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Practices and Procedures

*63 TEACHING SOCIAL JUSTICE THROUGH LEGAL WRITING

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INTRODUCTION

Because the topic of social justice is important to both of the authors, we were pleased to participate in the 2000 Legal Writing Institute Conference, [\[FN3\]](#) even though neither of the authors is currently a legal writing professor; however, we both were in the past. [\[FN4\]](#) Incorporating social justice in legal writing assignments provides benefits for professors and students. The first section of this article discusses the parameters of social justice and the goals advanced by incorporating social justice issues into legal writing curricula. The second section provides practical suggestions for creating fact patterns that contain social justice issues either as the background to the assignment or as the body of substantive law. The article then addresses concerns that may arise when professors incorporate social justice issues in legal writing assignments, including issues of academic freedom and job security for non-tenured professors and discusses how to resolve some of these concerns.

I. PARAMETERS OF SOCIAL JUSTICE

Before the article discusses why both professors and students benefit from teaching social justice through legal writing assignments,*64 it is important to define the concept of social justice.

A. What issues constitute “social justice”?

Social justice is the process of remedying oppression, which includes “exploitation, marginalization, powerlessness, cultural imperialism, and violence.” [\[FN5\]](#) Issues of social justice include problems involving race, ethnicity, and interracial conflict, “class conflict, gender distinctions, ... religious differences,” and sexual orientation conflicts. [\[FN6\]](#) Social justice also includes public interest work in its many guises.

B. Why teach social justice in legal writing courses?

Several important reasons exist that justify teaching social justice in legal writing courses. Benefits inure to both law students and law professors. This section of the article discusses the benefits to law students.

1. Teaching social justice issues encourages a diverse student body.

Some of the benefits of having a diverse student body accrue not only to members of underrepresented or outsider groups, but also to members of the dominant group or “ingroup.” Scholars have argued that by hearing outsider stories, members of the ingroup will develop the ability to understand the different perspectives and experiences of outsider groups. [FN7] These different perspectives and experiences will help to identify and eventually to eliminate biases in the law.

Many times, members of outsider groups are called upon to educate their ingroup colleagues. Addressing social justice issues in legal writing would expose ingroup students to alternative perspectives while alleviating some of the burden outsider students bear to provide this perspective. [FN8]

****65 2. Teaching social justice issues maintains student interest.***

Students attend law school for a variety of reasons and with differing career aspirations. Even so, most law students cannot see the connection between first-year mandatory courses and their ultimate careers. By introducing issues of social justice early in law school, professors introduce students who entered law school with an interest in practicing public interest law to situations they will face as attorneys. They especially will begin to realize the importance of legal writing and research to practitioners by being exposed to some of the types of writing attorneys engage in on behalf of their clients. While this is extremely important to professors in schools, such as City University of New York School of Law, which are devoted to training public interest lawyers, some students in other law schools also desire to practice public interest law.

In addition, law students who come from backgrounds other than white, middle class backgrounds may find little in law school that bears out their life experiences. In a law review article on his experiences in school, one Ivy League law school graduate has remarked on “how little of the legal academic world intersects even with the everyday world of even middle class African-Americans.” [FN9] Although he wrote this in the context of his property law course, the observation is true in many law school courses. Law professors typically incorporate in their courses the usually unstated assumption of common experiences that everyone has shared. However, many outsider students do not share in these “common experiences.”

3. Teaching social justice raises and addresses issues of race, ethnicity, class, and gender in society.

Issues of race, gender, ethnicity, and class are central social issues, not marginal ones. As adults, law students can best undertake critical scrutiny of their personal values and of their individual culture's values, assumptions, and beliefs. [FN10] Therefore, faculty should provide students with “disorienting moments” that will *66 cause them to question their values and beliefs. [FN11] This need to expand our students' horizons is especially critical because legal writing pedagogy silences outsider voices with its emphasis on an audience of attorneys that is largely white, male and allegedly “neutral.” [FN12] By raising social justice issues, professors let students know that their prelaw school experiences and concerns have value in the legal profession. [FN13]

4. Teaching social justices supports the creation of more sensitive and understanding attorneys.

All aspects of the law school curriculum, including legal writing, should be reviewed to ensure that course content prepares students to serve a diverse client base. [FN14] To that end, students must *67 become more sensitive to, and understanding of, various cultures and social groups. [FN15] This sensitivity can arise from making the study of the needs and problems of clients from underserved communities an essential component of legal education.

[\[FN16\]](#)

5. *Teaching social justice broadens students' exposure.*

In raising social justice issues, a professor helps students develop a broader sense of themselves and of the world. Law students are adult learners, and adult learners are in the best position psychologically to develop a broader sense of self. [\[FN17\]](#) One of the intellectual challenges of law school should be students' reassessing their vision of what social justice means to them now and what social responsibility will mean to them later as attorneys. Raising social justice issues in the classroom is problem-posing education, which is an adult education theory of challenging learners to critically perceive the world in which they live and their values. [\[FN18\]](#) Problem-posing education offers possibilities for critical self-reflection. [\[FN19\]](#) Finally, students should be exposed to multiethnic and diverse experiences to appreciate fully the pluralism of contemporary society. [\[FN20\]](#)

68 6. *Teaching social justices develops and provides an outlet for students' voices.

Some of the alternative pedagogies that can be used in teaching social justice, such as journals, diaries, or personal narratives, can provide an outlet for students who feel silenced by traditional legal education. [\[FN21\]](#) Addressing social justice issues can also minimize the potential for, and damage, of muting. [\[FN22\]](#) Using alternative approaches in legal writing teaches the value of both the legal voice and the personal voice, especially the voice of "outsiders." [\[FN23\]](#)

Perhaps raising multicultural issues will help those students who, because of their status as outsiders, lose their identity, self-esteem and will to succeed in law school. [\[FN24\]](#) Multicultural law students often feel that they are socially isolated in law schools, that they are invisible, and that they have concerns which are considered unimportant. [\[FN25\]](#) This has a negative impact on students' acclimation to law school, their self-confidence, and their academic performance. [\[FN26\]](#) A number of articles have discussed the alienation that white women, people of color, gays and lesbians, and other outsiders face in law schools. [\[FN27\]](#) One of the manifestations of this alienation is the silencing of alternative voices. [\[FN28\]](#) Incorporating issues of *69 importance to these outsider groups in the curriculum will not only encourage ingroup students to examine the law from another perspective but will also encourage students who are members of outsider groups to express their ideas and share their experiences in writing, even if they hesitate to speak up in class. [\[FN29\]](#) Students who are members of outsider groups often are made to feel unwelcome in law school. By incorporating social justice issues into legal writing classes, legal writing professors will afford students from outsider groups the opportunity to feel included in law school without a transparent overt effort to do so.

The theme of the 2000 Legal Writing Institute Conference was preparing students for life after the first year of law school. Many schools offer upper level courses on women and the law, on race relations law, or on legal perspectives, such as critical race theory and feminist jurisprudence. Incorporating social justice issues into the first-year legal writing course can help broaden students' perspectives for these courses by providing a broader foundation for these jurisprudence courses. Moreover, an introduction to alternative schools of thought on jurisprudence may encourage students to take one of these elective courses. Even students who do not take one of these elective courses will benefit from an introduction to alternative legal perspectives in the curriculum.

Writers enthusiastic about their topics are more likely to produce a better product. Incorporating issues of social justice into legal writing assignments is more likely to increase student interest in the writing assignment, especially when problems are based on current events. Examples include the issues of racial profiling by law enforcement officials, or gays in the military and the "don't ask, don't tell" policy.

Those professors who use the “process” approach [FN30] to teaching legal writing try to encourage students to focus on the audience who will read the documents. This approach focuses on predicting how judges and other attorneys expect to receive information; however, this focus frequently results in what has been called “regnant” lawyering. [FN31] Regnant lawyering, the opposite of client-centered lawyering, puts the attorney’s professional expertise ahead of the client’s interests. In teaching law students to think “like lawyers,” *70 professors frequently overlook the client’s role in the process. Some professors try to compensate for this omission by having students draft client letters; however, even in a client letter, the attorney’s expertise is still the focus.

Although a client-centered approach may still require attorneys to translate their clients’ stories for other attorneys or judges, this approach encourages attorneys to focus more on the client as a person rather than solely as a legal issue. However, focusing on the client may result in a conflict between the client’s desires and the attorney’s social justice mission. For example, a client’s desire to have his day in court and tell his story may conflict with his attorney believes is the best legal strategy to prevail. [FN32] It is never too early to assist students in developing strategies to deal with this type of conflict, including deciding whether to represent a client and whether to join a particular law firm, law office or other legal organization.

Social justice should be taught in legal writing, before students have become thoroughly indoctrinated into traditional legal thinking. By the end of the first year, many students will have assimilated the language of the law and will be unable or unwilling to see the biases in the law. [FN33] Teaching social justice in legal writing will train students to see the social, political, and economic implications of the law and the various legal arguments they make.

7. Teaching social justice introduces students to attorneys’ role in developing law.

As practitioners, legislators, or judges, attorneys play an important role in developing law, primarily through their writing. Many people believe that attorneys have a moral obligation to advance the law’s justice mission to alleviate the effects of oppressive legal and socio-political power structures in society. [FN34] Attorneys who practice public interest law (and students who aspire to do so) must consider how the law might be “reinterpreted and reformed to achieve social justice.” [FN35] Legal writing courses are the perfect place in which to introduce law students to this form of legal analysis.

***71 II. HOW TO TEACH SOCIAL JUSTICE THROUGH PREDICTIVE AND PERSUASIVE WRITING**

Several methods exist for law professors to use teach social justice through both predictive and persuasive writing assignments. The social justice issue can provide the factual background for the legal issue in the assignment or the social justice issue could be the primary legal issue.

A. Social justice issues can provide the background against which to place the entire fact pattern or the client.

Social justice issues can form the background for legal writing problems throughout the year. For example, problems can be set in a racially tense neighborhood. All memos and briefs can address the legal issues that would or could arise in such a neighborhood including ethnic intimidation, and intentional infliction of emotional distress. Alternatively, a same-sex couple could encounter various legal issues, including contract and property issues, such as a landlord reneging on a rental agreement upon learning that the couple is homosexual. Writing assignments also can demonstrate how the same legal issues are handled differently. For example, an assignment could include a fact pattern based on laws related to obtaining a home mortgage and issues of redlining and zip code discrimination. The problem could illustrate how one family has no trouble obtaining a mortgage, while another has great difficulty because of the family’s race or residential area. In addition, the professor can develop one factual scenario but have students research case law in two different jurisdictions to show how states with differing statutes and differing so-

cial values would handle the problem. Another example would involve demonstrating how a statute, such as one implementing the flat tax, affects different socioeconomic groups. The social justice issue may add background to a straight legal issue, such as an assignment on the issue of surrogacy contracts between the parties of different races.

B. Social justice issues can be tied to traditional first-year subjects and throughout first year curriculum.

Legal writing professors use issues from the range of doctrinal course subject matter throughout the entire law school curriculum. *72 Social justice issues, too, can cover the range of first-year subjects and beyond. Consider the following memorandum and brief problems that Professor Vance used one academic year. All memoranda and brief problems stemmed from the experiences of one client and her family. The intent was to replicate what happens in law practice when one client is the source of multiple legal matters. Professor Vance created Ruby Howard, an African-American woman, who was the lead singer of a Motown-type girl group called Ruby and the Gemtones. Ruby had a teenaged daughter and son. Ruby toured on the oldies circuit, but gave it up because she was tired of constantly being on the road. For nostalgic reasons, she opened a 1950s-style diner in an old nightclub where she used to perform. The neighborhood is the racially tense Gray's Ferry neighborhood in Southwest Philadelphia, which is not fictional. Ruby was unaware of the racial tensions in the neighborhood when she decided to reside there. Shortly after Ruby moved in, another African-American family was driven out of their home after racially-motivated verbal harassment, damage to their property, and physical violence. This incident was true.

The writing assignments were handled in the following ways. The issues in the first open research memorandum involved the tort of intentional infliction of emotional distress. Ruby's neighbor, an elderly white woman, harassed Ruby in an attempt to get her to close the restaurant and move. Consequently, Ruby suffered emotional distress and resultant physical symptoms. Professor Vance expected students to address the social justice issue of what standard the court apply to determine outrageous conduct. Should that standard be the way that people act in a neighborhood where overt racist acts are common? Perhaps in that neighborhood racist acts are not considered outrageous. If not, then can the appropriate standard be the way people act in neighborhoods where overt racist acts are essentially non-existent, and, hence, outrageous?

For the second open research memorandum, one class researched and wrote about a contracts problem involving interpretation of contract terms under the Uniform Commercial Code. This problem arose from Ruby's experience in ordering liquor for the restaurant. The other class researched and wrote about a criminal law problem involving reckless endangerment and terrorist threats, arising from Ruby's son's run-in with the white male his sister was dating and that male's uncle, who was a policeman. [\[FN36\]](#)

The appellate brief involved a civil procedure issue that concerned*73 personal jurisdiction law as applied to the Internet. Ruby had to return to the oldies' circuit because her harassing neighbor caused the restaurant business to slow down. That neighbor took her crusade against Ruby on-line to a restaurant review chat room. Ruby sued the Internet company that operated the chat room.

C. Using social justice as the substantive law to be addressed in the students' work

Instead of including a social justice piece as a side issue in an assignment, a professor may elect to use social justice as the substantive law to be addressed in the students' work. For example, a number of states have enacted bias crime and hate crime statutes that enhance the penalties for crimes motivated by the race, gender, religion, or sexual orientation of the victim. Current prominent litigation can be a fruitful source for social justice issues. For example, the court challenges to the law admissions practices of several public law schools may be particularly relevant and interesting to current law students. Other examples of social justice issues that students may relate to include: (1) renewed attacks on the voting rights in communities of color; (2) environmental justice and the placement

of undesirable projects in areas where the residents have little political power; and (3) racial profiling by law enforcement agencies. Several years ago, Professor Edwards based a legal writing assignment on an issue involving the application of The Religious Freedom Restoration Act of 1993 to prison inmates. [\[FN37\]](#) The problem involved prison dress code regulations promulgated to hinder gang-related activities and whether these regulations violated the right of inmates to wear religious beads.

Professors can use the same process to generate social justice assignments as they do to generate other assignments. Whether the social justice issue is used as background for the assignment or the substantive law of the assignment, professors should take advantage of the opportunity to enrich their assignments by incorporating a social justice perspective. On the other hand, concerns may arise in doing so.

***74 III. ISSUES THAT CAN ARISE IN THE COURSE OF TEACHING SOCIAL JUSTICE IN LEGAL WRITING**

When law professors decide to incorporate a social justice issue into a legal writing assignment, they should be prepared for several issues that can arise, including their own discomfort in discussing the issue, student discomfort with the issue, and questions of academic freedom.

A. Teacher comfort with the topic can become a concern.

Social justice problems can touch on issues that are personal to the professor and that may make the professor uncomfortable. [\[FN38\]](#) Professor Vance's experience with Ruby Howard is a good example. As an African-American woman, one of Professor Vance's goals in using an African-American client was to raise the racial sensitivity of students in the law school where perhaps 10% of the students were minority. Another goal was to use problems that reflected the real world and that would be interesting for the students and the professor alike. The incident in which an African-American woman was driven from her home in a predominantly white neighborhood actually occurred in a Philadelphia neighborhood in the first few weeks of the academic year. [\[FN39\]](#) Professor Vance was disgusted by the fact that this type of racism still existed. Also around the time of the incident, President Clinton announced his initiative on race. And personally, Professor Vance was feeling disconnected from both the predominantly white law school, where minority faculty were literally a handful, and the surrounding neighborhood, which also was predominantly white. [\[FN40\]](#)

***75** Professor Vance's teaching assistant drafted a problem and researched the case law. Some of the language in the problem was and had to be racially inflammatory. For example, words such as "Nazi white trash," "pansy white boy," and "jungle fever" were used in the fact pattern she drafted. Similarly, the case law cited inflammatory language. Courts used the word "nigger" frequently. That caused Professor Vance to wonder whether she really wanted the students to write "nigger" in their papers. She grappled with this issue around the time that the NAACP talked about taking "nigger" out of the dictionary. [\[FN41\]](#) Did she want to read "nigger" as many times as it would have been necessary to do in those papers? Professor Vance considered whether she could be objective if someone said that calling someone else a "nigger" was not outrageous. Could she agree with opinions which said that it was not? [\[FN42\]](#) Did she want to perpetuate or encourage that type of jurisprudence?

Moreover, as a year-to-year, non-tenure track professor, Professor Vance had no job security. She was convinced that she would be the one to suffer any repercussions for possibly "inflaming racial passions" with this fact pattern. So she stayed away from that fact pattern because she was uncomfortable with it. This troubled both Professor Vance and her teaching assistant, who questioned why the professor shied away from the fact pattern. The professor pondered the same question, shared her hesitation about the fact pattern with other legal writing faculty, and decided to speak about it at the upcoming legal writing conference. While Professor Vance did not feel that she had

the resources to handle that problem adequately then, in the course of preparing for this presentation, she learned some ways that she could have, and should have, addressed the issues. [FN43]

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. [FN44] However, such concerns should be addressed by using caution in presenting the subject *76 matter rather than avoiding it. [FN45] 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. [FN46]

B. Student comfort with the topic may be a concern.

Students may be uncomfortable with issues that are too personal or with issues they do not want to confront. Students may disagree with court opinions that do not reflect their concerns, especially if they are “outsider” students. Although legal writing pedagogy requires students to use “relevant facts,” the facts that are relevant to people of different cultures often differ from that the prototypical audience, largely white male judges or attorneys, considers relevant in the context of the dominant law and legal language. [FN47] Outsider students may become frustrated that what the court deems outcome determinative does not reflect their experience or knowledge. [FN48] This results in a troubling and unsettling gap between the personal “self” and the professional “self” of outsiders.

In the outrageous conduct problem discussed in Sections II and III, the students did not address the issue of race until Professor Vance instructed them to do so on the rewrite. It seemed that any discussion of race was taboo, perhaps because the professor was an African-American and the students were concerned about what would offend her. Only one student, a white woman, saw the issue that the fact pattern raised involving the neighborhood standard of outrageous conduct. When she raised it with other students, they thought that she was wrong. She told them that there must be some reason why the memorandum problem instructions included the newspaper article about the woman who was forced from her home.

Even the few African-American students in the class did not “get it.” Professor Vance thought a great deal about why they did not, or if they did, why they did not raise it. Perhaps they felt un-empowered to address these issues because discussions of race did not fit into the values and mores of the law school at that time. [FN49] The students really were not being exposed to racial issues in other *77 classes. Perhaps the dominant culture had silenced them instead of enabling them to accept the richness of their culture. [FN50] Perhaps because of their higher income and higher educational level, these students could not relate to a lower income woman who was driven out of her house.

On the other hand, Professor Vance wanted to shield the African-American students from the ethnic intimidation problem. She believed that the African-American students would feel uncomfortable discussing this case with other students. Alternatively, she felt that they would have to spend more time than they wanted educating other students about the impact of racially derogatory language.

C. Academic freedom of legal writing professors may be a concern.

Some legal writing professors may question whether they have the academic freedom, both in the classroom and within the legal writing program, to assign social justice issues to their students, especially if their colleagues fail or refuse to do so. The possibility of complaints from the non-legal writing professors on the law school faculty about controversial social justice assignments may also concern legal writing professors. Professors who incorporate social justice issues in their legal writing assignments may also have to use alternative pedagogies in preparing students to handle these issues.

1. Academic freedom in the classroom

The discussion about the legal writing professor's comfort level in raising social justice issues in the classroom relates to academic freedom. Academic freedom, in this context, concerns the individual First Amendment freedom of a teacher to communicate in the classroom unobstructed by the administration. [FN51] While the courts *78 have highlighted academic freedom as a special concern of the First Amendment, they have hesitated to define its scope, particularly in the context of in-class speech in university settings. [FN52] However, some courts have given professors at law schools the highest degree of academic freedom.

In *Blum v. Schlegel*, [FN53] the Second Circuit acknowledged the unique aspects of a law school environment and the need to protect speech that is a matter of public concern. In *Blum*, the court considered a tenure-track professor's promotion of the legalization of marijuana and criticism of the nation's drug control policy via in-class hypotheticals to be protected speech regarding an issue of public concern, and regarded such in-class speech as not interfering with the state school's mission as a law school. [FN54] However, in a footnote, the court cautioned that "politically charged hypotheticals are often confusing." [FN55] Nevertheless, the court was firm in its position that controversial speech in the classroom was central to the mission of a state university's law school. [FN56]

A district court's decision in a case involving a graduate business school writing professor could have an impact on the legal writing professor who raises social issues in the classroom. In *Scaliet*79 v. Rosenblum*, [FN57] the court held that a non-tenured professor's in-class speech advocating diversity and using alternative pedagogies was not protected under the First Amendment. The professor was a strong advocate of diversity. He sought to broaden classroom materials and the business community to make them more accessible to women and minorities. The court held that the professor's in-class speech obstructed the mission of the school to effectively deliver a required first-year writing course to its students in a uniform and essentially content-neutral fashion. [FN58]

The *Scaliet* opinion is interesting for a number of reasons. First, significant similarities exist in the facts between Professor Scaliet's position and those of most legal writing professors. Scaliet was a full-time non-tenured instructor at the University of Virginia's Graduate School of Business. He taught one section of a required first-year course in writing and speech called Analysis and Communications (A & C). Although their status is slowly changing, most legal writing professors occupy non-tenure track positions that do not have the protections of job security. [FN59] Second, like many legal writing directors, Scaliet also had administrative responsibilities as course head, which included administering the course, managing other A & C faculty, all of whom were adjuncts, and developing the curriculum for the course. [FN60] Third, many law schools have writing programs which require all of the legal writing professors to assign the same problems. A court adopting the rationale of the *Scaliet* court might determine that law schools also have a mission to deliver a uniform writing program to their first-year students that would be undermined by professors who add material to their classes.

2. Academic freedom within the legal writing program

Some of the issues raised in *Scaliet* are relevant to the amount of academic freedom allowed in a legal writing program, depending on the program model at the school. There is a question about whether one legal writing professor can really be divergent in her class in legal writing programs that are essentially uniform, using *80 a common syllabus, common textbook, and common due dates for memos and briefs. Can she give her class more assignments than others, such as requiring students to read articles on social issues to inform their understanding of related court opinions and having students keep a journal reflecting their feelings on these issues? Does she run the risk that the students will complain to the legal writing director that their class differs significantly from the other professors' classes? Will the students complain to her? Can she convince her colleagues to support what she is doing and to address social justice issues in their classes?

There is a risk that the legal writing program director or the dean might rein in the professor who addresses social issues in the classroom, especially if the legal writing professor must have her memorandum and brief assignments “approved” by the director or other doctrinal faculty. That professor might be told that the law school policy requires delivery of the same level of instruction to all students in the legal writing course.

3. Academic freedom within the law school

The *Scaliet* opinion also raises the issue of whether other professors will complain that the legal writing professor who uses alternative pedagogies to address social issues in the classroom is giving students materials that are similar to what the professor gives the students in such classes as critical race theory or feminist jurisprudence. [FN61] No one really owns these issues, but one wonders whether the academic or curriculum committee could legitimately decide, as in *Scaliet*, that discussion of such issues belongs in upper-level jurisprudence courses, not in the first-year legal writing program. [FN62]

Further, law schools are restricting the number of new hires or making hires with no promise of tenure or job permanency. This policy creates a tenuous position for the legal writing professor who raises social issues in the classroom in a school where the majority of the faculty do not undertake and are not supportive of such an approach. [FN63] This lack of job security is a real problem for those on year-to-year contracts. Even legal writing professors on the tenure *81 track may not have any more security to rock the social justice boat and still obtain tenure. Another question is whether raising social justice issues has a negative effect on the professor's evaluations. [FN64]

D. Questions on trying and applying alternative pedagogies may arise.

In order to incorporate social justice issues into legal writing assignments, professors may have to use alternative pedagogies. As mentioned earlier, traditional legal training focuses more on attorney expertise and professional judgment. In order to address a social justice issue effectively, students will probably have to take a more client-centered approach to lawyering - one that their professors will have to teach them.

Professors may want to change teaching methodology as well. One technique is called “cooperative controversy,” [FN65] which is described in a law review article as “a cooperative learning technique which involves having four members in a group who 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.” [FN66]

The students are given ground rules for exhibiting and maintaining mutual respect for the other participants. This approach not only has been successfully used to teach controversial material, but it appears to be a better approach for teaching students of color. [FN67] “Research on constructive controversy indicates that [this method] is more effective than debate or individual study ... [for retaining] information.” [FN68]

In incorporating social justice in a legal writing class, professors need to be aware of the silencing of outsider voices mentioned earlier. Legal writing professors may contribute to this silencing by emphasizing the prototypical audience when teaching legal writing.*82 [FN69] In the process of trying to address the issue in “neutral” terms, students (especially outsider students) may hesitate to incorporate their own perspectives in their writing. It is incumbent on the legal writing professor to allow space for these perspectives. The first step is to be aware of how “thinking like a lawyer” may alter the landscape. [FN70] In one law review article, a clinical professor tells a cautionary tale of how, in his presenting a client's case in language that satisfied the existing legal standard and could be readily accepted by his “audience,” he omitted facts that his client deemed relevant. [FN71] Thus, even though the

client “prevailed,” he felt silenced and deprived of having his day in court. [\[FN72\]](#)

E. The length of the professor's teaching experience may influence the decision to incorporate social justice issues into assignments.

When beginning a teaching career, a legal writing professor will focus on developing competencies in teaching the basics of legal writing. However, professors with a number of years of legal writing teaching experience may find that teaching social justice as part of a legal writing class adds texture to the problems they assign.

Many law professors may not have had experience with social justice issues as practitioners. These professors will have to bring themselves up to speed, but that is true of any issue with which they are unfamiliar. The same background information, such as, but not limited to, law review articles, newspaper or magazine articles, and articles from non-legal sources, that some professors may assign to their students will provide sufficient information. Also, professors may be able to get information from the attorneys who handled the case if the assignment is based on an actual case.

Depending on the social justice issue one selects, it is possible that students may have experience with the same issue. Professors should plan in advance how to handle the situation if the experience***83** was painful or traumatic for the student.

F. Questions on training and preparing students to address social issues may arise.

Traditional legal analysis and legal advocacy encourages law students and attorneys to extract legal issues from the factual backgrounds in which they are presented and to ignore the broader social contexts in which they arose. This is a result of students' immersion in the law, which is the goal of the first year of law school generally, and the “social view” [\[FN73\]](#) method of teaching legal writing specifically. Therefore, professors must take particular care to prepare students to address social issues.

After deciding to assign a social justice issue, professors may want to assess how controversial their students will find the issue. Professors may do so by assigning readings on the topic and having students write reflective opinion pieces about the readings. These opinion pieces will elicit potential difficulties that some students may have with the social justice issue. Even professors who do not have students write reflection memoranda have the option to assign readings that provide background information of the issue and then discuss the readings in class. Moreover, using the cooperative controversy method before distributing the assignment may allow professors to diffuse some of the tension.

As students research and analyze the social justice issue, it may be useful to have them keep a journal of their feelings, thoughts, and concerns about the issue. While these reflections may not appear in the final memorandum or brief, a journal would afford students (especially outsider students) the opportunity to confront the gap between their professional and personal voices. Finally, keeping in mind the tenuous position of too many legal writing teachers (short term contracts, low status, etc.), using reflection memoranda will allow students to express their hostility about the assignment before they complete the course evaluations.

CONCLUSION

Teaching social justice through legal writing can be a rewarding***84** experience for both law students and legal writing professors. With some advance planning, social justice issues can be used successfully as either the main issue or a subsidiary issue in a legal writing assignment. Especially for experienced professors, incorporating social

justice issues into assignments can add texture and improve opportunities to challenge students to provide more nuanced analyses. For students who enter law school planning to practice public interest law, the early exposure to social justice issues at or near the beginning of their law school careers will help them to develop the lawyering skills necessary to become creative lawyers capable of using different legal perspectives to achieve their goals. However, even those students who are not initially interested in social justice issues will benefit from the broader perspective gained from some exposure to diverse client problems and situations. Professors who incorporate social justice issues into their legal writing assignments may also benefit from the opportunity to use alternative pedagogies.

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*86 Ellie Margolis, [*Beyond Brandeis: Exploring the Uses of Non-legal Materials in Appellate Briefs*](#), 34 U.S.F. L. Rev. 197 (2000).

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versity School of Law. Professor Vance wishes to thank her research assistants, Alyssa Schwartz and Mary McAnnally, for their assistance with this article.

[FN3]. This article summarizes the presentation the authors made at the 2000 Legal Writing Institute Conference on July 21, 2000.

[FN4]. Prior to joining CUNY, Professor Edwards taught legal writing at Hofstra Law School for four years. Currently, among other courses, she teaches a Lawyering Seminar course that incorporates legal writing as well as other lawyering skills. Professor Vance taught legal writing at Villanova University School of Law for two years before becoming Director of Academic Support. Currently, she teaches an Education Law Seminar in which students learn legal writing skills through writing seminar papers.

[FN5]. John O. Calmore, [*A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*](#), 67 *Fordham L. Rev.* 1927, 1937 (1999).

[FN6]. Randall Kennedy, [*Race Relations Law in the Canon of Legal Academia*](#), 68 *Fordham L. Rev.* 1985, 1986 (2000).

[FN7]. Richard Delgado, [*Storytelling for Oppositionists and Others: A Plea for Narrative*](#), 87 *Mich. L. Rev.* 2411, 2435-2440 (1989).

[FN8]. See Glenn Omatsu, [*Teaching for Social Change: Learning How to Afflict the Comfortable and Comfort the Afflicted*](#), 32 *Loy. L.A. L. Rev.* 791 (1999) (discussing how understanding the field of ethnic studies can help activists change their communities).

[FN9]. Brian Owsley, [*Black Ivy: An African-American Perspective on Law School*](#), 28 *Colum. Hum. Rts. L. Rev.* 501, 527 (1997).

[FN10]. Fran Quigley, [*Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*](#), 2 *Clin. L. Rev.* 37, 47-48 (1995). Quigley attributes this “critical theory” of adult learning to adult learning theorists Paulo Freire and Jack Mezirow. *Id.* at 47, 48.

[FN11]. *Id.* at 51. Quigley defines the disorienting moment this way:

Adult learning theory maintains that when a learner begins describing an experience with the phrase, “I just couldn’t believe it when I saw”, an opportunity for significant learning has been opened. This phenomenon is called the disorienting moment, when the learner confronts an experience that is disorienting or even disturbing because the experience cannot be easily explained by reference to the learner’s prior understanding - referred to in learning theory as “meaning schemes” - of how the world works.

Id. She further explains that the role of the instructor is to provide a three-step process for the disorienting moment to occur. First, “the instructor must design learning experiences that will provide an opportunity for disorienting moments to occur.” *Id.* at 52. This may include class readings and discussions. Second, the instructor must facilitate “the productive assimilation of the experience through reflection and exploration of other information related to the disorienting experience” *Id.* at 52. Examples of media for reflection include classroom discussion, with a spirit of mutuality and instructor respect for the student and inclusion in class planning; explicit opportunities for student to student discussion; journals and other forms of self-evaluation; and supervisor-student conferences. *Id.* at 55, 57-62. Third, reorientation, which is learning, occurs. *Id.* at 52.

[FN12]. Kathryn M. Stanchi, [*Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*](#), 103 *Dick. L. Rev.* 7 (1998) (providing a comprehensive discussion on muting).

[FN13]. See Thomas L. Shaffer & Robert Rodes, Jr., *A Christian Theology for Roman Catholic Law Schools*, 14 *U. Dayton L. Rev.* 5, 14 (1998). Professors must let students know that “their moral impulses are useful things for a lawyer to have.” *Id.* These authors address the importance of raising social issues this way:

What we must steadily ask of the world if we are to be truthful teachers and scholars is what effect legal transactions have on the people underneath them. How does our real estate law affect people who need a place to live? How does our law on corporate mergers affect working poor and their families? How does our criminal justice system affect the ability of the urban poor to walk out on their streets? How does the First Amendment affect their ability to teach their children to live decent lives?

Id. at 17.

[FN14]. See Phoebe A. Haddon, [*Keynote Address: Redefining Our Roles in the Battle for the Inclusion of People of Color in Legal Education*](#), 31 *New Eng. L. Rev.* 709, 721 (1997). “Few schools examine their own teaching and curriculum holistically—with an eye toward the clients that lawyers will be serving in the twenty-first century, or if they do, the assumption is that the clients will be wealthy, globe-trotting megacorporations, not the underserved.” *Id.*

[FN15]. Phoebe A. Haddon, [*Education for a Public Calling in the 21st Century*](#), 69 *Wash. L. Rev.* 573, 580 (1994). “Hence, lawyering includes the ability to understand and to critique existing and emerging visions of the profession in relation to interdisciplinary and multicultural perspectives.” *Id.* at 581.

[FN16]. *Id.* at 585. “Legal education should socialize students to be more sensitive to existing inequities and should provide opportunities for them to think about the problems of mobilizing resources to ensure that the legal system can serve underrepresented poor clients' interests as well as the interests of corporate and other paying clients.”

[FN17]. See Quigley, *supra* n. 7, at 56.

Most psychological human development “stage” theories hold that the development of a broader sense of self as responsibly interactive with outside society is best able to be accomplished in adulthood. Therefore, in human development terms, adult law students are likely to respond to rather than retreat from the challenges of reassessing their vision of social justice and social responsibilities as lawyers.

Id.

[FN18]. See Paulo Freire, *Pedagogy of the Oppressed* (Herder & Herder 1970) (discussing problem-posing education). Freire explains, “In problem-posing education, men develop their power to perceive critically the way they exist in the world with which and in which they find themselves; they come to see the world not as a static reality, but as a reality in process, in transformation.” *Id.* at 70-71.

[FN19]. *Id.* at 72.

[FN20]. See generally Linda Karen Clemons, *Alternative Pedagogies for Minority Students*, 16 *Thurgood Marshall L. Rev.* 635 (1991) (explaining that “[t]he world view of Black and Hispanic students is often different than that of macrocultural students.” *Id.* at 635, 636).

[FN21]. See Marina Angel, [*Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers*](#)

[Who Appreciates Trifles, 33 Am. Crim. L. Rev. 229 \(1996\)](#) (inject narrative theory in first-year to encourage students to tell their own stories in their own words); James R. Elkins, *Writing Our Lives: Making Introspective Writing a Part of Legal Education*, 29 *Williamette L. Rev.* 45 (1993) (have students keep diaries or journals reflecting on their introduction to law and legal theories).

[FN22]. Stanchi, *supra* n. 12, at 52-57) (encouraging the use of alternative pedagogies to minimize and offset the damage of muting).

[FN23]. *Id.* at 18.

[FN24]. Haddon, *supra* n. 14, at 723.

[FN25]. Pamela Edwards, *The Culture of Success: Improving the Academic Success Opportunities for Multicultural Students in Law School*, 31 *N. Eng. L. Rev.* 739, 757-759 (1997).

[FN26]. *Id.* at 759, n. 131 (citing Cathaleen A. Roach, [A River Runs through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy](#), 36 *Ariz. L. Rev.* 667, 675-676, in which Assistant Dean Roach writes: “[I]n addition to psychological consequences, racial isolation also has academic consequences. Students of color are often excluded from important yet informal networking systems, which means that the student is ‘often shut off from the intra-institutional methods by which white students tend to acquire information about how to function in this new role, including advice from upper-class students and faculty members.’” (footnote omitted) (quoting Kevin Deasy, *Enabling Black Students to Realize Their Potential in Law School: A Psycho-Social Assessment of an Academic Support Program*, 16 *T. Marshall L. Rev.* 547, 562-563 (1991))).

[FN27]. *E.g.*, Linda R. Crane, *Coloring the Law School Experience*, 6 *Wis. L. Rev.* 1427, 1428-1430 (1991); Edwards, *supra* n. 25 at 757-759 & nn. 122-131 (1997); Placido G. Gomez, *White People Think Differently*, 16 *Thurgood Marshall L. Rev.* 543 (1991); Margaret E. Montoya, [Mascaras, Trenzas y Grenad: Unmasking the Self while Unbraiding Latina Stories and Legal Discourse](#), 15 *Chicano-Latino L. Rev.* 1 (1994); Roach, *supra* n. 26.

[FN28]. Stanchi, *supra* n. 12, at 7.

[FN29]. Clemons, *supra* n. 20, at 635-636.

[FN30]. *See generally* Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 *J. Leg. Educ.* 155 (1999) (discussing the development of the process approach as applied in law school). The process approach generally refers to the study of the individual and social processes of writing and how these processes create meaning. *Id.* at 156-168.

[FN31]. Calmore, *supra* n. 5, at 1933.

[FN32]. *Infra* n. 70.

[FN33]. Stanchi, *supra* n. 12, at 28.

[FN34]. Brook K. Baker, [Transcending Legacies of Literacy and Transforming the Traditional Repertoire: Critical Discourse Strategies for Practice](#), 23 *Wm. Mitchell L. Rev.* 491 (1997); Omatsu, *supra* n.8, at 792, 797.

[FN35]. Baker, *supra* n. 34, at 517.

[FN36]. Professor Vance rejected a criminal law assignment that involved ethnic intimidation. See *infra*, section III.A. of this article for a discussion of that assignment.

[FN37]. [42 U.S.C. §§ 2000bb](#) to [2000bb-4 \(Supp. V 1998\)](#). Professor Edwards assigned this issue before the U.S. Supreme Court ruled in [Boerne v. Flores, 521 U.S. 507 \(1997\)](#), that the Act is unconstitutional as applied to the states because Congress exceeded the scope of its Fourteenth Amendment § 5 enforcement powers. The Act still is in effect with respect to the federal government.

[FN38]. See Maurianne Adams & Linda Marchesani, *Multiple Issues Course Overview*, in *Teaching for Diversity and Social Justice* 269-271 (Maurianne Adams et al. eds., Routledge 1997), for a discussion of the relationship between the instructor's comfort level with social justice issues to creating a safe classroom climate.

[FN39]. *Farrakhan Talks of Grays Ferry Strife*, Phila. Inquirer R1 (Aug. 14, 1997). The incidents of harassment lasted for weeks, drew national attention, and prompted Nation of Islam minister Louis Farrakhan to visit Philadelphia. *Id.* These incidents culminated in a march in that neighborhood against racism and ethnic intimidation that drew a number of marchers. *Id.*

[FN40]. At the same time, Professor Vance's teaching assistant, a white woman, was quite interested in doing a criminal law problem. To have the second assignment build upon the first, which used racial harassment as an issue, Professor Vance considered an assignment that escalated the verbal harassment from a tort to a crime. She also wanted students to understand that racism can be a crime. Professor Vance acknowledges her grateful appreciation to her former teaching assistant Gretchen Witte for raising the issues that caused Professor Vance to question and to resolve her concerns about teaching social justice through legal writing.

[FN41]. *Definition of Racial Slurs Angers NAACP Merriam-Webster Is Asked to Modify Epithet's Entry*, S.F. Chron.; A1 (Oct. 17, 1997).

[FN42]. See *Cmmw. v. Ferino*, 640 A.2d 934 (Pa. Super. 1994), *aff'd*, 655 A.2d 506 (Pa. 1995); [People v. Johnston](#), 641 N.E.2d 898 (Ill. App. 1st Dist. 1994) (both finding no ethnic intimidation when the word “nigger” was used); *but see* [Commonwealth v. Rink](#), 574 A.2d 1078 (Pa. Super. 1990); [Wichita v. Edwards](#), 939 P.2d 942 (Kan. Ct. App. 1997) (both upholding the ethnic intimidation charge when the defendant used the word “nigger”).

[FN43]. *Infra* section III.D. (on Trying and Applying Alternative Pedagogies).

[FN44]. As one writer put it, “[R]etreat from the view of law as an abstract science brings forth the risk of legal education denigrating into an organized attempt to instill instructor values into their students.” Quigley, *supra* n. 10, at 42.

[FN45]. *Id.* at 42.

[FN46]. *Id.* at 61, 62.

[FN47]. Stanchi, *supra* n. 12, at 10-12.

[FN48]. *Id.* at 34, 35.

[FN49]. At the time, there was no course at the law school purely devoted to race, like Critical Race Theory.

[FN50]. See Freire, *supra* n. 18, at 49 (“At a certain point in their existential experience, the oppressed feel an irresistible attraction towards the oppressor and his way of life.”)

[FN51]. *Sweezy v. N.H.*, 354 U.S. 234 (1957). The Court's oft-cited definition of academic freedom is:

The essentiality of freedom in the community of American universities is almost self-efficient. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolute. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id. at 250. The Supreme Court has also construed academic freedom to mean the freedom of the university from government control. *Id.* at 263 (Frankfurter, J., concurring). “It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university - to determine for itself on academic grounds whom may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Id.* at 263.

Besides “freedom of teaching within the university,” the American Association of University Professors, in its seminal *Statement of Principles of Academic Freedom and Tenure*, defined academic freedom to include “freedom of inquiry and research; ... and freedom of extramural utterance and action.” This Statement does not have the force of law, but it is the guiding principle for hundreds of institutions of higher education. *Am. Assn. Univ. Profs.*, 1940 Statement of Principles on Academic Freedom and Tenure in *Policy Documents and Reports* 3 (1984) (available at <<http://www.aaup.org/1940stat.htm>>).

[FN52]. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

[FN53]. 18 F.3d 1005 (2d Cir. 1993). This case concerned a state-run law school. It is unclear whether the same analysis would apply to a private law school, but the precedent exists, nonetheless.

[FN54]. *Id.* at 1014. However, Blum was not reinstated to his position since he failed to prove that “but for” his in-class speech, he would have been retained. *Id.*

[FN55]. *Id.* at 1011 n. 5.

[FN56]. *Id.* at 1012.

[FN57]. 911 F. Supp. 999 (W.D. Va. 1996), *aff'd*, 106 F.3d 391 (4th Cir. 1997). The district court also held that Scallet's pro-diversity comments made in faculty meetings and his placement of pro-diversity materials on the wall outside of his office were protected forms of expression under the First Amendment *Id.* at 1017-1019.

[FN58]. *Id.* at 1016.

[FN59]. E.g. Pamela Edwards, *Teaching Legal Writing: Life on the Fringes of the Academy*, 4 *Cardozo Women's*

[L.J. 75 \(1997\).](#)

[\[FN60\]. 911 F. Supp. at 1007-1008.](#)

[\[FN61\]. See 911 F. Supp. at 1015-1017.](#)

[\[FN62\]. See id.](#)

[\[FN63\]. See Haddon, *supra* n. 14, at 713. “It need not be paranoid to imagine that in the future contract review can be a time for faculty and administrators to consider whether the candidate has demonstrated the appropriate civility and collegiality warranting renewal—a time, in other words, to isolate and discipline some faculty members.” *Id.*](#)

[\[FN64\]. Reginald Leamon Robinson, *Teaching from the Margins: Race as a Pedagogical Subtext, A Critical Essay*, 19 W. New Eng. L. Rev. 151, 169 \(1997\) \(providing an excellent discussion on the negative evaluations that can result when a professor raises social justice issues in the classroom\).](#)

[\[FN65\]. Clemons, *supra* n. 20, at 637.](#)

[\[FN66\]. *Id.*](#)

[\[FN67\]. *Id.*](#)

[\[FN68\]. *Id.*](#)

[\[FN69\]. Stanchi, *supra* n. 12, at 28.](#)

[\[FN70\]. Clark D. Cunningham, The *Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 Cornell L. Rev. 1298, 1299, 1328-1330, 1363, 1365-68, 1375-76, 1385-87 \(1992\) \(discussing a client's dissatisfaction with the legal system, even after acquittal, when his attorneys failed to raise the question of the role race played in a Terry-stop which arguably led to a pretextual arrest\).](#)

[\[FN71\]. *Id.* at 1298-1329.](#)

[\[FN72\]. *Id.* at 1329-1330.](#)

[\[FN73\]. Stanchi, *supra* n. 12, at 8-9 & nn. 7-14. The social view focuses on assimilating students into the study of the law. The social view has “as its goal the socialization or acculturation of the novice legal communicator into the legal discourse community through the learning of legal vocabulary, legal customs, and legal culture.” *Id.* at 9 \(internal quotations and citations omitted\).](#)

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