BRUTAL CHOICES IN CURRICULAR DESIGN...

LIFE WITHOUT GRADES: CREATING A SUCCESSFUL PASS/FAIL LEGAL WRITING PROGRAM

BY STEVE J. JOHANSEN

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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.

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In the very first “Brutal Choices” column to appear in Perspectives, Helene Shapo and Christina Kunz argued that Legal Writing courses should be graded just like other first year courses.1 Recent discussions on the Legal Writing Institute’s listserve suggest that this remains an issue that many people care deeply about. Thus, I appreciate the opportunity to present a different view. I believe that grades do far more harm than good, especially in Legal Writing.

Acknowledged Advantages

The debate over whether to use grades is not new, and many of the advantages of pass/fail courses are well known. In fact, in the earlier column, Shapo acknowledged two of these advantages: greater flexibility in assessment and less anxiety for first-year students.

There are other advantages as well. Peer review is much easier without the threat of grades looming over students. Consistency between teachers is less of a problem. Students have less incentive to sacrifice ethical responsibilities for the perceived short-term advantages of cheating. And most important, students are able to focus on learning to write and think, rather than focusing on what grade they might get.

Alleged Disadvantages

Despite the many sound reasons for pass/fail courses, most writing teachers insist that grades are a necessary component of a successful Legal Writing experience. Their reasoning seems to boil down to two premises. First, students will not work hard in a class that is not graded. Faced with the overwhelming burden of the first year of law school, students are not willing to risk a poor grade in their Contracts course by putting forth appropriate effort in a Legal Writing class that is graded pass/fail. Second, if Legal Writing is graded pass/fail and other first-year courses are not, Legal Writing will be perceived, by students and the law school community generally, as less important. I submit that both of these premises are flawed.

Let us start with the belief that students will not work in a pass/fail class. The argument is that they will quickly figure out that only their GPA matters, and will put forth only minimal effort in any pass/fail course. If our students are indeed solely motivated by grades, they will quickly figure out that their grade in Legal Writing just doesn’t matter anyway. For example, assume a student earns straight Bs in all classes in law school, except his or her two-credit Legal Writing course. Assume that the student makes the conscious choice to work extremely hard in Legal Writing, and that hard work will guarantee an A. (Of course, we all know that hard work doesn’t guarantee any grade, but let’s assume our student believes there is a cause and effect relationship between hard work and good grades.) That A in Legal Writing will boost the student’s GPA all the way to 3.02. On the other hand, if he or she decides to put forth minimal work in Legal Writing, settling for a C, the student will finish with a GPA of 2.98.

If a four-hundredths of a point increase in their GPA is what motivates our students to work hard, we should start questioning the need for our existence. In fact, students who are all consumed by their GPA will quickly realize that the extra effort required to “succeed” (i.e., get a high grade) in Legal Writing just isn’t worth the minimal reward. Thus, we must give students some other reason for subjecting themselves to the grief we cause them.

1 Helene S. Shapo & Christina Kunz, Brutal Choices: Should the First-Year Legal Writing Course Be Graded in the Same Way As Other First-Year Courses? 2 Perspectives: Teaching Legal Research & Writing 6 (1993).

2 Id. at 6.
The second objection to pass/fail courses, that Legal Writing will be perceived as less important, is similarly flawed. Legal Writing should be ungraded not because it is inferior to doctrinal courses, but because it is different from doctrinal courses. In my view, the work we do is too important to let grades foul it up. I submit that perceptions about Legal Writing are developed not from how students are assessed, but from other factors that reveal how the school values its writing program.

**Making Pass/Fail Work**

Although I have argued against grades for many years, I have yet to convince many colleagues that Legal Writing can work without grades. Still, my own experience over the past 10 years convinces me that I am correct. Thus, I thought I would describe how to make such a course successful by identifying 10 characteristics of a strong pass/fail Legal Writing program.

1. **Hire and keep excellent teachers.**
   No program can succeed without good teachers. A school that hires full-time faculty to teach Legal Writing sends a far more powerful message than any grading system can. It shows that the school believes the course is important enough that it is willing to devote the resources necessary to sustain a strong program.

2. **Keep class sizes and student-teacher ratios manageable.**
   No one can teach writing as effectively to 90 students as he or she can to 45. If teachers are overwhelmed with too many students, they will not be able to give each student the attention he or she deserves.

3. **Meet frequently with students.**
   Individual conferences are a time-consuming task. However, they provide an opportunity to get to know students, their writing, and their thinking to a degree that just isn’t possible in the classroom. Taking the time to meet with students shows that the teacher cares about the students’ progress. It requires the students to defend their writing. It quickly exposes unprepared students and provides an opportunity to monitor every student’s progress. The better we know our students, the less likely they are to slip between the cracks.

4. **Require students to assess their work.**
   Self-assessment provides a lot of benefits to students. One of the less obvious benefits is that when students have to assess their work, they will put more time and effort into it. We have students annotate their work, explaining the writing choices they have made and how those choices meet the identified objectives of the assignment. It becomes much more difficult for a student to make sloppy choices if he or she is going to have to defend those choices in the assessment.

5. **Provide exposure to the real world.**
   Students know that writing and reasoning are important in the “real world” because we tell them. Still, many students perceive such comments as self-interested puffing. However, when they hear the same ideas from practitioners and judges, they start to believe it. Every semester we bring in guest speakers to talk about the writing they do in their work. Our students also get a chance to see appellate lawyers argue before the state supreme court. By bringing in outside voices to echo our teachings, we are able to show students that legal writing isn’t just another class—it’s their bread and butter.

6. **Assign short, regular assignments.**
   Although our students ultimately produce three major assignments in the first year, we break these assignments into component parts so that our students are completing short assignments every week. This way, Legal Writing becomes a part of their regular study regimen. As such, there is less pressure to choose between Legal Writing and Torts—Legal Writing is not an “add-on” to their regular course work, but rather a part of that work.

7. **Disappear at finals.**
   Other classes increase in intensity as the madness of finals approaches. Where students are really pressed for time, and hence may need to exercise study triage, is at the end of the semester. We always finish our last writing assignment at least a week before other classes end, and we let the students know that the time they spend on Legal Writing during the semester will be available for other studying during the finals crunch time.

“In my view, the work we do is too important to let grades foul it up.”
8. Reward excellence.
One complaint about pass/fail courses is that there
is no way to reward those students who shine
above the rest. Of course, grades are not the only
way we can reward students. At Lewis and Clark,
we recognize the best written advocate and best
oral advocate in each Legal Writing section
through our first-year Mock Court Competition.
We also award honors to students who write
exceptionally strong appellate briefs. These
awards are noted on the students’ transcripts,
along with other awards and accomplishments
the students achieve while in law school. These
awards provide some short-term incentives for
students without the negative impact that grades
can have on those who produce competent,
though not exceptional work.

9. Do not accept failure.
As with any grading system, some students are
unable to successfully complete the expected
work in a pass/fail system. One must be willing
to fail those rare students who, through lack of
effort or lack of basic skills, do not produce
acceptable work. Fortunately, we have few
students who fall into this category. However,
most years we have one or two students who
receive no credit and must repeat the course the
following year. This provides a sufficient stick
to motivate those few students who want to put
forth minimal effort in the class.

10. Know the culture of your school.
Lewis and Clark prides itself on being a relatively
healthy place to study law. The students and
faculty support one another and the school works
to ensure that virtually all of its students succeed.
Perhaps the constant Oregon rain dampens the
hypercompetitive nature of our students. Teachers
at other schools have told me that their students
are simply too competitive for a pass/fail course.
Perhaps they are right. But if they are, it is the
school, and not the entering students, that creates
that culture. Perhaps if we who teach placed less
emphasis on grades, those who learn from us
would too.

Conclusion
Little on my list is new or even controversial.
The characteristics of a strong Legal Writing
program go far beyond the method of assessment.
When students see that Legal Writing is both
relevant and manageable, they will give it the
attention it deserves. Where Legal Writing is a
valued part of the curriculum, the crutch of grades
becomes unnecessary. Undoubtedly, many who teach
in a successful graded program will look at this list
and think, “But these things aren’t new, we already
do these things.” My point exactly; it is these
characteristics, and not grades, that are the mark
of a successful program.
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