

PERSPECTIVES

Teaching Legal Research and Writing

INCORPORATING DIVERSITY AND SOCIAL JUSTICE ISSUES IN LEGAL WRITING PROGRAMS

BY BROOK K. BAKER

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Legal education, including legal writing, can be criticized for presenting a monocultural, monochromatic, and overly doctrinal view of the world! We often select our legal research and writing problems for their doctrinal content, analytical structures, and adversarial balance. Given broad coverage concerns including legal bibliography; hybrid research; analytical paradigms and rule proofs; predictive and persuasive discourse conventions; and skills of counseling, negotiation, and oral advocacy, legal writing teachers necessarily concentrate on bare minimums rather than curricular enhancements. In making these hard choices, we tend to select our client problems without significant regard to the demographic diversity of our students, the diversity of their future clients, and the social justice concerns that might otherwise animate our discipline.

Although many legal writing professionals are committed in their personal and professional lives to redressing legacies of past injustice and to reforming present inequities, we often struggle over whether and how to bring these “outside” commitments into the classroom. If the importance of addressing class advantage, racism, sexism, disability discrimination, and homophobia were obvious and if it were easy to

¹ Brook K. Baker, *Language Acculturation Processes and Resistance to In “doctrin(e)”ation in the Legal Skills Curriculum and Beyond*, 33 J. Marshall L. Rev. _ (forthcoming 2000); Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 33 J. Marshall L. Rev. _ (forthcoming 2000).

do so, each of us would be doing it already. Accordingly, we should consider both the predicate question “Why incorporate diversity/social justice issues?” and the more pragmatic question “How do we do it?”

Why Should We Address Diversity and Social Justice in Our Classrooms?

This question does not have a single answer for all legal writing classes or for every teacher.

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My answers are personal, as well as contextual. Having grown up in Northern Kentucky in the long shadow of Jim Crow and the bright light of the civil rights movement, having fought in the anti-war movement while my twin brother was in ROTC, and having married a first-wave feminist after being mothered by a stay-at-home mom, I frankly cannot imagine not addressing these issues—my life and my times are full of them. I also teach at a law school that attracts a diverse student body and that defines itself in terms of public interest. Thus, even if my own personal experiences and values did not compel me to address these issues, institutional forces and student demands might. But other legal writing teachers have different paths to the present, and their experiences of privilege and oppression are different from mine. Despite there being no universal answers to the “why” question, there are at least three pretty good answers.

The diversity of our students. Law school is a far more diverse place than it was 25 or even 10 years ago. The number of female applicants now, for the first time, equals the number of males, and the proportion of students of color is still relatively small but increasing. Fewer gay and lesbian students are closeted. Similarly, more students with disabilities are attending law school and come with just claims for accommodation. Even though legal education employs instructional methods designed to indoctrinate this diverse group of students into a dominant legal culture, the educational needs and life ambitions of our students cannot be satisfied by a legal writing curriculum that neglects their multiple experiences and perspectives. Indeed, a curricular pedagogy that marginalizes patterned experiences of discrimination and the diverse perspectives of our students predictably alienates and frustrates them, many of whom already experience additional burdens of stereotype threat and cultural disjunction in our classrooms.² If we want our diverse student body to learn better, to succeed in law school, and to pluralize and reform the legal community, then we will have to do a

better job addressing their intra-psychic needs and the concerns of their constituent communities.

The diversity of our country and its growing international connections. The United States is becoming increasingly diverse demographically and the majority of the population will be nonwhite within 50 years. Moreover, the U.S. economy and its people are increasingly connected to others throughout the world through globalization, immigration, and travel. Finally, the legal interests of these diverse communities lie at the center of a just political economy. Issues of wealth redistribution; housing, school, and job opportunity; and political participation are significantly structured by the legal regime. As legal practitioners, students will need to be comfortable dealing with clients different from themselves and competent addressing legal concerns outside their immediate experience. Thus, if we want our students to be successful interacting with a more diverse group of clients and more responsive to diverse legal needs, we will need to expose them to legal and cultural pluralism earlier and more consistently in their legal training.

Problems in an unjust world. Most of us would agree that social justice remains an elusive and unachieved goal. Economic data clearly shows that the rich are getting richer and the poor poorer. The badges and incidents of slavery persist among African-Americans who still earn and own less, who live in more confined communities, who are profiled by the police and jailed disproportionately, and who suffer worse health and worse health care. Women too still earn less, care for others more, and are victimized more often by violence inside and outside the home. Gays and lesbians, though economically mainstreamed, still cannot marry, still face barriers to parenting, and still can be brutalized on the street. Despite the Americans with Disabilities Act, persons with disabilities are often excluded from the economic mainstream and from public buildings.

² See, e.g., Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 Cal. L. Rev. 1511 (1991); Janice L. Austin, Patricia A. Cain, Anton Mack, J. Kelly Strader & James Vaseleck, *Results from a Survey: Gay, Lesbian, and Bisexual Students' Attitudes About Law School*, 48 J. Legal Educ. 157 (1998); Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. Legal Educ. 137 (1988); Charles Calleros, *Training a*

Diverse Student Body for a Multicultural Society, 8 La Raza L.J. 140 (1995); Paula Lustbader, *Teach in Context: Responding to Diverse Student Voices Helps All Students Learn*, 48 J. Legal Educ. 402, 404 (1998); Margaret Montoya, *Voicing Differences*, 4 Clin. L. Rev. 147 (1997); Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 Dick. L. Rev. 7, 37, 41–51 (1998).

Internationally, issues of injustice are even more acute. Poverty in the developing world is worse, not better, than it was 30 years ago. For example, out of 34.3 million people with HIV, nearly 24.5 million reside in sub-Saharan Africa.³ If we want law students to be prepared to deal with issues of social justice on a local, national, and global stage, we have to put issues of human and economic rights somewhere on the stage, if not center stage, in our teaching.

How Can We Address Diversity and Social Justice Issues in Our Classrooms?

This trio of answers, though far from complete, is compelling enough, I hope, to encourage us to consider how to incorporate issues of diversity and social justice into legal writing programs. In making these suggestions, I will include some experiments that I and others have tried, and others I wish we had.

Creating virtual realities and compelling contexts. When drafting our legal writing problems, we often focus on legally relevant material at the expense of contextual detail that animates moral reasoning in the real world. Although lawyers necessarily go through a process of selection in constructing legal narratives and legal theories, to do so prematurely robs students of the opportunities to explore the social background as well as the legal foreground of a dispute or transaction. In particular, since moral reasoning and legal problem solving around issues of discrimination and social justice are likely to be more situational than abstract, we should concentrate on creating “thick” legal problems—ones that are embedded in a historical time and place and constrained by dominant interests and institutional arrangements.

Example: In our Legal Practice Program, we use a 221-page case file, including a 142-page discovery record. The case involves a failed HUD project, a renovated low-income housing co-op, a struggling single mom with a troubled teenage son, a volunteer security force that neglects its duties, an elderly tenant who is robbed and injured, and a manufacturer that failed to deliver nonduplicable

keys despite warranting to do so. Even though students primarily work on the third-party crime issue, contextual complexity heightens the intensity of their moral and legal inquiry.

Creating and interacting with clients with realistic identities. Real clients have identities. They are white or black or Latino/a or Asian-American; they are U.S. born or Kenyan or Jamaican; they are male or female or transgendered or transsexual; they are gay or straight or bisexual; they are young or middle-aged or older; they are able-bodied or impaired, Catholic or agnostic, and on and on. In fact, individual clients are always many of these things—their identities are constituted by their unique personal histories and by the communities they have called home. Thus, if we want our students to seriously address issues of diversity in the legal problems we assign, even at the margins, we must create a diverse world. Although the default path might be to create either sanitized clients or clients who fulfill a stereotype, we should do everything in our power to particularize the characters we cast in our legal writing problems for several reasons. First, when we create “generic” brand clients, our students tend either to ignore issues of identity altogether or to project prevailing cultural stereotypes. Second, when we create paper clients with whom students do not have to interact, students learn incorrectly that legal writing is an instrumentalist, self-directed skill instead of a representation skill, one that is responsive to the needs, goals, and perspectives of a real, but “messy” client. Third, one of the most important skills of lawyering is learning how to connect, empathize, and struggle with “imperfect” clients who come from unique and perhaps alien social locations.

Example: In our Legal Practice problem, students observe and participate in at least one client interview and counseling session. Mr. Agar, the plaintiff tenant, is a 72-year-old, white widower who has a drinking problem. He is afraid of losing his apartment, afraid that he’ll be permanently disabled, and ambivalent about suing his neighbors. He lied in a deposition and wants to keep his alcohol treatment records private. He is alternately cantankerous and depressed. Ms. Melendez, the president of the defendant housing

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³ UNAIDS, Report on the Global HIV/AIDS Epidemic 6 (July 2000).

“By interacting with ‘real’ clients, students and instructors can also explore complicated issues of lawyer domination and client control.”

co-op, is middle-aged, Latina, and concerned about her job. She hires troubled youths, she tries to involve tenants in the management at the development, and she struggles to enforce safety policies. She has to decide whether to try to evict the Lewis family, whether to put Mr. Agar’s unit on the market, and whether to settle his lawsuit. Kenny Lewis, the teenage assailant, lives with his mom and two younger sisters and is suspected of involvement in a youth gang. His father has abandoned the family and his mom works full time. Does he have a race? Of course he does, and although many students initially assume he is black, we make sure to clarify that he is white and then discuss “youth gang” as a code word, and the danger of appealing to bias. In counseling these clients, instructors and students ask them what they want, how they want to be portrayed during the case, and how they want to portray their party-opponents. By interacting with “real” clients, students and instructors can also explore complicated issues of lawyer domination and client control.

Putting issues of equality and social justice center stage. In addition to populating complex virtual realities with multidimensional clients, legal writing teachers can put issues of legal diversity, social justice, and client empowerment⁴ at the center of their legal problems. According to this principle, instructors would assign problems that require students to address human rights issues, e.g., political asylum; discrimination issues, e.g., high-stakes testing; and economic justice issues, e.g., community reinvestment. Admittedly, when creating legal writing problems, instructors often have to choose first-year material. Moreover, instructors should worry about creating “hot” topics that can trigger traumatic memories for certain students and that are so imbalanced that students on the “bad guy” side feel set up. Nonetheless, it should be possible to select cases in which individual claims for justice connect with group harms, where the law needs to be reformed because of the way it privileges power, or where novel legal theories must be cobbled together to address a newly defined need. Although legal writing teachers tend to focus on domestic law

⁴ Brook K. Baker, *Traditional Issues of Professional Responsibility and a Transformative Ethic of Client Empowerment for Legal Discourse*, 34 *New Eng. L. Rev.* 809, 857–906 (2000).

problems, we could also consider problems that address justice issues between the global North and the global South.

Examples: When in South Africa this past summer, I authored a legal analysis and writing problem that focused on the unaffordability of HIV/AIDS medications in South Africa and on the constitutionality of a dual or tiered pricing scheme by international pharmaceutical companies that had a disparate racial effect. On previous trips, out of my experiences in South African law clinics, I authored multicultural and human rights problems dealing with a lesbian custody dispute and with misappropriation of cows paid as part of the lobola, or bride’s price, in a customary law marriage. Previously at Northeastern, we have used a statutory analysis, plea-bargaining simulation involving “skinhead” racial violence. Similarly, Charles Calleros has written extensively about using writing problems that involve Native-American legal and cultural issues and issues of discrimination against gays and lesbians.⁵ Clinical literature is full of simulations and real-life examples of social justice and diversity issues that arise in live-client law school clinics and of teaching methods that try to deal with them appropriately.⁶

Dealing with “ancillary” diversity and social justice issues. Even if it is not possible or desirable to build an entire legal writing curriculum or research problem around an equity or social justice issue, it certainly is possible to have students address these as ancillary issues both in writing and in class discussion. Although there is some risk of giving an implicit message that these issues are “peripheral” by treating them as ancillary, there is an even greater risk of disaffecting students by ignoring such issues altogether.

⁵ Calleros, *supra* note 2, at 150–56.

⁶ E.g., Beverly Balos, *Learning to Teach Gender, Race, Class and Heterosexism: Challenge in the Classroom and Clinic*, 3 *Hastings Women’s L.J.* 161 (1992); Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 *Mich. L. Rev.* 901 (1997); Mary Jo Eyster, *Integrating Non-Sexist/Racist Perspectives into Traditional Course and Clinical Settings*, 14 *S. Ill. U. L.J.* 471 (1990); Kimberly E. O’Leary, *Using “Difference Analysis” to Teach Problem-Solving*, 4 *Clin. L. Rev.* 65, 96–97 (1997); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 *Stan. L. Rev.* 1807 (1990).

Examples: In our Legal Practice case, we talk about discrimination against the elderly and against those with substance abuse problems. Students must research and write both about state psychotherapist/patient privilege rules and about federal statutes providing confidentiality for substance abuse treatment records. In class, we talk about the desirability of hiring troubled youth, about whether it is appropriate to evict entire families based on the misconduct of one household member, and about the financial issues and benign integration prohibitions that complicate housing choices for low-income people. Although these discussions occasionally are treated as distractions, many students relish the opportunity to talk about some of the values and experiences that brought them to law school in the first place.

Reading law critically. Although some legal writing specialists may have been too passive toward law as given, many have argued that we must teach students to read law critically.⁷ By opening legal text to scrutiny, the social origins of law are revealed, as are its assumptions about the world and preferred power relationships.⁸ By criticizing legal text, students can learn to talk back to power by exploring and exploding master stories of race, class, and gender—all the systems of oppression that make our world less just.⁹ By criticizing legal text, students can also discover their interpretive responsibilities—their power to transform law in the pursuit of social justice.

Examples: When we first ask students to write a “case brief,” we ask them to write a “Context and

⁷ See, e.g., Brook K. Baker, *Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice*, 23 Wm. Mitchell L. Rev. 491 (1997) [hereinafter *Transforming the Traditional Repertoire*]; Beth Britt, Bernadette Longo & Kristin R. Woolever, *Extending the Boundaries of Rhetoric in Legal Writing Pedagogy*, 10 J. Bus. & Tech. Comm. 213 (1996); Calleros, *supra* note 2; Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163 (1993); Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 Mercer L. Rev. 709 (1998); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561, 597 (1997); Diana Pratt, *Representing Non-Mainstream Clients to Mainstream Judges: A Challenge of Persuasion*, 4 J. Legal Writing Inst. 79 (1998); Lorne Sossin, *Discourse Politics: Legal Research and Writing's Search for a Pedagogy of Its Own*, 29 New Eng. L. Rev. 865 (1995); Stanchi, *supra* note 2.

⁸ Britt et al., *supra* note 7, at 213, 225–26.

⁹ Fajans & Falk, *supra* note 7, at 165; see Sossin, *supra* note 7, at 901.

Commentary” section. This section asks students to express their experience of the world and to use that experience to interrogate and criticize the court’s reasoning and outcome. Similarly, because many of the cases that students read when researching our simulation involve crimes of sexual violence against women, we ask students to reflect upon and criticize the courts’ collective unwillingness to address this reality more directly. To augment this focus, we have created a parallel mini-simulation that involves a related domestic-violence case. In both cases, we ask the students to consider whether the law should address issues of violence against women more directly and whether the tort system’s third-party crime rules are effective legal/social policies for redressing these forms of harm.

Pluralizing participation in the legal writing classroom. Some legal writing professionals, especially Charles Calleros and Kathryn Stanchi, have urged that the legal writing classroom be pluralized and that legal writing instructors should undertake “to ensure that the lived experiences, perspectives, and voices of outsider students be included both in the classroom and in legal discourse.”¹⁰ As discussed above, when we add multicultural issues to the classroom, we implicitly encourage minority students to participate knowingly about their communities and traditions.¹¹ By so participating, students are less alienated, more engaged, and more likely to express themselves authentically.¹² However, one of the complexities of using difference in the classroom is getting mainstream students to appreciate perspectives and experiences radically different from their own.¹³ A second problem is how to prevent putting minority students on the spot and treating them as stand-ins for their entire

¹⁰ Baker, *supra* note 1, at _; Calleros, *supra* note 2, at 150–56; Stanchi, *supra* note 2. The discussion in this subsection draws substantially on Baker, *supra* note 1, at _.

¹¹ Calleros, *supra* note 2, at 151–53; Brook K. Baker, *Dilemmas of Cross-Cultural (and Inner-Cultural) Lawyering and Teaching: Six Months in South African Classrooms and Clinics*, 5–19 (draft on file with the author 1998).

¹² Stanchi, *supra* note 2, at 51–57; Parker, *supra* note 7.

¹³ Carolyn Grose, *A Field Trip to Benetton ... and Beyond: Some Thoughts on “Outsider Narrative” in a Law School Clinic*, 4 Clin. L. Rev. 109 (1997).

“[M]any students relish the opportunity to talk about some of the values and experiences that brought them to law school in the first place.”

“[A]s instructors we must be aware of our own cultural baggage, our inherited insights and blind spots.”

group.¹⁴ A third difficulty is how to avoid a classroom dynamic that builds stereotypes and essentialist views about individuals and groups rather than combating them.¹⁵ Fourth, in order to be successful in pluralizing the classroom, we may have to counteract some conventional classroom dynamics that limit participation by “outsider” students. For example, observers of classroom participation find that white men with more unquestioned social power speak more frequently and more confidently in most law school classes;¹⁶ Mertz describes these “tribal” voices¹⁷ as the “kinds of voices [that] can speak in the language of the law.”¹⁸

Examples: Despite the difficulties of ensuring pluralistic participation, there are techniques that expand dialogue. One particularly effective strategy is to have students break into small discussion groups so that everyone gets to participate. Another is to ask students to write some thoughts down on paper before they speak, thereby encouraging participation by those who are careful and slow as well as quick and glib. A third strategy is to ask students to share cultural introductions after some initial trust has been established. A fourth is to ask whether people have experience with a particular diversity issue while avoiding looking at target group members only—after all, for example, white people know a lot about racism too!

Improving instructor/student cross-cultural transactions. It would be comforting if the only mistakes and difficulties in cross-cultural exchanges were between students, but as instructors we must be aware of our own cultural baggage, our inherited insights and blind spots, and be willing to navigate the interpersonal dilemmas created by systems of oppression that affect us and

our students. For example, students may be resistant to our efforts to socialize them to discourse conventions and to a rule of law that has disadvantaged them and their communities.¹⁹ Students may experience the imperative “to write like a lawyer” as an implied disavowal of their own contrasting conventions of expression.²⁰ Students may also fear that legal writing instructors will evaluate them subjectively and unfairly, especially because so many outsider students have experienced stereotyped responses and reduced educational opportunity in the past.²¹ In other words, there are cultural barriers and barriers of unfamiliarity, distrust, and suspicion that can complicate our efforts to create productive pedagogical alliances with students from diverse backgrounds and that require us to become more culturally competent. We have to find out more about students’ varied backgrounds and perspectives without thereby placing them in an “essentialist” box. Not only must we acknowledge rough spots when they occur, but we must also be willing to say “sorry” when we learn that we have affronted a student. Moreover, we have to train students to accept constructive feedback, not as a form of domination, but as an act of collaboration by a more knowledgeable mentor.

Examples: At legal writing conferences, multiple presenters have addressed interpersonal problems that arise in teaching students in general, and diverse student populations in particular. At Northeastern, we hire a multicultural trainer for a full Saturday to work with each rotation of teaching assistants and course instructors. We also give teaching assistants several diversity articles to read to help prepare them for their work.²² Finally, we regularly ask questions in TA training sessions

¹⁴ Calleros, *supra* note 2, at 160; Kimberle Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 Nat’l Black L.J. 1, 6–7 (1989) (describing an expectation of minority “testifying” that poses barriers to participation in the classroom).

¹⁵ See Elizabeth Mertz with Wamucii Njogu & Susan Gooding, *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. Legal Educ. 1, 80–86 (1998); Calleros, *supra* note 2, at 156–58 (discussing the problem of stereotyping).

¹⁶ See Mertz et al., *supra* note 15 (reporting data on class participation in eight semester-long contracts classes and noting contextual complexity and patterns of reduced participation by women and minorities).

¹⁷ Cf. Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089, 1102 (1986).

¹⁸ Mertz, *supra* note 1, at _.

¹⁹ Baker, *supra* note 1, at _.

²⁰ See Jill J. Ramsfield, *Is “Logic” Culturally Biased? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. Legal Educ. 157 (1997) (discussing cross-cultural perspectives on logic and persuasion).

²¹ Claude M. Steele, *Thin Ice: “Stereotype Threat” and Black College Students*, *The Atlantic Monthly* 44 (August 1999).

²² Valerie Batts, *Modern Racism: New Melody for the Same Old Tunes*, Episcopal Divinity School Occasional Papers (1998); Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, Working Paper No. 189, Wellesley College Center for Research on Women (1988); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. Legal Educ. 147 (1988); Steele, *supra* note 21.

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and in our individual supervision meetings about difficulties teaching assistants might be having and whether they need assistance brainstorming constructive responses.

Conclusion

I am confident that many legal writing colleagues routinely address issues of equity and social justice in their legal writing programs and in their classrooms. Despite this confidence, I believe that we are not yet doing enough to share our experiences with each other. Over the long run, we will need to explore stories of brilliant success and traumatic failure so that we can expand our repertoire of pedagogical innovations that address these areas of vital concern.

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