

## Controversial Issues in the Legal Writing Classroom: Risks and Rewards

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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, e-mail: h-shapo@law.northwestern.edu, or Kathryn Mercer, Case Western Reserve University School of Law, e-mail: klm7@case.edu.*

**By Greg Johnson**

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The desire to create writing problems based on controversial issues is understandable.<sup>1</sup> Challenging students with contemporary “hot button” issues such as same-sex marriage, “partial-birth” abortion, torture of “enemy combatants,” and school prayer, for example, will likely enliven classroom discussion in a way that dusting off an old, “canned” problem may not. Students will presumably work harder on their briefs or memos if the issues they are writing on matter to them. From the professor’s perspective, critiquing papers and oral arguments on lively issues is, frankly, more fun.

Yet there are risks involved when introducing controversial issues into the classroom. The well-intentioned decision to use a controversial issue, without planning and forethought, can backfire. It can destroy classroom dynamics, undermine the goals of the course, and, in the worst-case scenario (though one that is not so far-fetched in the highly

politicized world of academia) harm or ruin a professor’s career.<sup>2</sup>

There are risks, but with careful planning, using controversial issues to teach legal writing can be a richly rewarding experience for the students and the professor. This article will make the case for using controversial issues in the classroom. I will offer a pedagogical approach and some assignment design strategies that can help ensure the experience is educational and enlivening.

### Defining “Controversial” Issues

I define “controversial” issues broadly to include any issue that can evoke a student’s passion, interest, and emotion. Previous contributors to *Perspectives* and other legal writing journals have persuasively argued for incorporating “social justice issues” into legal writing assignments and classroom discussion.<sup>3</sup> Such issues include “class advantage, racism, sexism, disability discrimination, and homophobia,”<sup>4</sup> and more generally encompass “[a]ny questions that implicate issues of a power imbalance within society[.]”<sup>5</sup> Professor Brook Baker and others have described the many benefits that accrue to the student and the teacher when social justice problems are used. I completely agree with these authors’ argument on the salutary effect of incorporating social justice issues into the legal writing classroom.

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<sup>2</sup> See Miki Felsenburg & Luellen Curry, *Incorporating Social Justice Issues into the LRW Classroom*, 11 *Perspectives: Teaching Legal Res. & Writing* 75, 77–78 (2003) (“Class discussion of a controversial topic could ‘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.”).

<sup>3</sup> See Brook K. Baker, *Incorporating Diversity and Social Justice Issues in Legal Writing Programs*, 9 *Perspectives: Teaching Legal Res. & Writing* 51 (2001); Pamela Edwards & Sheilah Vance, *Teaching Social Justice Through Legal Writing*, 7 *Legal Writing* 63 (2001); Felsenburg & Curry, *supra* note 2.

<sup>4</sup> Baker, *supra* note 3, at 51.

<sup>5</sup> Felsenburg & Curry, *supra* note 2, at 75.

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<sup>1</sup> I would like to thank Mary Lawrence for providing inspiration and valuable editorial assistance for this article.

Yet I prefer the more comprehensive term controversial to social justice since it includes more subjects and suggests less of an agenda. Controversial issues include not only social justice issues such as “homosexual adoption, stem cell research, and abortion,”<sup>6</sup> but also issues not related or even in opposition to social justice. For example, successful writing assignments could be based on the constitutionality under the Second Amendment of a restrictive gun control law, or a polygamist’s challenge to a “one man/one woman” marriage law. Extending the range of issues to cover the entire spectrum of political and personal views ensures that “outsider” voices of every persuasion, not just those on the left, are represented in the classroom.

I agree with Professor Baker that legal writing professors “must be aware of our own cultural baggage, our inherited insights and blind spots. . . .”<sup>7</sup> Professor Baker makes this point in the context of encouraging legal writing professors to challenge our assumptions about race, class, sexual orientation, and other social justice issues. We can all profit from such an assessment, but we should challenge our assumptions on other issues as well.<sup>8</sup> Developing problems based on issues and political causes we are opposed to, in addition to those we support, can be enlightening and can make the classroom discussion less doctrinaire.

In particular, we should be sensitive to our “cultural baggage” on religious issues. The literature on social justice issues alludes to religion, but only in passing. Yet a growing number of our students are religious,<sup>9</sup> and I am sure many of them see the propagation of religious belief and the advancement of religious causes as a social justice

issue. Instead of ignoring this reality, we should embrace it by challenging our students (and ourselves) to consider faith-based arguments in a legal context. For example, in several cities (including Boston), Catholic Charities in 2006 stopped placing adopted and foster children with lesbian and gay families.<sup>10</sup> A number of interesting and challenging writing assignments could spring from this controversial development.

Students could be assigned to write an office memo or brief on behalf of Catholic Charities in a suit brought against it under the city’s antidiscrimination ordinance. A writing assignment like this could accomplish several goals. First, it would make students with deeply felt religious beliefs feel less isolated in today’s largely secular law school classroom. In addition, for those students who are not religious, the assignment might give them some appreciation for fellow students (and future clients) who are. At the very least, by making arguments for Catholic Charities, the nonreligious students could gain insight into the strengths and weaknesses of faith-based arguments. In the law, as in chess, anticipating your opponent’s moves is as important as planning your own.

Alternatively, students might be asked to write an amendment to the city’s antidiscrimination ordinance addressing Catholic Charities’ dilemma, and perhaps excepting Catholic Charities from the ordinance’s reach. The value of this assignment is that it would teach students the importance of crafting provisions with neutral language that could be acceptable in a highly charged political context. It could also introduce students to the discrete skills of legislative drafting.<sup>11</sup>

Another option would be for the students to write an office memo for the state’s Human Rights

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<sup>6</sup> Felsenburg & Curry, *supra* note 2, at 78.

<sup>7</sup> Baker, *supra* note 3, at 56.

<sup>8</sup> Lorraine Bannai & Anne Enquist, *(Un)examined Assumptions and (Un)intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 Seattle U. L. Rev. 1, 38 (2003) (footnotes omitted) (“A professor can admit that everyone, including the professor, continues to learn about [bias] issues.”).

<sup>9</sup> Robert L. Palmer, *Is God on Your Seating Chart? Discussing Religious Beliefs in Class*, L. Tchr. 1, 1 (2005) (“[L]ike it or not, our students bring God to class.”).

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<sup>10</sup> See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, Boston Globe, Mar. 11, 2006, at A1, available at <[www.boston.com/news/local/articles/2006/03/11/catholic\\_charities\\_stuns\\_state\\_ends\\_adoptions](http://www.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions)>.

<sup>11</sup> Professors interested in an assignment like this should consult some of the growing number of helpful guides to legislative drafting. See, e.g., Ann Seidman, Richard Seidman & Nalin Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (2001); Frederick Bowers, *Linguistic Aspects of Legislative Expression* (1989).

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Commission assessing the strength of Catholic Charities’ argument against forcing it to place children with gay families. This assignment would allow students to view the issue somewhat objectively, which might alleviate some of the tension associated with it. The assignment could also offer professors a chance to educate students about administrative law and legal opportunities in the executive branch.

My argument that legal writing problems should be based not just on social justice issues but on a full spectrum of controversial issues does not come with any hidden agenda. I am, I will readily admit, far to the political left. On religion, I was raised Catholic but am now a pagan/spiritualist. I would not use the polygamy or Catholic Charities examples above to advance any cause. Rather, my goal would be to spark discussion, to get my students interested in the problem, and to thereby cause them to care more about their writing. If we truly believe the university is a “marketplace of ideas,” then we should free ourselves to create problems from a wide range of controversial issues, even those we find offensive.

### Whether to Reveal a Position on Controversial Issues in Class

Professors using writing problems based on controversial issues face a threshold question of how to treat their own positions on the issues in classroom discussion. Responses to this sensitive question from those who have written on the subject run the gamut from keeping personal views private<sup>12</sup> to full disclosure and advocacy for social reform.<sup>13</sup> Each extreme is problematic.

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<sup>12</sup> Palmer, *supra* note 9, at 2. (“I never give any indication of my own religious views [in classroom discussion]. To do so would be distracting and overreaching, and would cause concern even for those students who hold the same beliefs as I.”)

<sup>13</sup> See, e.g., Susan P. Liemer, *Many Birds, One Stone: Teaching the Law You Love*, in *Legal Writing Class*, 53 J. Legal Educ. 284, 291 (2003) (“LRW teachers who have social reform goals, and who create assignments that raise their students’ awareness, may gain benefits quite different from increases in salary or prestige. . . . LRW teachers have the potential for a far-reaching effect on the future of our legal system.”).

First, for experienced professors, it may not be possible to keep our positions private. As Professor Baker notes, “[M]any legal writing professionals are committed in their personal and professional lives to redressing legacies of past injustice and to reforming present inequities[.]”<sup>14</sup> Many of us have spoken publicly and have written on social justice and other issues. For example, I have written on same-sex marriage and civil union.<sup>15</sup> When Vermont was considering civil union legislation in 2000, I testified in support before the judiciary committees of both houses of the state Legislature. I also teach a seminar in sexual orientation and the law. In one of my legal writing classes (legal writing II: constitutional law), I use same-sex marriage as the basis for one of the writing assignments. We discuss the issue for four weeks of the semester. I obviously cannot conceal my position; students come to class knowing how I feel about it. The challenge is to ensure that my opinion does not dampen class discussion. I make it clear at the start that all opinions on same-sex marriage are valid. In fact, I encourage the students to express contrary views to make the discussion more interesting. One technique I use to encourage this is to argue *against* my position, challenging those who support same-sex marriage and supporting, for the most part, those who oppose it. I have found that this helps counterbalance my written record. It empowers students to express views contrary to the majority view in class (which, at Vermont Law School, would support same-sex marriage).

Even if it were possible to keep our views private, concealing our position on controversial issues could come across as disingenuous when we are encouraging and expecting our students to take risks in expressing theirs. Students know the

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<sup>14</sup> Baker, *supra* note 3, at 51.

<sup>15</sup> See, e.g., Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 Vt. L. Rev. 15 (2000); Greg Johnson, *Vermont Civil Unions: A Success Story*, in *Marriage and Same-Sex Unions*, A Debate 283 (Lynn D. Wardle, Mark Strasser, William C. Duncan & David Orgon Coolidge, eds., 2003).

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professor must have a position;<sup>16</sup> why keep them guessing? Professor Robert Palmer offers this reason for keeping his beliefs private:

My goal as a law teacher is to convey the material in any given course, including policy, philosophy, black-letter rules, background facts, and all else that is reasonably relevant. Expressing my beliefs would only get in the way of that goal. On the other hand, student beliefs, particularly religious beliefs, can be informative and bring us all to a deeper level of understanding.<sup>17</sup>

Some would say that a professor's beliefs are necessarily embedded in any explanation of the subject matter of a course. Aside from this post-modernist concern, I do not see why a professor's careful and candid expression of a position on an issue necessarily interferes with the goal of conveying the relevant material. Of course, given the power differential, professors need to be sensitive to student reaction when we reveal our position. We must stress that we contribute our opinions only to generate discussion, not to dominate it. We must also remind the students not to get carried away with the politics of the problem. The ultimate goal is, of course, to teach them to be better writers.

Given the power differential, I have a problem with using controversial issues for legal writing problems in order to direct students toward a particular position on the issue, rather than merely as an effective tool to teach legal writing. Most professors who have written about using social justice issues for legal writing problems emphasize the many sound pedagogical reasons for doing so, and stress that open advocacy for a position has no place in

the legal writing classroom.<sup>18</sup> Still, some of the literature suggests that the classroom can be used to advance social reform goals and personal agendas.<sup>19</sup> Revealing our position is one thing, advocating for it is quite another. Students are required to take legal writing and it is almost always the case that they are placed in our sections randomly, without a choice. It is simply unfair to the students, especially the students who hold opposing positions, for professors to impose their position on the class and to expect the students to adopt it. Professors should not take advantage of their position of authority to use the classroom as a platform for social reform.

I agree with Professor Louise Wetherbee Phelps' approach to politics in the classroom. She argues for what she calls a "constrained vision" of professors' power to impose their views on students. Professor Phelps "reject[s] certain dogmatic, evangelical modes of teaching writing for the sake of promoting societal or even educational change, which is to say that I oppose unconstrained projection of teachers' political visions into classroom discourse."<sup>20</sup> She believes that professors have "a responsibility to constrain themselves in the ways their political visions intersect with their work

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<sup>18</sup> See, e.g., Bannai & Enquist, *supra* note 8, at 38–39 ("The discussion should be one about effective legal analysis and lawyering, not about political positions."); Edwards & Vance, *supra* note 3, at 75–76 (footnotes omitted) ("The format of the presentation of social issues can be controversial because students may feel that the professor is trying to instill her values into the students. However, such concerns should be addressed by using caution in presenting the subject matter rather than avoiding it. Instead of indoctrinating the students, faculty can 'invite' students to explore the issues that arise from social justice problems. This approach follows the Socratic concept that persuasion is more of an invitation than a command.").

<sup>19</sup> See, e.g., Liemer, *supra* note 13, at 286, 292 ("Given that the students of today will play important roles in the justice system of tomorrow, real social reform can begin in the legal writing classroom, again simply through the choices of topics for assignments. . . . With assignments meant to introduce students to greater social issues, the benefits to students and teacher seem particularly intertwined. An important part of the satisfaction may lie in seeing some of the students acquire the teacher's broader goals.").

<sup>20</sup> Louise Wetherbee Phelps, *A Constrained Vision of the Writing Classroom*, 103 ADE Bulletin 13 (1992), available at <web.ade.org/ade/bulletin/N103/103013.htm> at 2–3.

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<sup>16</sup> See Franke Wilmer, *Pedagogy and Politics: Democracy in the Classroom*, Teaching Learning Committee, Montana State University-Bozeman, available at <www.montana.edu/teachlearn/Papers/ideological%20conflict.pdf> (last visited Jan. 11, 2007) ("The question of how and whether politics influences pedagogy has to do with what the teacher does about the fact of his or her position. It is not, in other words, in my opinion a question of whether or not we have a position; it is a question of what we do about the inescapability of having one.").

<sup>17</sup> Palmer, *supra* note 9, at 2.

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as educators.”<sup>21</sup> Professor Phelps accepts that professors may “acknowledge, articulate, and argue for [their] own values in the classroom,” but she asserts professors are “forbidden . . . to use or manipulate students as objects or instruments of [the professors’] ends, however noble.”<sup>22</sup> My position is the same. I should and do advocate for social justice reform in many contexts—just not in the classroom.

### Strategies for Ensuring a Positive Experience Using Writing Problems Based on Controversial Issues

The old adage about never discussing politics and religion is borne from the harsh truth that these subjects excite people’s emotions. Using controversial issues such as politics or religion for a legal writing problem is guaranteed to “raise the temperature” of classroom discussion. This can be a good thing. In fact, it is the very reason to use controversial issues, since all scholarship on the subject says increased interest in the underlying issue will make the students care more about their writing. However, there are many traps for the unwary. Students may focus too intensely on the issue and lose sight of the fundamental legal writing principles that are the central pedagogical goals of the class. Some students with an especially close attachment to an issue (perhaps a student who has had an abortion, or a student who is in a committed same-sex relationship and wants to marry her partner but cannot) might be distracted and even traumatized by being forced to discuss and to write on it. An errant comment in class could evoke painful memories or feelings that can unfairly hinder the student’s performance. Students may feel self-conscious, or “spotlighted,”<sup>23</sup> if they are members of the race, gender, class, etc., that the problem is based on. Professors using

controversial issues for writing assignments need to be sensitized to these and other potentially explosive problems that lurk in such an approach.

Professors using writing problems based on controversial issues must first make clear to the students that unpopular views on the issues are not only acceptable, they are welcome. I tell my students that the class would be boring without them. When a student does take the risk of offering a comment contrary to the perceived majority opinion in the class, I try to be supportive. I never ignore the comment. I use it as an opportunity to spark discussion, both by asking the student questions about his or her position, and by challenging other students to react to the comment. Professor Palmer, in his article on dealing with religion in the classroom, uses the example of a student who, during a discussion of same-sex marriage, says, “I’m a Lutheran, and we believe . . .”<sup>24</sup> In his hypothetical, Professor Palmer asks the student to explain how non-Lutherans might learn from the student’s religious beliefs. He also asks the student, “If we hold with the doctrine of separation of church and state, how can your belief properly inform the law?”<sup>25</sup> While this is an appropriate line of inquiry, it is not enough. In the same situation, I would also ask other students what they think about the place of religious belief in the same-sex marriage debate. To ensure that “outsider” voices really are welcome in class, we need to do more than just say they are; we need to support them and linger on them when students hazard an unpopular view. There are, of course, limits to this leniency. Students are not allowed to use offensive language and they must be civil and professional with each other. As long as these basic rules are met, students should be encouraged to feel comfortable expressing any and all opinions on controversial issues.

The literature is rich with ideas for how to manage the challenges of using legal writing problems based on controversial issues. Professor Baker suggests

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<sup>21</sup> *Id.* at 3.

<sup>22</sup> *Id.* at 5.

<sup>23</sup> Felsenburg & Curry, *supra* note 2, at 77 (“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.”).

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<sup>24</sup> Palmer, *supra* note 9, at 2.

<sup>25</sup> *Id.*

breaking the students into small groups for more intimate discussions, having students write thoughts down on paper before speaking, and having the students offer “cultural introductions.”<sup>26</sup> Ungraded, reflective essays,<sup>27</sup> journals documenting feelings and concerns,<sup>28</sup> and a teaching method called “cooperative controversy”<sup>29</sup> are among the strategies that have been offered to handle successfully the heightened emotions surrounding controversial issues.

The format of the writing assignment can also help increase student interest and ease potential tensions associated with controversial issues. Having students write a judicial opinion can be an effective way for them to gain distance from the “emotionalism” of the problem by requiring them to adopt a judicial temperament in deciding what the result should be under precedent. In my experience, lawsuits under consumer protection statutes can be effective teaching tools. It is not uncommon for students who are assigned to represent the corporations in such actions to report back later that after an initial struggle they often come to appreciate the corporation’s perspective.

One effective technique, if there is time, is to assign students to write both the majority and the dissenting opinions on a controversial issue. This has the obvious advantage of forcing students to see both sides of an issue, but it also has an additional, less obvious benefit. Prior to teaching, I clerked for several appellate court judges. Through their mentoring I came to appreciate the importance of a moderate tone when writing dissents, where there is every temptation to lash out with vicious attacks on the majority. Teaching

this valuable skill could be of great help for those students interested in clerking.

If professors prefer the more traditional model of brief writing, I offer this. After students have finished the first draft of their brief on a controversial issue, have them submit the one or two questions they absolutely do not want the court to ask them at oral argument. This can focus their attention on the parts of their argument that need shoring up better than most any other exercise. Professor Tracy Bach, who teaches legal writing here at Vermont Law School, takes this idea a step further. She has students do practice oral arguments between their first and final drafts, rather than after they have handed in their final drafts, which is more customary. She believes that this helps students sharpen their all-important “theory of the case” for the final brief.<sup>30</sup>

Earlier I noted the value of a legislative drafting exercise. Drafting legislation makes students focus on the public policy implications of controversial issues. In addition to drafting amendments to, or pieces of, a statute (to make the assignments more manageable), professors might also consider having students “testify” before a legislative committee in defense of or in opposition to proposed changes to the law. Given the steady diet of courtroom oral argument assignments in legal writing, testimony before a legislative committee considering a controversial issue, such as a medical marijuana bill, would provide students with a fresh perspective on the diverse oral advocacy skills attorneys must develop. If this path is taken, it might be helpful to bring in a guest speaker—a local legislator if possible or someone from the legislative counsel’s office—to explain from his or her experience the style and substance considerations relevant to effective committee testimony.

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<sup>26</sup> Baker, *supra* note 3, at 56.

<sup>27</sup> See Felsenburg & Curry, *supra* note 2, at 78.

<sup>28</sup> See Edwards & Vance, *supra* note 3, at 83.

<sup>29</sup> *Id.* at 81 (quoting Linda Karen Clemons, *Alternative Pedagogies for Minority Students*, 16 T. Marshall L. Rev. 635, 637 (1991)) (“[F]our members in a group . . . are given study materials on a controversial issue. Two members argue one side while the other two oppose them. Then the teams switch roles and argue the opposite side. Finally, the group must come to a consensus.”).

<sup>30</sup> Tracy L. Bach, *Linking Oral Argument with Brief Redrafting to Communicate the Importance of a Persuasive Theory of the Case*, The Second Draft, Dec. 2005, at 10, 11 (“I have watched first drafts metamorphose from solid recitations of applicable law and fact to persuasive tours de force as students reorganize arguments and sharpen their well-reasoned arguments to bring home the ‘big idea.’”).

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Still another novel approach to incorporating controversial issues into legal writing assignments would be to have students write a newspaper op-ed article. Examples include an article (or, to make it even simpler, a letter to the editor) on the evolution/“intelligent design” debate, or on whether the Environmental Protection Agency should regulate carbon dioxide emissions from cars and utility plants. Assignments such as these teach students to shape and temper their opinion on divisive issues to appeal to the public at large. They also help students develop the important skill of turning legal theories into arguments that are understood by nonlawyers.

Whatever the format of the writing problem, professors using controversial issues also need to consider whether they assign students a side or whether they let students pick who they will represent. Although both options have advantages, I favor letting students choose. One advantage to assigning students a side is that students who support unpopular positions but are not comfortable saying so need not “tip their hand” through their selection, thus avoiding possible derision. Also, students who are assigned a side they do not agree with may gain enlightenment by being forced to represent that party. Finally, assigning students to represent a party they do not agree with reminds them that they do not always get to pick their clients. Thus, the experience can approximate the real-life dilemma many lawyers face. One disadvantage to assigning sides is that if students feel too repulsed by the position of the party they are forced to represent, they may be too distracted to appreciate and absorb the legal writing lessons of the course.

I let students pick who they want to represent. I have done this on many controversial issues, including the constitutionality of sodomy laws, public displays of the Ten Commandments, immigration, federal regulation of isolated wetlands, and global warming. The presumed risk of letting students pick a side on such controversial issues is that the “unpopular” position may not attract enough students, which would result in having to assign students to that position to

balance the numbers (for oral argument, etc.). Yet, somewhat to my surprise, the numbers almost always come out even or close to even, and the few students who might need to, readily volunteer to switch sides to balance the numbers. Students who pick the side they are opposed to say they do it because they enjoy the challenge, and because they seek enlightenment about their opponent’s arguments. Letting students pick a side on controversial issues gets them invested in the problem. It also can help avoid some of the pitfalls of using controversial issues, since students will presumably feel more at ease working on the problem when they can pick the side they favor.

### Conclusion

Professors should use controversial issues to create legal writing problems since this will motivate students to care more about their writing. When selecting controversial issues to create writing problems, professors should draw equally from issues relevant to the left and the right. An unbiased and wide-ranging approach to subject selection, combined with a “constrained” approach toward dictating the course of the conversation and the ultimate opinion of the students, will result in dynamic classroom discussion and contribution from all points on the political spectrum. We should use controversial issues for legal writing problems not to advance one agenda or silence another, but rather to evoke interest and enliven discussion in order to, in the end, improve our students’ writing.

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