

THE CASE AGAINST COLLABORATIVE LEARNING IN THE FIRST-YEAR LEGAL RESEARCH, WRITING, AND ANALYSIS COURSE

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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, fax: (312) 503-2035.

The burgeoning literature advocating innovative approaches to first-year legal research, writing, and analysis (LRWA) programs is obviously a welcome development; but, also welcome would be more serious discussion of the weaknesses and costs of some of the proposed innovations. Such a counter-perspective would be especially useful in light of the apparent trend toward adding instructional components to the LRWA course on broader lawyering subjects such as problem-solving, negotiation, case planning, and professionalism. These additions cannot help but dilute the focus on traditional LRWA skills. As important as these subjects are to the training of lawyers, it is by no means self-evident that they should be taught either at the expense of, or before, a student has developed a solid foundation in the understanding and application of the traditional LRWA skills.

I fear that the introduction of collaborative learning (CL) exercises into the LRWA course,

which a number of LRWA teachers have recently advocated, will only exacerbate this dilution in the focus on LRWA skills. While those advocates do emphasize CL's benefits beyond simply the acquisition of LRWA skills, they rest their case on the proposition that CL exercises will enhance students' learning of those skills. There is little, however, in the CL literature that supports this proposition and even less that weighs, or even acknowledges, the costs of using CL to teach the first-year LRWA course.¹

I raise this challenge to the calls for such use, not as a teacher of the first-year LRWA course, but rather, as a demanding, and occasionally dissatisfied, consumer of its work product. During my 33 years as an in-house, live-client clinical teacher, I have more often than not found that many of my students would have been far better prepared for the challenges they were likely to meet in practice had they spent more time and effort learning and reinforcing the fundamental LRWA skills. I would also emphasize that my concerns about adding CL exercises to the LRWA course do not arise from doubts about either the need for collaborative lawyering skills in law practice or the benefits of teaching such skills in law school. I use a variety of CL techniques in both my clinic classes and my case supervision, where I often structure, as well as assess the effectiveness of, students' collaborative work on cases. Rather, my concerns about CL exercises in legal education arise only with respect to their use in first-year LRWA. That concern arises primarily for two reasons: first, they are being used before

¹ Among those claimed benefits are: easing worries and fears, reducing competitiveness and its resulting counterproductive anxieties, enhancing self-esteem, building judgment, reducing class barriers, promoting democratic values, generating friendships, developing and enhancing team-working abilities, and promoting alternative dispute resolution methods and more conciliatory negotiation methods. Elizabeth L. Inglehart, Kathleen Dillon Narko & Clifford S. Zimmerman, *From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom*, 9 J. Legal Writing Inst. 185, 188, 192, 194, 210 (2003). Zimmerman, "Think Beyond My Own Interpretation: Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum," 31 Ariz. St. L.J. 957, 1000 (1999).

most students are likely to gain the working knowledge of the basic LRWA concepts that is essential to make CL exercises productive, or at least not counterproductive and, second, by design or credit limitations, they reduce the amount of student-teacher interaction that is at the heart of good LRWA teaching.²

I. The Major Problems with Collaborative Learning Theory as Applied to the First-Year Legal Research, Writing, and Analysis Course

Although the CL literature I have found does not directly address the learning process by which its methods are supposed to facilitate law students' acquisition of the essential LRWA skills, the following seem to be the basic ways it is supposed to accomplish such learning:

1. It enables students to begin to become accustomed to the sort of lawyering discourse that is a good model for practice.³
2. It exposes students to peer criticism of their work, which both provides them with a wide variety of alternative views to consider and allows for more creativity since it is not being dictated by the teacher on whose favor the students depend.⁴

² As a caveat to this critique, I would note that it does not apply to schools where CL exercises supplement, rather than supplant, this one-on-one student-teacher interaction that should be at the heart of effective LRWA instruction. Any bad learning that might result initially from premature CL exercises can not only be rectified, but can also be utilized as occasions for greater learning where teachers are able to take the time to discover the bad learning, explain and correct it, and, finally, supervise exercises to assure the corrections are understood and take hold. Given the time restraints under which most LRWA courses operate, however, it is questionable whether this corrective model of effective CL teaching is practicable at most schools, or is even desired by most CL advocates. Further, since teaching through CL takes longer to cover the same material than through traditional individual assignments, there is even less likelihood that LRWA courses will be able to add CL exercises purely as a supplement to the existing level of teacher-centered individualized instruction. Inglehart et al., *supra* note 1, at 199.

³ See Zimmerman, *supra* note 1, at 995–96; Inglehart et al., *supra* note 1, at 190–91.

⁴ Inglehart et al., *supra* note 1, at 190.

3. It enhances students' critical abilities by allowing them to consider and articulate strengths and weaknesses in other students' work.⁵

These are all valuable ways in which student collaboration contributes to novices' acquisition of any professional skill. Missing from the literature on CL, however, is a discussion of the preconditions needed if these various ways of learning are to be effective in enabling students to develop the essential LRWA skills. As in any profession or skilled trade, law practice has a body of core concepts and practices that must be understood, tried, and, as much as possible, internalized as a precondition for attaining competence as a practitioner. As an obvious, but important, example, a lawyer cannot meaningfully use case law in legal argument without knowledge of the basic conventions for relying on precedent, such as how to discern the relative significance of factual distinctions between cases.⁶ What CL advocates have yet to explain is how students can be expected to critique meaningfully other students' use of case law, assess other students' critique of their own use of case law, or cooperate in drafting legal analyses or arguments without first learning on their own both what the underlying conventions for the use of precedent are and how to begin to go about applying those conventions. CL proponents are likely to answer this question in one of two ways: first, that students can adequately engage in CL exercises while they are learning didactically the LRWA rules and practices or, alternatively, that students can sufficiently learn the LRWA rules and practices before engaging in CL exercises.

Given the breadth of the LRWA subject matter, the time needed to learn how to begin to apply its rules and practices, and the typical paucity of

⁵ *Id.* at 193; Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 J. Legal Writing Inst. 1 (2003).

⁶ See Richard B. Cappalli, *The Disappearance of Legal Method*, 70 Temple L. Rev. 393, 404–05 (1997) (listing 34 core concepts that students should be taught in order "to function with sophistication in a world of courts, legislatures and agencies, and of precedents, statutes and regulations.").

LRWA course credit hours, it seems highly unlikely that first-year students can gain a sufficient working knowledge of the essential LRWA skills before they are the subject of CL exercises. Although it would seem obvious that the later in the course such exercises are introduced, the more the students would be prepared to provide and utilize meaningful collaboration in research, writing, and analysis, such back-loading does not appear in the literature as an essential element of the curricular design of CL programs.⁷ The reason for this seems to be the prevalence of the first of the foregoing two CL rationales, that CL exercises can be an effective means for introducing and reinforcing students' ongoing learning of LRWA skills. There are several problems with this rationale that I have not found addressed in the CL literature.

First and most important, it fails to appreciate the role of habituation to the development of effective professional skills. Educators now widely accept John Dewey's recursive, experiential learning model of education, according to which students should not be treated as mere receptacles of information, but rather, as active participants in the learning process in which they learn best by continually evaluating and re-evaluating their learning in light of its effect in moving toward some deliberate goal.⁸ Professor Donald Schon has amplified Dewey's learning model in the context of effective professional education by describing the steps of a process by which novice students first use discrete professional skills to try to accomplish certain practical tasks, then the students' mentors critique their performance of those skills with respect to what they did well or poorly, and what they need to improve for future success and, finally, the students, through repeated

practice, seek to improve their skills in light of their mentors' critique.⁹

The CL literature does not address the role CL exercises play in this recursive, experiential learning model, but it is easy to see how it can strike at its heart when the advice or feedback students receive comes from fellow students who share their own inevitable knowledge and experiential deficits and who, therefore, are as likely as not to contribute to the development or reinforcement of bad learning and performance habits. Of course, as noted above, such miseducation can be remedied and can even be an occasion for deeper understanding, where students' collaborative communications are monitored and deconstructed in order to illuminate how the students arrived at their mistaken conclusions. Such careful and continual faculty monitoring of the ongoing collaborative process, however, is not called for by most CL advocates for two reasons. First, such intensive faculty monitoring and feedback on the student critique or feedback process are probably impractical because of their cost and relative inefficiency. Rather than spend their time critiquing the adequacy of students' mutual critiques, teachers can promote their students' development of fundamental skills and learning habits more effectively and efficiently by assessing directly students' initial attempts to perform skills, suggesting ways to improve their performances, and then assessing their ability to use that feedback to improve their performances. If a teacher's goal is to improve students' critiquing abilities, then critiquing their critiquing of other students' work would make sense. Such a curricular goal, although undoubtedly valuable, is, nevertheless, secondary to the goal of developing students' affirmative ability to exercise fundamental LRWA

⁷ See, e.g., "Students should become comfortable with group work as early in the school year as possible." Inglehart et al., *supra* note 1, at 200.

⁸ John Dewey, *Experience and Education*, 38–39, 68–69, 88 (1938).

⁹ See Donald Schon, *Educating the Reflective Legal Practitioner*, 2 *Clinical L. Rev.* 231 (1995); Richard K. Neumann Jr., *Donald Schon, the Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 *Clinical L. Rev.* 401, 415–18 (2000).

skills and can best be pursued after a certain competence in those skills has already been attained.

Second, such intensive monitoring of the ongoing collaborative process appears to be contrary to the philosophy of many CL advocates, who argue that CL is effective precisely because it decenters the role of the classroom teacher and adopts a more democratic model of mutual instruction.¹⁰ Rather than its prime virtue, however, I suggest that even this partial displacement of the LRWA teacher's instructional control by CL exercises is CL's primary harm. Although some CL advocates' claim a Deweyian mantle for what they believe is its more democratic, student-centered approach, it is in fact the antithesis of the developmental mentoring role that Dewey believed was the unique province of the effective teacher:

It thus becomes the office of the educator to select those things within the range of existing experience that have the promise and potentiality of presenting new problems which by stimulating new ways of observation and judgment will expand the area of further experience. He must constantly regard what is already won not as a fixed possession but as an agency and instrumentality for opening new fields which make new demands upon existing powers of observation and of intelligent use of memory. Connectedness in growth must be his constant watchword.¹¹

Dewey's call on teachers to develop from their diagnosis of students' existing learning needs new challenges that will extend their learning capacities sounds like a daunting call for LRWA teachers, especially in light of their customarily high

student-teacher ratios. In fact, however, it reflects how dedicated LRWA teachers ordinarily go about their work of providing students with individualized critique and advice as to what they need to do in order to improve their skills. This is a role obviously beyond the powers of neophytes and, I believe, beyond that of even the great majority of law teachers, who have not studied and developed methods for teaching legal writing as a process for developing students' thinking and learning abilities. As Linda Berger has summarized, effective legal writing teachers will use a spectrum of different teaching approaches depending upon their students' individual learning needs and the teacher's particular learning goals:

A teacher may want to let the student know what strong points and shortcomings she sees in his arguments or explanations (feedback based on analysis of the student's subject, content, or meaning); she may want to let the writer know what she has determined are his major strengths and weaknesses (feedback based on diagnosis of the student writer and communicated to the student reader); she may want to let the student know how his paper affected her (feedback based on the reactions of the teacher reader and communicated by the teacher writer); or she may want to let the student know how his paper measured up to a set of textual criteria (feedback based on the features of the student text).¹²

From this repertoire of teaching techniques, reader-response type of feedback is the only one student collaborators can be expected to be prepared to use. However, given that the target audiences of most LRWA writing are themselves legally trained, such neophyte reader response will

¹⁰ "The initial requirement for using collaborative learning is to recognize the value of student input—primarily to each other and absent a high degree of teacher intervention. Thus, the focus of the classroom shifts from one which is teacher-centered to one which is student-centered." Zimmerman, *supra* note 1, at 998.

¹¹ Dewey, *Experience and Education*, at 75 (1938).

¹² Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher As Reader and Writer*, 6 J. Legal Writing Inst. 57, 76 (2000).

not be very useful, and quite possibly misleading. In sum, the argument that CL exercises should displace even some of the teaching that teachers of first-year LRWA do underestimates the importance and complexity of the job LRWA teachers do.

A counterargument to this critique is that by the time they reach law school, students have sufficient facility in logic and rhetoric, and, especially as a result of the increasing numbers with substantial work experience, sufficient pragmatic or common-sense judgment to offer each other constructive insights into what they did wrong and how they can do it better. While this rationale may work quite well for graduate business schools, where most students have significant prior work experience in the general areas that are the subject of their business school studies, the opposite is true for law schools where college and most types of pre-law work do not prepare for and, indeed, are often inconsistent with, properly performed LRWA practices. For example, it has been my experience that students who prided themselves on their writing in college were likely to make such common legal writing mistakes as including tangential matters in briefs because they seem interesting, withholding the conclusion to the end of a memo in order to heighten the suspense, using waffle words to avoid being found wrong, or simply avoiding altogether the weaknesses in their side of the cases to make their argument appear stronger than it actually is.

Another potential problem with use of CL exercises in first-year LRWA that is not addressed in the literature arises from student collaboration in doing initial drafts of writing assignments. Although some experienced lawyers may find collaborative writing of analytical legal documents helpful, for neophytes such collaboration is likely to interfere with the progressive stages of the writing process that make the act of writing itself an instrument of active thinking, or, in other words, a process that, if done with due deliberation, is generative of concept formation, logical analysis, clarity of thought, and critical inquiry. Thus, the very act of choosing and not choosing particular words in sentences is intrinsic to the discovery and formulation of ideas. The act

of writing words, sentences, paragraphs, and topics in a particular sequence generates understanding of logical relationships between ideas and provokes insights into new such relationships. Rewriting one's own drafts requires a rethinking of both the logic of one's arguments and whether their expression is effective for their particular audience. Perhaps most important, as an overarching process, during each stage of analytical writing, good writers naturally engage in a form of self-interrogation by which they challenge their own tentative propositions in order both to generate alternative reasonings and to advance their arguments to their conclusions.¹³

Student collaborative discourse during the writing process necessarily disrupts the type of sustained self-interrogative and sequential reasoning that generates creativity, logical analysis, and critical insight. Suzanne Ehrenberg has pointed out several ways in which writing is superior to oral discourse in promoting creative and critical thinking:

[S]poken discourse is not as useful as writing at enhancing our creative thinking because oral brainstorming and debate depend on having an engaged and responsive audience for our ideas. Writing, on the other hand, is always available as a tool for igniting creativity and generating ideas. Even if we have an audience to employ as a sounding board, the very presence of that audience may inhibit the creative process because it "puts pressure on us to make sense and avoid inferences we cannot explain." Thus, "solitary writing for no audience is often more productive than speaking" in the early stages of a project, when the generation of ideas is of paramount importance.

Spoken discourse is also not as effective as writing at fostering critical thinking. Only writing offers us the opportunity to

¹³ V.A. Howard and J.H. Barton, *Thinking on Paper*, 68–70 (1986).

examine a text for internal logic and consistency. “[T]he difference between ... the contemplation of the text and the pondering of the utterance, between the capacity to review a statement visually as well as internally, by eye as well as by ear ... is of fundamental importance for the development of ... reasoning.”¹⁴

Students who collaborate in the drafting process can independently go through all of the stages of this generative, self-critical writing process and then mutually critique each other’s final drafts to develop a stronger joint work product. The CL literature I have seen, however, does not relegate the collaborative element of writing to this final stage of mutual critiques of revised drafts and, therefore, risks allowing students to avoid the creative and critical thinking that is generated by students’ full and independent engagement in the progressive phases of the writing process.¹⁵

A related problem, again not discussed in the CL literature, concerns how to assure that collaborating students do not divide their independent research and writing so that one or more of the collaborators miss important learning experiences. Such deficient learning may result if assignments do not require each student to engage in the learning experiences deemed critical by the teacher, or, where, even if they do, freeloaders can

avoid such experiences or more eager students can take on a disproportionate share of the work.¹⁶

Teachers can, of course, closely monitor all phases of students’ ongoing collaborative work in order to assure that all collaborating students actively engage in all of the prescribed learning experiences. But, such monitoring would seem to undercut CL exercises’ underlying premise that students will develop CL skills through independent give and take. Of course, giving students the freedom not to do the work may be defended as a learning experience itself since such students are likely to learn through their ultimate shortcomings the adverse consequences of their nonlearning. The problem with this rationale is that students are unlikely to appreciate the critical, long-term importance of the mastery of LRWA skills, especially in view of the relatively low status the LRWA course and its faculty enjoy in most law schools. The ultimate cost of such nonlearning is, of course, ultimately borne by clients.

Finally, an inevitable issue of fairness as well as assessment accuracy arises in LRWA programs where students are graded on the basis of the results of their collaborative efforts. Arguments that the potential for under-rewarding high-achieving partners and over-rewarding low-achieving ones is outweighed by the unique learning that arises from the necessity of cooperating to produce the best result make far more sense in the context of upper-level courses where (i.) grades are not as critical as they are in

¹⁴ Suzanne Ehrenberg, *Embracing the Writing-Centered Legal Process*, 89 Iowa L. Rev. 1159, 1189 (2004) (footnotes omitted).

¹⁵ “[S]tudents may work collaboratively at any and every stage of the process of writing. ...” Inglehart et al., *supra* note 1, at 197. *But see* Davis, *supra* note 5, at 4–5 (peer review editing of primary writing assignment for which students instructed not to collaborate in the writing process held in second semester “because, at that point in the year, students had completed five substantial writing assignments and would be more likely, by virtue of instruction and practice, to possess the knowledge and experience to provide a useful critique of the memorandum’s organization and analysis.”

¹⁶ In applying an economic analysis to collaborative learning in his undergraduate introduction to law course, Nim Razook observes that the students “shar[ed] responsibilities according to their individual strengths. ... [T]he better writers would assume additional writing and editing responsibilities while others would take on more quantitative responsibilities.” Nim Razook, *Some Order and Some Law: Cooperative Norms, Free Riders, and Bridge Burners in Student Teams*, 47 J. Legal Educ. 260, 262–63 (1997). Such an economically efficient division of assignments is rational, but exactly contrary to the learning needs of the students as well as to the interests of the public and the profession since the weaker students should obviously spend more, not less, time on improving their competencies.

the first year when they determine law review eligibility, first summer jobs and, for many students, prospects for transfer to a more desirable law school; (ii.) students usually have a choice as to whether to take courses in which grades are based on collaborative work; and (iii.) there is more opportunity to prepare students in effective techniques of collaboration.

II. The Implications of the Move Toward Collaborative Learning in First-Year Legal Research, Writing, and Analysis for Legal Education and the Practice of Law

There are no more important skills for the effective practice of law than those taught in the first-year LRWA course. Why then is there a growing movement for adding components and methods to the LRWA course that would dilute its focus on developing each student's LRWA capabilities?¹⁷ Perhaps the correct answer to this question might suggest strategies for reinforcing the traditional focus of the LRWA course on LRWA skills.

One explanation could be that LRWA teachers are bored, or otherwise dissatisfied, with teaching year after year the same conventional LRWA skills. Occupying relatively low-paid, insecure, and unprestigious teaching positions, LRWA teachers may find that developing new teaching approaches and subject matter could not only be intellectually more stimulating, but also generative of publications and a path toward higher pay, greater job security, and higher prestige. Any such discontent, however, should, be remedied in ways other than changing the traditional LRWA course, such as making LRWA teachers' pay, faculty status,

¹⁷ As my foregoing analysis indicates, the movement rests in part on its advocates' overestimation of the benefits and underestimation of the costs of substituting CL exercises for direct teacher instruction. In addition, however, the non-LRWA educational benefits that CL advocates claim for their exercises, listed at note 1 above, also appear as a factor in generating enthusiasm for including CL in LRWA.

and prerequisites commensurate with these teachers' crucial role in preparing students for practice. Creating opportunities for teaching courses besides LRWA would also seem a constructive use of resources not only for teachers, but also for students in light of the oft-noted growing disconnection between the world of legal academia and the practice of law.¹⁸

Teaching for mastery of LRWA skills may also assume diminished significance in those schools that promote their LRWA course for teaching "people skills" that will help in business as well as legal careers.¹⁹ Law schools that dilute their focus on LRWA skills for such reasons, I suggest, are misguided and disserving their students and the public. What most importantly distinguishes lawyers from, for example, nonlegally trained managers, businesspeople, or social workers, for example, is the ability to analyze how the law is likely to be applied and how it is likely to be changed or how it can be influenced to be applied or changed. Aiming for less than mastery of these abilities would undermine the primary value added by a legal education. Some law graduates,

¹⁸ See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992); John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?* 39 J. Legal Educ. 343, 370-71 (1989).

¹⁹ My law school specifically promotes its LRWA course as teaching those skills in addition to LRWA that are needed in today's legal and business worlds:

In today's increasingly complex and competitive legal and business worlds, lawyers must possess excellent communication, presentation, and teamwork skills that go beyond the typical legal analysis and reasoning skills taught at every good law school. At Northwestern, first-year students are required to take two semesters of Communication and Legal Reasoning. In addition to offering traditional instruction in legal reasoning, research, writing, and oral argument, the course encourages teamwork and collaboration on brief writing exercises and role-playing situations. <www.law.northwestern.edu/academics/clr.html>.

This theme is echoed for its academic program in general:

"In addition to providing a first-class legal education, Northwestern Law offers a uniquely inviting and collaborative environment in which our students develop supportive, not competitive, relationships with each other and faculty." <www.law.northwestern.edu/mainpages/community>.

of course, do end up working in fields that do not call upon any legal analytical skills, but adapting the curriculum for their career needs would defeat the very point of having law schools that derive their monopoly power from state supreme courts' certification that they are in fact preparing students adequately for the practice of law.²⁰

A final, and perhaps more troubling, and certainly more provocative, reason for the putative decreasing focus on the teaching of traditional LRWA skills may lie in the rise in the legal academy of schools of jurisprudence that posit common law legal reasoning as a subjective, inaccurate, unjust, inefficient, or inconsequential method of legal decision-making. In part, these attacks have come from scholars who, having adopted analytical methods from the fields of sociology, economics, or political science, see traditional legal outcomes more as the function of underlying social forces than the deliberate analysis of individual judges following common law reasoning methods. The decreasing focus on LRWA skills may also be in part a legacy of the perspective shared by legal realists and critical legal scholars who see court decisions as the product of almost infinitely manipulable rhetorical games, dependent far more on personal or policy preferences than objectively ascertainable legal rules. From either perspective, there is little of social value that rides on whether or not students master common law analytical methods since outcomes will not vary with the skill with which these methods are performed.

Because I am not aware of any empirical studies that measure the extent to which LRWA teachers have doubts about the practical or normative efficacy of common law reasoning or the extent to which any such doubts negatively affect their effectiveness in teaching LRWA skills, this explanation for LRWA teachers' putative move

away from their traditional focus on teaching only LRWA skills is admittedly hypothetical. Assuming, however, it has some value either as explanation or forewarning, I suggest that LRWA teachers who, as a result of the foregoing quasi-scientific or critical perspectives, are not requiring rigorous mastery of LRWA skills are breaching a trust they owe their students.

Whatever the jurisprudential standing of common law decision-making methodology, no lawyer can competently ascertain or argue the law without mastery of LRWA skills since common law legal reasoning is the form of argument required by courts at every level and supplies the decisional principles that are in fact outcome determinative for at least the bulk of legal controversies, which, some critical legal studies adherents notwithstanding, are decided by objectively ascertainable legal rules or principles.²¹ My argument in this regard is not based on the premise that our common law system of legal decision-making is better than other existing or potential systems or even that critical and sociological schools of jurisprudence do not in

²¹ Owen M. Fiss succinctly summarizes these jurisprudential schools, their implications for approaches toward judicial decision-making, and, in the following passage, shows why it is still critical for lawyers and judges to be well prepared to apply the rules that govern common law judicial decision-making:

In sum, the justices are disciplined in the exercise of their power. They are caught in a network of so-called 'disciplining rules' which, like a grammar, define and constitute the practice of judging and are rendered authoritative by the interpretive community of which the justices are part. These disciplining rules provide the standards for determining whether some decision is right (or wrong) and for justifying it (or for contesting it). They constrain, not determine, judgment. Of course, disagreement can still take place, as it has throughout history. But disagreement—at least within modest proportions—is not destructive of law. Rather, it is generative of it: Disagreement is in fact an essential part of any collaborative moral enterprise within a changing society.

In this account of adjudication I recognize that I am making an empirical assumption about the richness of the legal system in a country such as the United States. I am assuming that our legal culture is sufficiently developed and textured so as to yield a body of disciplining rules that constrains judges and provides the standards for evaluating their work.

Owen M. Fiss, *The Death of the Law*, 72 Cornell L. Rev. 1, 11 (1986).

²⁰ See John S. Elson, *The Governmental Maintenance of the Privileges of Legal Academia: A Case Study in Classic Rent-Seeking and a Challenge to Our Democratic Ideology*, 15 St. John's J. Legal Comment 269 (2001).

fact reveal important ways in which that system is permeated by unfairness, hypocrisy, economic and racial privilege, or inefficiency. Rather, because it is in fact the operative system by which legal decisions are made, law teachers have a duty to prepare their students both to master it and to be capable of improving it. The failure to prepare students to do this not only shortchanges them, but also undermines our legal system's premise that lawyers will be adequately trained to apply its methodology.

It could also be argued that more is at stake here than the adequacy of law students' preparation for practice. If students are becoming progressively less rigorously educated in the methods of common law decision-making and that method is what primarily constrains judges from engaging in wholly subjective decision-making, it follows that any trend away from rigorous preparation of students in LRWA skills could degrade the future quality of decision-making in our legal system generally.²² Although such extrapolation is not necessary to my argument for re-examination of the case for

CL in first-year LRWA, its logic should, at least, be a cause for heightened concern among law faculty generally for what is going on in their schools' LRWA courses.

III. Conclusion

None of my foregoing points breaks any new jurisprudential or pedagogical ground and, I suggest, they are useful to consider only because of what I see as a growing trend in legal education away from its traditional and critically important focus on teaching the fundamental skills of legal writing, research, and analysis. I see the introduction of collaborative learning techniques into the first-year LRWA course as only one manifestation of this trend. If this article can provoke a discussion of, or even better, empirical research on, the proper place and method of those techniques in legal education, it will have achieved its purpose.

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²² An additional argument against any move away from law schools' rigorous focus on teaching LRWA skills that is outside the scope of this article is that there is a critically important ethical dimension to the professional exercise of legal research, writing, and analysis skills that emphasizes such duties as thoroughness, accuracy, and honesty. Although my argument has been framed in terms of the damage to lawyering skills that flows from diluting LRWA teaching, the same, if not a more powerful, argument can be made as to the harm to the profession's ethical standards from such dilution. No matter how technically proficient law students become in their ability to exercise LRWA skills, unless they are taught to understand and appreciate the legal profession's ethical standards for the exercise of those skills, whether in the role of advocate or counselor, they will not be able to practice with true professional competence. I cannot help but speculate whether the Justice Department attorneys who avoided analyzing, or even citing, germane authorities, including Supreme Court precedent, in their memorandum of law legitimating the military's use of torture or torture-like practices in Iraq and Afghanistan might have provided their clients with a more thorough, accurate, and less one-sided opinion if they had had an LRWA course that had succeeded in instilling in them both the methodological and professional-ethical requirements of good LRWA. See Kathleen Clark and Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, Washington Post, June 20, 2004, at B3.