

## TEACHING SOCIAL JUSTICE IN THE LEGAL WRITING CLASSROOM THROUGH PERSONAL NARRATIVE

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The COVID-19 pandemic and the Black Lives Matter (“BLM”) movement have inspired a renewed national conversation about social justice and racial equality. The disparate impacts of the pandemic on communities of color and the failure to address systemic racial inequities in our policing and criminal justice system have converged to create a defining moment in our country. Not surprisingly, empirical evidence suggests that the call for radical change through social activism has inspired many young people to pursue a career in the law.<sup>1</sup> In my incoming first-year class, at least one-half of my students mentioned that their purpose in coming to law school was to “help people,” “become involved in the social justice movement,” work on issues of “poverty and racial injustice,” or work on “access to justice issues, including voting rights.”

Propelled by the salience of the moment, law schools and legal employers, at the forefront of producing, training, and employing a new generation of lawyers, have publicly pledged to combat racial injustice through legal education and legal action.

Law schools have recognized that they have a unique role to play in the eradication of racism both within their own walls and in the communities that they serve. For example, Cornell Law School’s published statement reads, in part, “As a law school, we have a distinctive perspective to offer on these events. Committed as we are to the equal protection of the law, the killing of black Americans (by private citizens and by police) followed by the absence of the most basic legal accountability strikes at the very heart of the values we purport to teach our students.”<sup>2</sup> New York University Law School

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<sup>1</sup> Press Release, Kaplan, Kaplan Test Prep Survey: The Politics-Driven Law School Application Increase Continues, <https://www.kaptest.com/blog/press/2020/01/29/kaplan-test-prep-survey-the-politics-driven-law-school-application-increase-continues/> (Jan. 29, 2020).

<sup>2</sup> Eduardo M. Penalver, *Statement from Dean Peñalver on Police Violence*, CORNELL LAW SCHOOL (May 31, 2020) <https://www.lawschool.cornell.edu/spotlights/Statement-on-Protests-Against-Police-Violence.cfm>.

states, “It is hard to find the words to meet this moment. It can be even more difficult to know what to do. Yet it is clear there is tremendous work that must be done to address the injustices in our systems and the acute ways they affect the most marginalized among us. We must pledge to do more as individuals and as a community. . . .”<sup>3</sup>

Some schools have issued not only statements of solidarity and general calls to action, but have also proposed concrete steps to combat racial injustice through curricular change. For example, Rutgers Law School has pledged, in part, to “engage in committee work . . . to ensure that all of our students, as future lawyers, understand how individual and institutional racism impacts every aspect of our legal system, and acquire the knowledge and skills needed to take an anti-racist approach to combat racism in all its forms. . . .”<sup>4</sup>

Beyond academia, law firms have recognized the urgency of the call, and have pledged their support financially as well as through pro bono representation and fellowships opportunities. For example, Orrick, Herrington & Sutcliffe plans a fellowship program in which at least five of its lawyers will spend a year working on civil rights and social justice issues. A large number of law firms have pledged financial support to groups such as the Equal Justice Initiative, the NAACP Legal Defense and Educational Fund, the Lawyers’ Committee for Civil Rights Under Law, the American Civil Liberties Union, the Southern Poverty Law Center, and the Center for Constitutional Rights. Some law firms are also expanding pro bono support and outreach programs for their associates.<sup>5</sup>

Law professors have long struggled with the desire to bring social justice issues into the classroom and the personal and professional implications of doing so. The benefits of teaching social justice in the classroom include broadening student exposure, maintaining student

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<sup>3</sup> Trevor Morrison, *A Message from Dean Trevor Morrison to the Law School Community on Recent Events*, NYU LAW (June 1, 2020) <https://www.law.nyu.edu/news/trevor-morrison-message-recent-events>.

<sup>4</sup> Rutgers Law School Faculty Resolution on Black Lives Matter and Commitment to Anti-Racist Principles and Action, <https://law.rutgers.edu/rutgers-law-school-faculty-resolution-black-lives-matter-and-commitment-anti-racist-principles-action>.

<sup>5</sup> Debra Cassens Weiss, *Law Firms Pledge Funds for Racial Justice and Issue Statements*, ABA JOURNAL (June 11, 2020, 10:56 AM), <https://www.abajournal.com/news/article/law-firms-pledge-funds-for-racial-justice-and-issue-statements>.

interest, producing more sensitive attorneys, introducing students to an attorney's role in developing the law, and of course, preparing attorneys for a career in social justice.<sup>6</sup> Yet in spite of the advantages, professors have expressed concerns that addressing these issues within the classroom may alienate students who do not share these similar interests. They fear, also, that addressing these issues may uncomfortably spotlight students who feel they share the characteristics of some of the individuals involved in the assignments focused on social justice issues (for example, a student who comes from an underprivileged background who may have family members involved in the criminal justice system).<sup>7</sup>

Yet with the rise in student interest in pursuing social justice as an integral part of a law school education, law school statements recognizing social justice issues and promising curricular change, and law firm pledges to devote substantial time and resources to social justice work, it is no longer a question whether to incorporate social justice into the law school classroom. It has become a moral imperative and a curricular obligation for law schools to provide students with, at the very least, an awareness of the intersection of societal injustice with the law. Further, for those growing numbers of students who have chosen to attend law school because of an interest in social justice, it is the obligation of law schools to provide them with the tools to engage in those careers. The current call to action by students, academia, and legal employers should serve to re-assure law school faculty that it is in both the students' and society's interest to teach the law school curriculum, at least in part, through a social justice lens.

As a legal research and writing professor who has the opportunity to open the minds of law students early in their careers, I have often brought substantive issues into my memo and brief writing assignments that intersect with social justice. With a criminal justice system heavily impacted by police bias and racial disparities, issues of criminal procedure strike at the heart of the struggles encountered by racial minorities in this country.<sup>8</sup> So, during the first semester of my legal writing class, we work on questions like "Was the defendant's

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<sup>6</sup> Pamela Edwards & Sheilah Vance, *Teaching Social Justice Through Legal Writing*, 7 LEGAL WRITING: J. LEGAL WRITING INST. 63, 64–70 (2001).

<sup>7</sup> *Id.* at 75–76.

<sup>8</sup> "African-American defendants are 22% more likely to have convictions involving police misconduct that eventually result in exoneration." NAACP, *Criminal Justice Fact Sheet*, <https://www.naacp.org/criminal-justice-fact-sheet> (last visited Dec. 6, 2020).

confession voluntary?” “Was the search of the car or the home unreasonable?” “Was the defendant in ‘custody’ such that a Miranda warning should have been given?” These issues provide the perfect backdrop to learning basic legal research and writing skills while exposing students to the vicissitudes of the criminal justice system and the difficulties criminal defendants encounter when trying to enforce their constitutional rights.

As we move into federal statutory interpretation and persuasive brief writing, I often have students focus on Title VII law. We work on problems involving the evolving law of gender discrimination as well as racial discrimination and disability discrimination. These types of assignments prepare students not only to understand the nuances of researching and analyzing statutory law, but also engage with the struggles of people of color, women, LGBTQ individuals, and other underrepresented and historically marginalized groups in their search for equality under the law.

Yet even more can be done. Asking students to familiarize themselves with the substantive laws that impact the lives of the disenfranchised—either for better or for worse—is a start, but it misses the explicit identification of the systemic power imbalances in our society. I recently asked one of my first-year students how law professors could do a better job of teaching their courses through a social justice lens. She responded, “Through context.” In other words, professors should teach not just what constitutes the crime of felony murder, or how questions of child custody are determined by a court, but also how these criminal and civil claims may disparately impact people of color, women, or LGBTQ individuals. They should talk about the societal structures under which these laws developed, and how the enforcement of these laws can act to reinforce the unequal power balance of our society.

Teaching legal research and writing does not lend itself easily to the discussion of the history or impact of particular laws, yet, context can be added through other means. This year, due to the urgent and powerful call for teaching social justice in the classroom, I plan to use narratives from real cases as told by lawyers in the field upon which to build many of my assignments. Through this method, I hope to achieve the twin goals of exposing students to the basics of writing, research, and analysis while providing them with a personal understanding of the impact of the law on the lives of real people.

Any number of narratives—whether published in books, articles, or online forums—could form the basis of the assignments. Depending upon the lawyer’s field, one could use these personal

narratives to develop problems involving criminal law or procedure, immigration, housing, education, employment, etc.

For example, this year I plan to take advantage of my law school's required summer reading: *Just Mercy* by Bryan Stevenson.<sup>9</sup> *Just Mercy* is a compelling account of Mr. Stevenson's career representing inmates on death row in Alabama and Georgia. The book is replete with stories of the struggles of Mr. Stevenson and his clients battling systemic racism within the criminal justice system. He recounts many of the legal challenges he and his clients faced, including overturning convictions on the basis of improper use of peremptory challenges, ineffective assistance of counsel, and coerced testimony.

After reading *Just Mercy*, students who have already committed themselves to working on social justice issues are only further inspired, while students who have not considered these issues are educated and exposed. This is a great jumping off point to teach not only legal research and writing skills but also to connect students to some of the very same legal battles that Mr. Stevenson recounts in his book.

Many of Mr. Stevenson's clients were represented at trial by attorneys who were woefully ill-prepared and ill-equipped to provide effective representation to their clients. Some of Mr. Stevenson's appeals, therefore, involved ineffective assistance of counsel claims. As a first-year research and writing assignment, a claim of ineffective assistance of counsel is useful. The claim involves a clear two prong test: (1) that the defendant's trial lawyer's performance fell below an "objective standard of reasonableness" and (2) that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>10</sup>

Using a fact pattern drawn from Mr. Stevenson's accounts, one could draft a realistic set of circumstances for students to research and analyze. The law is simple enough that students could easily learn the mechanics by researching the relevant cases, finding the rule, discussing the facts, holding, and reasoning of precedent cases, comparing and contrasting their facts to the caselaw, and drawing a well-reasoned conclusion about their own case. At the same time, students would be mirroring some of the very same processes Mr. Stevenson engaged in in his own cases. Such connection breathes life, purpose, and context into learning legal writing skills.

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<sup>9</sup> BRYAN STEVENSON, *JUST MERCY* (2014).

<sup>10</sup> *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984).

Such an assignment would also lend itself to conversation about some of the more pressing access to justice issues that Mr. Stevenson recounts. As illustrated by the cases that students would research and by Mr. Stevenson's own experiences, indigent defendants often find themselves with attorneys who are unprepared to defend their clients in court.<sup>11</sup> Some states have no state public defender system and many other states underfund appointed attorneys or state public defenders.<sup>12</sup> It is not uncommon for attorneys to fail to investigate an alibi defense, fail to investigate or interview witnesses, fail to enlist qualified experts, and fail to present mitigating evidence about the defendants' disabilities or conditions. It is not unheard of for attorneys to fall asleep during hearings. Students would learn and may be surprised by the heavy burden faced by defendants when trying to overturn convictions based upon an ineffective assistance of counsel claim, even in the face of fairly egregious errors.<sup>13</sup> Writing their own memos or briefs addressing such a claim, after having read the poignant accounts of some of the defendants in *Just Mercy*, brings context and consequence to their work.

Law students and the broader legal community are calling out for transformation in the law school classroom. We must transform the

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<sup>11</sup> In fact, the Equal Justice Initiative has stated that “[t]he failure to provide adequate assistance to capital defendants and people who are sentenced to death is a defining feature of the American death penalty, especially in Alabama.” *Supreme Court to Hear Argument About Legal Assistance for Poor Defendants in Capital Cases*, EQUAL JUSTICE INITIATIVE, (Apr. 18, 2017) <https://eji.org/news/supreme-court-argument-on-legal-assistance-for-poor-defendants>.

<sup>12</sup> For example, “Alabama has no state public defender offices and trial judges appoint counsel, many of whom have little training or experience in capital litigation.” Bryan A. Stevenson, Statement Before the United States Senate Judiciary Committee Subcommittee on the Constitution 4 (Apr. 8, 2008), <https://www.judiciary.senate.gov/imo/media/doc/08-04-08StevensonBryanTestimony.pdf>.

<sup>13</sup> “A report released by the Innocence Project examines the first 255 wrongful convictions overturned through DNA testing and finds that at least 20% raised claims of ineffective assistance of counsel on appeal. In the overwhelming majority of those cases (81%), appeals courts rejected the defendant's claim of ineffective assistance. In only 10 of the first 255 DNA exoneration cases, courts found that that the actions, or lack thereof, of defense counsel required a reversal of a trial verdict or another review by lower courts.” *When the Defense Fails*, INNOCENCE PROJECT (Sept. 1, 2010), <https://www.innocenceproject.org/when-the-defense-fails>.

way we impart the fundamentals of legal training to include a contextual understanding of the legal struggles that underrepresented and marginalized groups face. We need to impart an understanding of how the law both enforces the existing inequities but can also be used as a vehicle for change. I believe that tying lawyers' narratives to the classroom assignments is just one way I can start to transform my own classroom to bring context, genuineness, and purpose to the related assignments. Through such innovation, I hope to expose some students for the first time to the struggles of marginalized groups and help others prepare for a career in social justice.

**POSTSCRIPT:** Writing this at the close of the fall 2020 semester, I am happy to report that my class and I made it through a semester like no other—an on-line platform, a contentious presidential election, a worsening pandemic, and a period of racial reckoning. Yet despite this significant historical moment, my students remained engaged in and focused on their first semester of law school.

I built the semester around a series of claims arising from a single fact pattern involving a defendant who had been charged with manslaughter. The fact pattern was loosely based on two of Bryan Stevenson's clients (Willie Veasy and Victoria Banks) who had both been convicted of crimes they did not commit, in part due to ineffective legal assistance and coerced confessions. I asked my students to represent this fictional defendant, contemplating potential defenses and strategies on his behalf.

For our closed memo, I asked students to evaluate an ineffective assistance of counsel claim. Like Stevenson's clients, our defendant had been represented by an inexperienced and overworked attorney who failed to investigate witnesses and failed to make proper objections at trial. After conducting the research for that assignment, students understood the high standard under which ineffective assistance of counsel claims are considered and connected the experiences of their own client to Stevenson's clients. Most students came to the conclusion that despite the glaring errors of the attorney, the client would likely not prevail on this claim.

The most impactful assignment of the semester, however, was evaluating the client's success at bringing a motion to suppress his confession. To begin the assignment, I directed students to Bryan Stevenson's Equal Justice Initiative website, on which he discusses how false and coerced confessions are one of the most common factors driving wrongful convictions. We also revisited Veasy's and

Bank's convictions as told by Stevenson on both his website and in *Just Mercy*.

The confession transcript I used for the assignment was adapted from a case that I had worked on as designated counsel in the appellate division of the New Jersey public defender's office. I made slight changes to the transcript, but much of the interrogation was an entirely accurate representation of the techniques used by the detectives in that case. We evaluated whether police tactics such as promises of leniency and deception would be sufficient to suppress our client's confession.

Through our research, we learned that even without clear misconduct, the police are legally entitled to use many tactics that could conceivably cause an innocent person to confess. After doing the research for our memo, we saw that the courts were mixed in how they treat these tactics—some finding that in certain situations, the defendant's will was overborne, but in others with very similar facts, finding that the tactics were permissible. Students expressed surprise at the level to which police were legally permitted to engage in deceptive and coercive tactics with the suspect without the confession being deemed involuntary.

Coincidentally, at the end of the semester, the students and faculty of the Rutgers Criminal and Youth Justice Clinic held a webinar involving a case in which they won the release of a man named Huwe Burton, who had spent 20 years in prison for a crime he did not commit based upon a false confession. In the webinar, the lawyers who worked on the case discussed many of the same police interrogation techniques that we had studied during the semester. Mr. Burton, himself, discussed the impact that those techniques, including promises of leniency, threats, and deception had on his psyche during the interrogation, and how they directly resulted in his false confession.

Listening to Mr. Burton tell the story of his wrongful conviction was a fascinating, meaningful, and no doubt heartbreaking end to our semester. It permitted me to introduce yet another narrative into the classroom, bringing with it further understanding of the impact of the law on people's lives and society. It made me think about other ways that I can bring personal narrative into the classroom: through both written and oral testimonials of individuals whose lives, like Mr. Burton's, have been immeasurably impacted by the law. Finally, it allowed students to see firsthand the intersection and diversion of justice and the law, which is at heart, the inspiration for pursuing social justice lawyering.