THE SECOND DRAFT

ESSAY

Bad Cases/Good Assignments

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Developing writing assignments can be one of the most challenging aspects of teaching first-year legal writing. Collaborating with other professors, using research assistants, and reworking old problems[1] can all make it easier. And there is a wealth of scholarship on best practices, including, among many topics, how to develop problems that incorporate professional norms and ethics[2] and raise urgent issues regarding racial and social justice.[3] But even with all of these resources,[4] it

[1] Rita Barnett-Rose, Reduce, Reuse, and Recycle: How Using "Recycled" Simulations in an LRW Course Benefits Students, LRW Professors, and the Relevant Global Community, 38 U. DAYTON L. REV. 1, 5 (2012).

[2] Beth Hirschfelder Wilensky, Assignments with Intrinsic Lessons on Professionalism (Or, Teaching Students to Act Like Adults without Sounding Like a Parent), 65 J. LEGAL EDUC. 622 (2016); Beth D. Cohen, Instilling an Appreciation of Legal Ethics and Professional Responsibility in First-Year Legal Research and Writing Courses, 4 PERSPS. 5 (1995).

[3] See, e.g., Rosa Castello, Finding Balance: Using Employment Law Problems to Achieve Multiple Learning Goals in Persuasive Legal Writing, 47 S.U. L. REV. 177 (2019); Brook K. Baker, Incorporating Diversity and Social Justice Issues in Legal Writing Programs, 9 PERSPS. 51 (2001); Pamela Edwards & Sheilah Vance, Teaching Social Justice Through Legal Writing, 7 LEGAL WRITING 63 (2001).

[4] See, e.g., Susan P. Liemer, Many Birds, One Stone: Teaching the Law You Love, in Legal Writing Class, 53 J. LEGAL EDUC. 284, 286 (2003); Lorraine Bannai et al., Sailing Through Designing Memo Assignments, 5 LEGAL WRITING 193, 195 (1999); Grace Tonner & Diana Pratt, Selecting and Designing Effective Legal Writing Problems, 3 LEGAL WRITING 163

is a daunting task to sit down and write a problem that will help your students learn what you want them to learn, work as you intend with the right amount of difficulty, and not be a terrible experience to grade.

For me, one of the easiest ways to develop a new problem is to start with a case that the students will have to use extensively in their memo or brief. Often, the best cases to use for this will be recent, binding authority, will resolve timely legal questions, will have interesting facts, and will provide detailed explanations of their reasoning. But there is another type of case that—counterintuitively—can be a particularly strong foundation for a first-year legal writing assignment: a "bad" one.

There are all kinds of bad cases. To name just a few, there are cases that don't explain their reasoning; cases that ignore counterarguments; cases that misconstrue authority; cases that offer flimsy justifications; cases that neglect policy concerns; cases that aren't candid about the facts; cases that are poorly organized; and cases that aren't written with care.

Building a first-year writing problem around a bad case still allows students to practice case reading, analysis, and synthesis—the foundational skills of the first-year writing curriculum. But more, it captures "hidden" skills that lawyers need in law practice and that can't be learned in other law school settings. In particular, when students confront bad cases and have to use them to predict the outcome of an issue or to make an argument on behalf of their client, they are getting trained in a way to analogize, distinguish, and apply the law that is far more true to life than when a problem is built upon authorities that are well reasoned and well written. Because, unfortunately, in practice students are going to often be forced to rely on cases that aren't models of reliable judicial decision-making.

For example, I recently worked with colleagues[5] to design a first-semester writing assignment around the 2022 case *People v. Dawson* from the New York Court of Appeals.[6] In *Dawson*, New York's highest court decided that a defendant who was in custody had not "unequivocally invoked" his constitutional right to counsel.[7] The opinion provides the rule that whether a request is unequivocal "is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request including the defendant's demeanor,

(1997); Jan M. Levine, Designing Assignments for Teaching Legal Analysis, Research and Writing, 3 PERSPS. 58 (1995).

[5] In particular, the problem was designed with my colleagues Rosa Castello, Mike Perino, and Katy Piper at St. John's School of Law.

[6] People v. Dawson, 190 N.E.3d 1151 (N.Y. 2022).

[7] Id. at 1152.

manner of expression and the particular words found to have been used by the defendant." Then, the court provides the following to analyze and resolve the issue:

> Here, there is support in the record* for the lower courts' determination that defendant—whose inquiries and demeanor suggested a conditional interest in speaking with an attorney only if it would not otherwise delay his clearly-expressed wish to speak to the police—did not unequivocally invoke his right to counsel while in custody. That mixed question of law and fact is therefore beyond further review by this Court (*id.*; *see Mitchell*, 2 N.Y.3d at 276, 778 N.Y.S.2d 427, 810 N.E.2d 879). Defendant's remaining contentions are without merit.[8]

That's it! The majority's reasoning is one short paragraph that makes no effort to describe the underlying facts and demonstrates no attempt to apply the legal standard to them.

Unsurprisingly, there is a lengthy dissent.[9] In the dissent, Judge Wilson describes why Dawson was being questioned, transcribes from a video both Dawson's statements and those of the detectives, explores the line of cases that explicate the New York rule for when counsel has been unequivocally invoked, applies that rule to the facts of the case by analogizing and distinguishing, and addresses the policy implications of the court's decision.[10]

Based on the dissent, many readers will conclude that the Court of Appeals reached the wrong decision. Indeed, it may be hard to see the case any other way upon reading this transcript provided in the dissent:

> Detective: "Do you understand each of your rights?"
>
> Dawson: "Yeah, definitely. I just wish that I'd memorized my lawyer's number. He's in my phone. *Is it possible for me to like call him or something?*"
>
> Detective: "*Do you want your lawyer here?*"
>
> Dawson: "Right now?"
>
> Detective: "Yeah."
>
> Dawson: "*If I could get a hold of him 'cause I don't know his number; it's in my phone.*"
>
> Detective: "OK."

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[8] Id.

[9] Id. at 1152–60.

[10] Id.

> Dawson: "But you could still tell me what's going on though, right?"
> Detective: "No, *I can't talk to you if you if you want your lawyer here and you already said you did, so let's, you know what, let's give him a call*."
> Dawson: "And if he don't answer then can you come talk to me?"
> Detective: "No."
> Dawson: "So what happens if he don't answer?"
> Detective: "Ah, I mean, we'll, we'll deal with that if it happens. Let's hope he answers. I mean, from the sound of it, *it sounds like you understand your Miranda rights and you want your attorney*."[11]

As Judge Wilson notes,

> Mr. Dawson unequivocally invoked his right to counsel—the record supports no other conclusion. As is clear from the quoted portion of the colloquy with the detective, he twice said he wanted to call his lawyer, and the detective twice expressly stated that he understood Mr. Dawson had asked to call counsel and therefore the detective could no longer speak to Mr. Dawson.[12]

Our fall semester assignment gave students a transcript of police officers questioning our fictional client and asked them to write a memo that predicted whether our client—who had made statements similar to Dawson's—would be held to have unequivocally invoked his right to counsel. Students had to wrestle with and rely on *Dawson*, which was the most recent decision on invoking the right to counsel from New York's highest court, to write their predictive memos.

The assignment was just the right kind of challenging. Students had to think about how to understand the majority's decision, even though the opinion offered almost no reasoning as the basis for doing so. And they had to struggle with how to synthesize a rule when the most recent case is inconsistent with the cases that came before. They also had to noodle on how to use the dissent, which provided so much more than the majority opinion, but wouldn't be binding on future courts.

The students also had to think deeply about what it means to rely on a case that many of them believed was wrong on the merits. And in doing so, they were given a chance to see in practice that attorneys must be willing recognize that there are bad cases and argue that those bad cases shouldn't control.

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[11] Id. at 1153.
[12] Id. at 1155.

First-year law students learn very quickly how to do their job of reading and absorbing cases. The Socratic dialogue in first-year podium classes reinforces for them that they should focus on mastering what the cases say so they can answer questions and appear prepared. So, the skills of questioning the cases they read, disagreeing with them, or even just evaluating them as fallible pieces of written advocacy can easily get lost and ultimately forgotten during the first year. But by building problems around bad cases, professors who teach legal writing can activate those skills for our students. In that way, using bad cases can be a really good idea.