

INCORPORATING SOCIAL JUSTICE ISSUES INTO THE LRW CLASSROOM

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Brutal Choices in Curricular Design ... is a regular feature of *Perspectives*, designed to explore the difficult curricular decisions that teachers of legal research and writing courses are often forced to make in light of the realities of limited budgets, time, personnel, and other resources. Readers are invited to comment on the opinions expressed in this column and to suggest other “brutal choices” that should be considered in future issues. Please submit material to Helene Shapo, Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611, phone: (312) 503-8454, or to Mary Lawrence, University of Oregon School of Law, 1515 Agate Street, Eugene, OR 97403, phone: (541) 346-3848.

“The future is not a result of choices among alternative paths offered by the present, but a place that is created—created first in the mind and will, created next in activity. The future is not some place we are going to, but one we are creating. The paths are not to be found, but made, and the activity of making them, changes both the maker and destination.”—John Schaar

*“Honor isn’t about making the right choices. It’s about dealing with the consequences.”
—Midori Koto*

“Brutal: very harsh or rigorous[;] plain and direct, although distressing in effect.”—New World Dictionary of the American Language

The decision to bring social justice themes into the legal research and writing classroom presents difficult choices, well within the definition of “brutal.” We base this conclusion on audience

reaction to our presentations at two conferences¹ and to our research on the topic.²

Before confronting the choices involved in incorporating issues of social justice into the legal writing classroom, the term must be defined.³ In their article, *Teaching Social Justice Through Legal Writing*, Professors Pamela Edwards and Sheilah Vance define social justice as “the process of remedying oppression, [including] ‘exploitation, marginalization, powerlessness, cultural imperialism, and violence.’”⁴ More specifically, social justice issues include “problems involving race, ethnicity, and interracial conflict, ‘class conflict, gender distinctions, ... religious differences,’ and sexual orientation conflicts.”⁵ Other areas that fit this definition of social justice focus on the rights of the disabled, the elderly, children, and families. Any questions that implicate issues of a power imbalance within society can be deemed “social justice issues.”

Having defined the term, the next step is to examine the nature of the “brutal” choices involved. Two main choices arise. The first is whether or not to incorporate such issues into the

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¹ We presented on using social issues in the legal research and writing (LRW) classroom at a North Carolina statewide legal writing conference in May 2001, and at the National Legal Writing Institute (LWI) Conference in Knoxville, Tenn., in May 2002.

² In preparation for the Knoxville LWI conference, we posted an e-mail through the LWI e-mail discussion list asking for legal writing professors’ experiences with using social justice issues in the classroom. We are extremely grateful to the numerous professors who responded. Their ideas, practical suggestions, and willingness to share information were instrumental in the development of our presentation and this article. Our work in this area goes back to the 1998 Ann Arbor, Mich., LWI conference, where we began to talk to each other about race and other social justice issues, an exploration and discussion that we continue to pursue.

³ “What do we mean when we say ‘social justice’? I’ve perceived many views on this. Does it mean incorporating legal issues impacting historically marginalized communities (e.g., discrimination claims—which I think is what many people think of)? Or seeking a more contextualized analysis of legal issues (e.g., needing to look beyond the ‘black letter law’ and ‘legally significant facts’ to see what is really happening in any given case)? Or discussing with students the politics of power and oppression? Or making the legal writing classroom more inclusive of non-traditional students and views?” E-mail from Lorraine Bannai, Legal Writing professor, Seattle University School of Law, to Miki Felsenburg, associate professor of Legal Research and Writing, Wake Forest University School of Law, and others, *Pursuing Social Justice Inside and Outside the LRW Classroom* (June 17, 2002) (copy on file with Professor Felsenburg).

⁴ Pamela Edwards & Sheilah Vance, *Teaching Social Justice Through Legal Writing*, 7 J. Leg. Writing Inst. 63, 64 (2001).

⁵ *Id.*

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classroom at all. If the response to that choice is yes, the second choice involves what method to use. There are at least three methods.⁶ In general, the first method requires students to analyze in the broader context of a specific social issue. The second is more indirect: a social issue is the subject of the assignment, but students write only about their legal analysis, not the larger social issue. The third method involves creating a “real world” context for the characters in a problem by describing their race, class, disability, sexual orientation, etc., whether or not the legal analysis involved directly involves those characteristics.

The threshold choice, whether to bring social issues into the LRW classroom, is a difficult one and has the potential to resonate deeply in the classroom throughout the school year.⁷ The reasons to do so seem initially straightforward, although the choice involves layered pros and cons and considerable potential danger. The teacher must consider whether his or her ultimate goal is to influence students’ development as people, lawyers, or both, and to what degree the teacher’s own social justice agenda might or should influence the agenda set for the class.⁸

The incorporation of social justice themes into the classroom reflects several benefits. In doing so, the LRW teacher demonstrates that the world is complex and varied, not generic.⁹ If the LRW teacher does not give the characters in his or her legal writing problems a real-world context, the students will form their own pictures. Such pictures may reflect the dominant white culture or the students’ own experiences and prejudices.¹⁰

⁶ These methods are discussed fully below. See *infra* p. 78.

⁷ Edwards & Vance, *supra*, n. 4, at 74–83 (Edwards and Vance discuss several concerns that could occur if social justice issues are brought into the classroom, such as student and teacher comfort with the chosen issue, and academic freedom for the teacher, among others).

⁸ See Brook K. Baker, *Incorporating Diversity and Social Justice Issues in Legal Writing Programs*, 9 Perspectives: Teaching Legal Research and Writing 51, 51 (2001) (noting the difficulty of bringing legal writing professors’ own views on social justice issues into the classroom).

⁹ *Id.* at 53–54.

¹⁰ See Julie Landsman, *A White Teacher Talks About Race* 40 (Scarecrow Press 2001) (the white author describes the “unconscious arrogance that accompanies [a white person’s] assumption of [his or her] place at the center of the world.” In her preface, she states, “White people do not usually think of themselves as having a race; race is a marker for ‘the other.’ When we refer to a person, without further description, the social norm is white (and male and straight and not disabled.” *Id.* at xv). Along these same lines, see Baker, *supra* n. 8, at 53–54.

Real clients, however, are never generic. The working lawyer does not create a mental picture of the client, the opposing counsel, the opposing party, or the judge, because these people are real. Thus, students can be challenged to confront one of the realities of practicing law if legal writing problem characters exist within a social context.¹¹ Students should have the opportunity to confront their own prejudices in the classroom, rather than for the first time when dealing with real clients. Students also need the chance to think about how to fight stereotypes in front of judges and juries before actually having to do so.¹²

LRW teachers help law students acquire a legal vocabulary. Including social justice issues and contexts helps ensure that their vocabulary is based in the diversity of the real world.¹³ Along the same lines, choosing a socially just and relevant topic that sparks interest in doing “good” in the world may spur students to choose a particular career path or later accept pro bono work.¹⁴

Further, choosing a “cutting-edge” or controversial topic can create interest in the subject, thus engaging students intellectually. Just because a legal writing problem has a good split of authority or an accessible standard of review doesn’t necessarily make it interesting.¹⁵ In fact, such problems may be deadly dull, and our students must wrestle with them sometimes for weeks at a time. By choosing something more “meaty” that involves social justice, teachers can increase students’ interest as well as their own.¹⁶

¹¹ Anne Enquist, Lorraine Bannai, & Ramona Witt, LWI Presentation, *(Un)Conscious Assumptions and (Un)Intended Messages: Recognizing Bias in Legal Writing, Analysis, and Argument* (Knoxville, Tenn., June 1, 2002) (the workshop explored the techniques for teaching students how to deal with race, gender, and class issues likely to confront them in practice).

¹² *Id.*

¹³ *Id.*

¹⁴ E-mail from Ruth Anne Robbins, clinical attorney and supervising attorney of Rutgers Domestic Violence Project, Rutgers School of Law, Camden, to Professor Felsenburg, *Response to Request* (Sept. 20, 2001) (copy on file with Professor Felsenburg).

¹⁵ *Id.*

¹⁶ E-mail from Sheila Simon, assistant clinical professor, Southern Illinois University, to Professor Felsenburg, *Survey for LWI Conference* (Sept. 20, 2001) (copy on file with Professor Felsenburg) (Professor Simon, commenting on choosing socially relevant subjects, said, “It has always made it more fun for me, and I think the students appreciate a topic that at least one person is energetic about.”).

The above are just a few of the many reasons why bringing social justice issues into the LRW classroom is a good idea. However, there are three areas of immediate concern that may weigh on the side of not bringing social justice issues into the LRW classroom: the pedagogy of teaching legal writing, the well-being of the students, and the well-being of the LRW teacher.

First, the pedagogy. Both teaching and learning legal writing are hard tasks. For most students, legal writing is a new skill that is every bit as difficult and maybe even more so than the underlying skill of legal analysis itself. Most teachers view negatively anything that distracts from the learning process. There is a danger that students, especially beginners, may be so distracted by feelings about the race, sex, religion, culture, or background of problem characters that the learning process itself suffers.¹⁷

The second concern centers on the well-being of the students. If the problem concentrates on issues involving characteristics students themselves may have, those students could feel spotlighted. No student should be expected to be the authoritative voice for a group.¹⁸ An openly gay student, for example, may feel pressured to take the lead in discussing a problem about homosexual adoption. On the other hand, a gay student who is not open about his or her sexuality could feel even worse and might refrain from participating at all because of a fear of exposure. Similarly, a student who holds an opinion on a social justice issue he or she perceives as unpopular with the rest of the class may feel silenced or spotlighted by the discussion. If a problem has an identifiable “bad guy,” students who share some of the same characteristics may feel criticized or ridiculed. For example, on a problem

¹⁷ E-mail from George Gopen, professor of the Practice of Rhetoric, adjunct professor of English and senior lecturing fellow, Duke University, to Professor Felsenburg, *Social Issues in LWR* (Sept. 21, 2001) (copy on file with Professor Felsenburg) (Professor Gopen stresses, “Anything that distracts the teacher and the students from focusing on LANGUAGE and ARGUMENT and AUDIENCE and READERS is deleterious to a writing course. The more interesting the ‘subject matter’ is, the greater the danger that the energy in the course will be misdirected to the ‘issue’ and therefore away from the ‘writing.’”) (emphasis in original).

¹⁸ Baker, *supra* n. 8, at 55; see Helen Fox, “When Race Breaks Out”: *Conversations About Race and Racism in College Classrooms* 96–97, 113 (Peter Lang Publishing Group 2001) (describing the frustrations felt by many students of color when expected to repeatedly educate their white classmates on racial issues).

dealing with an abortion clinic shooting, students with anti-choice sentiments may worry they will encounter personal criticism if they reveal their feelings about the issue during a discussion of the problem.¹⁹

Another concern is the possibility that a student has had the negative experience depicted in the problem.²⁰ The student may feel “trapped” into dealing with a subject area he or she might well choose to avoid in real life. For example, a student who has been raped may be severely distressed during discussion of a memo assignment about a similar situation. And, because work on memo problems may last several weeks, that student could be exposed to a long period of discomfort. All of these reactions could have a negative effect on the student, both in terms of furthering his or her legal writing skills and in terms of his or her relationships with classmates.

Additionally, the well-being of the LRW teacher may also be at stake. In most law schools, LRW professors do not have solid job security.²¹ Each teacher must carefully consider the potential danger if he or she chooses difficult, controversial, classroom subjects.²² It is disconcerting to think of a troop of students marching down to complain to the administration that they have been forced to take on subjects that make them uncomfortable.²³ Class discussion of a controversial topic could

¹⁹ In a traditional legal writing problem involving criminal activity, a typical student would be unlikely to identify with a criminal in the same way as a student might if a social justice issue is at the center of the problem.

²⁰ Baker, *supra* n. 8, at 54.

²¹ Jo Anne Durako, *2000 Survey Results: Association of Legal Writing Directors/Legal Writing Institute*, 7 J. Leg. Writing Inst. 155, 163 (2001) (The survey reports that most programs use full-time, non-tenure-track teachers, adjuncts, or a hybrid staffing model. Just five programs in the country reported that only tenured or tenure-track teachers teach legal writing. In four of the hybrid programs, tenured or tenure-track teachers are employed in addition to non-tenured teachers).

²² Edwards & Vance, *supra* n. 4, at 77–81 (discussing the dangers that can derail a legal writing teacher’s career if using social justice issues in legal writing problems becomes controversial).

²³ See, e.g., *Boston Public*, Chapter 37 (Fox television broadcast Feb. 25, 2002). In this episode of the television series about teachers and students at a public high school, there is enormous conflict when the students debate use of the “n-word” in a class taught by a provocative and often controversial teacher. The white teacher, who is inept at the discussion but probably means well, and who tries gamely to engender honest discussion of the difficult topic, is nearly fired by the African-American principal when the debate erupts community-wide and students, parents, and community activists complain.

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“blow up,” leaving the teacher to deal with the fallout, in terms of its effect on the students, class dynamics, and the teacher’s career.²⁴

Thus, the reasons not to bring social justice issues into the classroom are compelling. The fear of hindering the learning process, damaging students, or damaging our own careers is legitimate.

Ultimately, however, many teachers choose to deal with social justice issues just because it makes good sense. While all students will not be dealing with cutting-edge issues in their law practices, all will be practicing in an increasingly diverse world. All students will be called upon to work with and for others from varying backgrounds. The more we as teachers can use aspects of this reality in the classroom, the better prepared our students will be to practice law in the real world.

Finally, having decided what is meant by social justice and having decided that social justice issues belong in the LRW classroom, the final choice, related strongly to the choices already discussed, is how to do it. As described above, there are at least three major ways to bring social justice issues into the classroom, but others probably exist as well. The first involves directly using social justice issues to create a context for a legal writing problem. The second is more indirect: letting the social issue serve as the backdrop for the problem, without the social issue being discussed as part of the analysis. The third involves designing a “case file,” and giving a social context to all the characters in the problem.

A legal writing problem designed around a race- or sex-based employment discrimination claim illustrates the first method, the direct use of a social justice issue. Other examples of direct uses of social justice issues include such cutting-edge topics as homosexual adoption, stem cell research, and abortion. In working on these types of problems, students are forced to read the statutes and the cases that deal directly with these specific, social justice issues. A student working on an employment discrimination problem, for example, may have to read parts of Title VII of the Civil Rights Act of 1964.²⁵

²⁴ Edwards & Vance, *supra* n. 4, at 77–81.

²⁵ 42 U.S.C. §§ 2000–2000e-16 (2000).

Clifford Zimmerman at Northwestern University School of Law has developed an interesting process for using social justice issues directly. He requires students to do outside reading on the topic and to write ungraded, reflective essays on their thoughts about the subject.²⁶ He also allows students to choose sides on advocacy problems, and requires them to maintain journals,²⁷ which may help to avoid some of the potential problems outlined earlier.

The second method is more indirect: using a social justice topic as the underlying subject of an LRW problem, but without making the social justice topic the core of the analysis. An example would be a problem involving a race discrimination statute, but analyzing and focusing only on the statute’s elements, rather than discussing racism and its effects directly. With Title VII, for example, it is quite possible to talk about common *prima facie* elements²⁸ of race-based employment discrimination without ever discussing the real-life consequences when someone is not hired, not promoted, or fired because of his or her race.

Even if a writing problem has a social justice backdrop, it does not necessarily require a discussion of the underlying reasons—the social justice reasons—the statute was developed in the first place. While students may have experienced discrimination themselves, the class can analyze the legal writing problem without discussing the societal basis for the statute or the experiences that many of them may have had. Thus the teacher may be able to use a problem dealing with real-world, cutting-edge, interesting issues, without running as great a risk of interfering with the learning process,

²⁶ E-mail from Clifford Zimmerman, clinical associate professor of law, Northwestern University School of Law, to Professor Felsenburg, *Re: Am I Too Late?* (Oct. 12, 2001) (copy on file with Professor Felsenburg).

²⁷ *Id.*

²⁸ Although the precise elements required to prove a Title VII claim of racial discrimination in employment will vary depending on the facts of the case, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n. 13 (1973), generally speaking, the complainant must show that he or she “(i) ... belongs to a racial minority; (ii) ... applied and was qualified for a job for which the employer was seeking applicants; (iii) ... despite his [or her] qualifications, he [or she] was rejected; and (iv) ... after his [or her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” *Id.* at 802.

disadvantaging some students or endangering his or her career.²⁹

The third method of bringing social justice issues into the LRW classroom uses a case file for each assignment, regardless of the assignment's actual legal issues. Characters in such LRW problems have social contexts, not just legal ones. They are described according to their race, sex, age, or other physical characteristics. They wear culturally or religiously significant garb and have names reflecting diverse ethnicities.³⁰ For example, a potential client, Ms. Cho, crashes her car when a tire fails. While this products liability problem is not directly related to the background of the client, by giving her an ethnicity and identity, she becomes more of a person. The problem could also incorporate the social and cultural context of other characters, such as the judge, the opposing counsel, or other parties. One could deliberately choose to include these contexts, even though they are not directly related to the potential client's legal problem.

The teacher who decides to use social justice issues in his or her classroom also faces several other, related choices. Choosing to use social justice issues may require the teacher to think about the type of atmosphere that exists in the classroom.³¹ Considerations include the degree to which tolerance of differing views is emphasized, whether the class is deliberately inclusive and encouraging for those not members of majority groups, and the teacher's level of comfort with minority viewpoints.

Still other issues involve whether the teacher should reveal his or her point of view on a social issue, and to what degree a teacher should advocate a particular viewpoint.³² Even among those who are

committed already to using social justice issues, opinions vary widely. Some feel that the teacher's personal opinions belong in the classroom, and that all law teachers have a duty to instill socially responsible values in their students. Others believe just as strongly that a teacher's personal opinions have no place in the classroom.

Response to our LWI workshop showed that the legal writing community is intensely interested in the brutal choices and consequences involved in using social justice issues in the legal writing classroom. Even after our presentation ended, discussion of the issues continued through lunch and into the next day. Out of those discussions came the suggestion that those interested explore organizing a mini-track on using social justice issues in the classroom for the next biennial LWI conference.

While these questions will not be easily or quickly resolved, we remain committed to the idea that our students will be the ultimate beneficiaries as we continue to struggle with how best to prepare them to practice law in a world where diversity is an ever-present reality, and social justice remains an elusive goal.

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²⁹ However, by not allowing some discussion of the social justice issue itself, the teacher runs the risk of some students feeling alienated, silenced, or frustrated, resulting in the same concerns for the learning process, the students' well being, and the teacher's job security discussed above.

³⁰ Baker, *supra* n. 8, at 53.

³¹ See Fox, *supra* n. 18, at 75–78 (describing several different methods teachers use to set ground rules for discussion of racial issues in their classes). In Professor Curry's civil rights seminar, she allows students to set the atmosphere by asking each of them to write out three ground rules for discussion, which she then compiles and gives to everyone. In addition, Professor Curry asks students to agree that they will not share outside of class what is said in class in a way that identifies the speaker.

³² Edwards & Vance, *supra* n. 4, at 75.