SOC. PSYCHOL. 1069, 1070 (1995); Koehler, *supra* note 142, at 502; Koriat et al., *supra* note 141, at 107 (demonstrating the effectiveness of contradictory reasoning during the decision-making process).

171. *See generally*, Lord et al., *supra* note 144.

172. *Id.* at 1233-37 (emphasis in original).

173. *Id.* at 1233-34.

174. *Id.* at 1234-36.

175. *Id.*

176. Lord et al., *supra* note 144, at 1233-34.

177. *Id.* at 1234.

178. *Id.* at 1236.

179. Hirt & Markman, *supra* note 170, at 1084.

viewing legal doctrine on its head, considering the opposite might serve, as one study put it, to "break the inertia"[180] and infuse decision-making with possibility and exploration.[181]

Despite its potential, however, effective use of a "considering the opposite strategy" is not an easy process. The strategy requires active consideration of "opposites" and construction of justifications for such results.[182] Given the powerful influence of biased fact assimilation,[183] merely listening or reading opposing arguments, even with a self-imposed goal of maintaining an "open mind," is not enough.[184]

Of course, there are a number of ways for judges to "consider the opposite." One potentially effective but impractical technique would be to write an opinion that resolves a controversy in a manner that differs from the likely "decision." A less time-consuming alternative would be to sketch out opposite results as opposed to writing them out in a full opinion. However, perhaps the most realistic way to "consider the opposite" is to incorporate the essence of the strategy into the very act of writing opinions. While current opinions typically address alternative analyses in order to discredit them,[185] writers of opinions should explicitly draft alternatives and view them as *real* alternatives. This process of *writing* the opposite might serve to destabilize monologic "truths" and thereby expand the scope of what is possible.[186]

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180. *Id.*

181. *See id.* In addition, considering the opposite might diminish the tendency of the monologic judge to assert that the judge has no discretion in reaching a decision because the law "compels" a given result; this "judicial cannot" often masks the real choices to be made through a purported (and fictitious) lack of discretion. *See supra* text accompanying note 79. *See also* Horwitz, *supra* note 8, at 117 (The Supreme Court has increasingly "resort[ed] to mechanical jurisprudence . . . to avoid coming to terms with the deepest challenges that modernism has presented"); COVER, *supra* note 7, at 232-36 (describing how pre-Civil War judges externalized responsibility for the enforcement of the Fugitive Slave Law by claiming that they were mechanistically applying formal principles).

182. Koriat et al., *supra* note 141, at 117.

183. *See supra* text accompanying note 143

184. Koehler, *supra* note 141, at 467 (demonstrating that subjects have shown greater overconfidence in relation to tasks involving hypothesis evaluation as opposed to hypothesis generation).

185. *See supra* text accompanying notes 98-100.

186. Of course, time constraints might make this strategy impractical as well. However, at least as far as the United States Supreme Court is concerned, this might be less of a problem because of declining numbers of cases disposed of by written opinions. *Compare Statistical Recap of Supreme Court's Workload During Last Three Terms*, 54 U.S.L.W. 3038 (July 30, 1985) (in the 1984-85 term, 170 cases were decided by signed or *per curiam* opinions) *with Statistical Recap of Supreme Court's Workload During Last Three Terms*, 64

B. Identification with Parties

Another strategy would entail active identification with those affected by litigation. Such identification is neither an easy task nor commonly recognized as central to the judicial role.[187] Nevertheless, such a projection might destabilize "the usual and the generally accepted" and humanize the impact of judicial decision-making.[188]

A good example of this strategy is the argument of Homer Plessy's attorney in *Plessy v. Ferguson*:[189]

> Suppose a member of this court, nay, suppose every member of it, by some mysterious dispensation of providence should wake to-morrow with a black skin and curly hair . . . and in traveling through that portion of the country where the 'Jim Crow Car' abounds, should be ordered into it by the conductor. It is easy to imagine what would be the result . . . What humiliation, what rage would then fill the judicial mind![190]

This statement expressly invites the consideration of another perspective—the perspective of Homer Plessy (or that of Korematsu which Justice Black found to be "confusing"). Such a

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U.S.L.W. 3094 (Aug. 8, 1995)(in the 1994-95 term, 94 cases were decided by signed or *per curiam* opinions). Such declining decision calendars might also permit less reliance on the work of clerks. This is, of course, essential because the strategy is meaningless if clerks write opinions embodying preordained results.

187. As Robert Cover noted, it is "most uncharacteristic of judges, to project [themselves] into the place of the petitioners." COVER, *supra* note 7, at 255.

188. *See* Delgado & Stefancic, *supra* note 57, at 1952 ("[M]ost serious judicial mistakes result from the judge's inability to empathize with the litigants or their circumstances"); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1576 (1987) (claiming that legality and empathy are not mutually exclusive); Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477, 1488-89 (1995) (calling for judges to engage in "sympathetic imagining" as an aid to decision-making). *See also* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY *xvi* (1989) (calling for "increasing our sensitivity to the particular details of the pain and humiliation of other, unfamiliar sorts of people" as a means to "make[] it more difficult to marginalize people different from ourselves by thinking, 'They do not feel it as *we* would'") (emphasis in original).

189. 163 U.S. 537 (1896). This example is from Minow, *supra* note 156, at 59-60.

190. Brief for the Plaintiff, Plessy v. Ferguson, 163 U.S. 537 (1896), *reprinted in* CIVIL RIGHTS AND THE AMERICAN NEGRO 298, 303-04 (A. Blaustein & R. Zangrando eds., 1968). Thurgood Marshall employed comparable strategies during oral argument in Brown v. Board of Education. *See* ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA 1952-55, 36-51, 61-68 (Leon Friedman ed., 1969). For an analysis of Marshall's *Brown* argument, see Henderson, *supra* note 187, at 1593-1609.

perspective might set ideas in motion and lead to a richer conception of meaning. Moreover, this type of projection saves "separate but equal" and "equal protection of the laws" from hazy abstraction. Although it is, of course, impossible to know the impact of this specific argument, it is possible that it led Justice Harlan, as the sole *Plessy* dissenter, to recognize that the statute at issue was designed "not so much to . . . exclude colored people from coaches occupied by or assigned to white persons,"[191] but as "a badge of servitude."[192]

Such empathy was distinctly lacking in the universally condemned cases of *Dred Scott, Buck v. Bell* and *Korematsu*.[193] Such a lack promotes monologic abstraction and vast simplification which in turn creates a state of affairs that leads to reductionism that, like Justice Scalia's *Adarand* concurrence, cannot be right.

C. Expand Life Experience

Polyphony embraces "a participatory orientation" as a means to intensify dialogue and thereby enrich meaning.[194] Judges should therefore reject isolation in favor of an affirmative effort to experience the unfamiliar. There are at least three possible strategies that may contribute towards reaching this goal.

1. Attend Court Out of Role.—The bench is physically and metaphorically above the litigants. Justice Shirley Abrahamson of the Wisconsin Supreme Court attended court out of role and has urged other judges to follow suit.[195] She went to court wearing casual clothes and without identifying herself because she recognized that as "Ms. Justice," she would be treated "royally and ushered into chambers."[196] Instead, she found that she was treated rudely and condescendingly by attorneys and court personnel alike.[197]

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191. *Plessy,* 163 U.S. at 557 (Harlan, J., dissenting).

192. *Id.* at 562.

193. See *supra* text accompanying notes 53-57.

194. *See supra* text accompanying note 43.

195. Shirley S. Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE U. L. REV. 489, 497-98 (1984). Judith Resnick offers a feminist perspective on this experience in Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1928-29 (1988).

196. Abrahamson, *supra* note 195, at 497-98.

197. *Id.*

Although entailing difficult (but not insurmountable) problems for Supreme Court justices whose faces are of course well known, visits by judges *incognito* to courtrooms offer an otherwise unattainable experiential perspective. As Judith Resnick has written, this exercise will permit judges "to understand more clearly how much [a judge's] position of power affects her own construction of courtroom reality."[198]

2. *Experience the Voices of Others.*—In addition, judges could affirmatively seek out the voices of others. This entails not merely lecturing, reading, attending conferences or discussing questions with colleagues.[199] Rather, the best approach might be to "bring the world closer and familiarize it in order to investigate it fearlessly and freely."[200]

Louis Brandeis suggested such a possible strategy to his colleague Oliver Wendell Holmes. Holmes recounted the conversation as follows:

> Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations. He said ["]you talked about improving your mind, you only exercise it on the subjects with which you are familiar. Why don't you try something new, study some domain of fact. Take up the textile industries in Massachusetts and after reading the reports sufficiently you can go to Lawrence [Massachusetts] and get a human notion of how it really is["].[201]

Perhaps Brandeis' idea is more generalizable. Judges might seek to visit "outsider" neighborhoods not ordinarily part of the judge's experience. These visits would not be that of a judge; they

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198. Resnick, *supra* note 195, at 1929. This strategy recalls a rich religious and secular literature in which characters gain wisdom through abrupt changes in social status or supernatural metamorphoses. *See, e.g.*, APULEIUS, THE GOLDEN ASS (Jack Lindsay trans., 1962); THE BUDDHIST TRADITION IN INDIA, CHINA AND JAPAN 60-68 (William Theodore de Bary ed., 1969). Bakhtin also alludes to this idea by describing "the adventure plot" in Dostoyevsky: "It places a person in extraordinary positions that expose and provoke him, it connects him and makes him collide with other people under unusual and unexpected conditions precisely for the purpose of *testing* the idea." PDP, *supra* note 12, at 105 (emphasis in original). *See also id.* at 114-15.

199. *See generally* Jack B. Weinstein, *Limits on Judges Learning, Speaking, and Acting—Part 1—Tentative First Thoughts: How Many Judges Learn?*, 36 ARIZ. L. REV. 539 (1994).

200. DI, *supra* note 14, at 25.

201. 2 HOLMES-POLLACK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLACK 1874-1932, 13 (Mark DeWolfe Howe ed., 1946).

would be of one human being trying to understand the perspectives of others. As Brandeis suggested, such visits could be in conjunction with reviewing literature expressing "alien voices," views and opinions with which the judge is either unfamiliar or had rejected long ago.[202]

Perceptions of these circumstances would, of course, still be colored by confirmation bias.[203] Nevertheless, even such summary dialogic interaction would, perhaps, contextualize seemingly self-evident truths and help to individuate members of stereotyped groups.[204]

3. Witness Consequences of Judicial Actions.—Judicial acts are by their nature a kind of legitimized violence; they compel transfers of money, imprisonment or death.[205] Understanding these consequences may promote polyphony by concretizing abstraction and individualizing the impact of litigation.[206]

As a practical strategy, justices should thus witness the consequences of their actions. This might include unannounced visits to prisons and witnessing executions or evictions. It is, for example, inconceivable that any informed decision can be made about whether capital punishment is cruel and unusual without an

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202. Matsuda, *supra* note 52, at 325 (arguing that judges should "study[] . . . the actual experience of black poverty and listen[] to those who have done so"). *See also* Delgado & Stefancic, *supra* note 57, at 1952 (arguing that "counter- or 'saving' narratives could conceivably serve as strong antidotes to serious moral error"); Rorty, *supra* note 188, at *xvi* ("[T]he process of coming to see another human being as 'one of us' rather than as 'them' . . . is a task not for theory but for genres such as ethnography, the journalistic report, the comic book, the docudrama, and, especially, the novel."). However, as Delgado and Stefancic incisively point out, "outsider" texts are often viewed as "political" because of the very fact that they are "outsider" texts and thus are not part of the literary canon. Delgado & Stefancic, *supra* note 57, at 1955. Of course, the realization that works that are currently part of the canon were, at one time, viewed as subversive, might provide something of a deeper sense of the changing context of social reality.

203. *See supra* text accompanying notes 142-44.

204. Henderson, *supra* note 188, at 1650. *See also* Stangor & Lange, *supra* note 145, at 392 ("It is known that increasing familiarity with a target group increases the likelihood that representations will be formed around persons or around subgroups rather than around the broader social level category.") (citations omitted).

205. *See generally* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

206. *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 237-38 (1989) (arguing that the judicial reliance on abstract principles and failure to be aware of "the hurt of being treated as an outsider who doesn't belong" has enabled law to be an instrument of social inequality). *Cf.* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1157 (1990) (arguing that "the absence of intercircuit stare decisis" promotes "experiential dialogue by observing the consequences of different legal rules on the parties affected by such rules").

understanding of what capital punishment actually is and how it works.[207]

D. Recognize the Situated Nature of Judges

The monologic tendency operates under a fiction that the judicial perspective is not bounded and situated, but a way to pursue an absolute truth.[208] In contrast, polyphony recognizes that any decision is, at most, a hypothesis about meaning at one point in time situated in a continuing dialogue.[209]

Put in more prosaic terms, judges and the opinions that they write should reflect a humility about the complexity of the judicial undertaking. Doubt, not overconfidence, should be the hallmark of the search for meaning. Learned Hand proposed one means to promote doubt: "'I beseech ye in the bowels of Christ, think that ye may be mistaken.' I should like to have that written over the portals of every church, every school, and every courthouse . . . in the United States."'[210]

Perhaps a more effective strategy is to study the history of the development of doctrine. Such an investigation would demonstrate that truths formerly viewed as "self-evident" are embodied in rhetorically persuasive opinions that, in light of contemporary

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207. Judge Alex Kozinski has recently written about his own struggles in coming to terms with deciding capital cases and his failure to witness an execution:

> Though I've now had a hand in a dozen or more executions, I have never witnessed one. . . . I sometimes wonder whether those of us who make life-and-death decisions on a regular basis should not be required to watch as the machinery of death grinds up a human being. I ponder what it says about me that I can, with cool precision, cast votes and write opinions that seal another human being's fate but lack the courage to witness the consequences of my actions.

Alex Kozinski, *Tinkering with Death*, NEW YORKER, Feb. 10, 1997, at 52.

208. *See supra* text accompanying notes 30-34, 71-88.

209. *See supra* text accompanying notes 36-45, 118-31.

210. Lord et al., *supra* note 144, at 1231 (quoting Judge Learned Hand). The same sentiment occasionally appears in Hand's judicial opinions as well. *See, e.g.*, Fishgold v. Sullivan Drydocks & Repair Corp., 154 F.2d 785, 791 (2d Cir. 1946) ("[t]he fact that we are ourselves not agreed cautions us that we should not be too sure of our conclusion"). This sentiment resembles the approach of the physicist Richard Feynman:

> "Great value of a satisfactory philosophy of ignorance," Feynman jotted on a piece of notepaper one day, "teach how doubt is not to be feared but welcomed." This became his credo: he believed in the primacy of doubt, not as a blemish upon our ability to know but as the essence of knowing.

James Gleick, *Introduction* to RICHARD FEYNMAN, CHARACTER OF PHYSICAL LAW *x* (Mod. Libr. ed., 1994).

morality, rest on appalling assumptions.[211] This highlights the danger of subordinating complexities into a finely wrought argument. As Clifford Geertz has noted, "[t]he force of our interpretations cannot rest, as they are now so often made to do, on the tightness with which they hold together, or the assurance with which they are argued."[212]

VI. Conclusion

The judge's voice is one voice, but as the voice with the power to impose its will, the judicial mission should be to embrace as many conceptions of meaning as possible. Judges should thus try to preside over a polyphonic courtroom where equally valid voices engage in an intense dialogic interaction. Mere desire to do this is not enough. Rather, judges should seek out extraordinary intellectual and experiential situations so as to better explode assumptions and find "new ways to mean." Such an intense exploration of meaning—enriched with as many ideas, experiences, and perspectives as possible—might make for a less classically "persuasive" opinion, but perhaps a richer and truer one.

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211. *See supra* text accompanying notes 93-99. *See also* Delgado & Stefancic, *supra* note 57, at 1930 ("Because of the particularized stock of life experiences and understandings judges bring to the bench," even decisions which are later universally condemned "seemed to their authors unexceptional, natural, 'the truth.'").

212. GEERTZ, *supra* note 1, at 18.