

Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year

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I. INTRODUCTION¹

In this article, we advocate using actual legal work to teach legal research and writing (LRW) courses, including first year courses. By “actual legal work,” we mean work that is part of an ongoing or planned lawsuit, transaction, negotiation or other form of legal representation. We focus on litigation, although what we propose applies to non-litigation projects as well.

We offer five guidelines to flesh out our proposal:

Feasibility: The LRW teacher should be able expediently to convert the legal work into LRW assignments. This might involve adding hypothetical features to an actual matter without compromising its real-world quality.²

Legal need: The beneficiaries of the students’ legal work should be members of groups that have problems obtaining the legal assistance they need.³ Paradoxically, to effectively teach

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² See *infra* Part III(A)(6) for a description of how we modified an actual post-conviction matter to teach an appellate advocacy course.

³ The 1994 ABA Comprehensive Legal Needs Study surveyed the unmet legal needs of low- and moderate-income persons (households with incomes up to \$60,000). CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, AM.

with actual legal work it is helpful if the immediate beneficiaries are represented, either by a lawyer from inside the school (for example, a clinical or LRW teacher) or from outside the school (for example, a legal services, pro bono, or private lawyer). Even if the immediate beneficiaries are represented, the “legal need” guideline should help to assure that LRW course resources help those who need it.⁴

*Secondary educational goals:*⁵ In addition to core LRW skills—research, analysis, and writing—the courses should include professional responsibility, access-to-justice, and law reform issues, to the extent possible.⁶ The primary and secondary goals are interrelated. Law is contextual. To understand it, one needs to assess its effects—how and to whom it is applied. This is part of the analysis that is central to good writing.

Visible clients: The LRW professors should bring them, literally or figuratively, into the courses, and teach with their stories. This is a major source of the teaching power of actual legal work and an essential step in improving the quality, and changing the culture, of first-year legal education.⁷

BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 11-17 (1994). It found that only twenty-nine percent of “low-income households” and thirty-nine percent of “moderate income households” that had legal problems used the “civil justice system” to resolve those problems. *Id.* at 11. That is, seven out of ten low-income households and six out of ten moderate-income households that had legal problems did *not* use our legal system to resolve them. *Id.* at 12. Many failed to use the legal system because they could not afford to retain counsel. *Id.* at 15. Although there is some national funding for civil legal services, it is grossly inadequate to meet the legal needs of indigents. *See, e.g.*, Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213 (2002). Similarly, many public defender programs do not receive the resources they need to effectively represent indigent defendants. *See, e.g.*, Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783.

⁴ In some matters, the lawyer may need additional help to effectively represent the client. In others, the promise of assistance from a LRW professor and students may enable a lawyer to take on the representation. The students’ work also may indirectly benefit unrepresented members of the client’s group. Ultimately, working on an actual matter may encourage the students, when they become lawyers, to provide legal services to members of underrepresented groups. *See infra* Part IV(A)(2)(b).

⁵ We say “secondary” not because these goals are unimportant. To the contrary, we believe these are among the most important goals of legal educators. We call them “secondary” to distinguish them from the core skills of legal research, writing, and analysis that are the primary focus of most LRW courses. *See infra* Part II(B).

⁶ *See infra* Part IV(B)(1).

⁷ *See* Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1733 (1993).

LRW/clinical collaboration: LRW and clinical teachers should collaborate on these courses, especially the initial ones. This would extend clinical education, in modest forms, into the first year of law school and build curricular bridges between LRW and clinical courses, which largely are separate enterprises today.⁸

We envision a continuum of possible hybrid courses. Here are some possible points on that continuum:

A. A LRW course taught by a LRW teacher in which the assignments are based on actual legal work drawn from a clinic or outside public or private law firm.

B. A LRW course co-taught by a LRW and clinical teacher in which the assignments are based on actual legal work from the clinical teacher's separate clinical course

C. A course that includes clinical and LRW components and is co-taught by a LRW and clinical teacher, in which the assignments are based on actual legal work from the integrated clinical component or an outside public or private law firm.

⁸ In 2001, Elliott Milstein, a past president of the AALS, former law school dean, and long-time clinical teacher, addressed the Association of Legal Writing Directors. He described the road clinical teachers had taken to obtain more permanent and equal membership in law school faculties, which included a fair amount of institutional "schmoozing." Plenary, *Is the Tail Wagging the Dog?: Institutional Forces Affecting Curricular Innovation*, 1 J. ASS'N LEGAL WRITING DIRECTORS 184, 197 (2002), available at <http://www.alwd.org/>; Terri LeClercq, *Proceedings of 2002 Conference: A Challenge from the Future: Legal Writing*, 2009, 9 LEGAL WRITING 111-12 (2003). Based on Millstein's talk, Terri LeClercq constructs an imaginary scenario in which LRW teachers, with the support of the Legal Writing Institute, develop a campaign nicknamed "Operation Schmooze" to upgrade their status within law schools. Part of this imaginary campaign involves forging partnerships with clinical teachers. LeClercq says: "Oddly before Operation Schmooze, it was rare for the legal writing faculty to work with clinicians. Now, we offered to co-teach classes. We worked with them to develop cross-disciplinary journals, professional formats for moot court, and community outreach writing. From the clinicians we absorbed an understanding of the larger legal world and a hands-on practicality that has improved our teaching. In turn, we have helped clinicians integrate process writing in their courses and have helped their public image through community writing projects." *Id.* at 112. The collaborative courses that we describe in this article represent our endorsement of LeClercq's vision. Despite all of the good reasons for collaboration, however, the LRW and clinical curricula in most law schools today remain largely separate. See Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the "Casebook" Classroom (without Grading Papers)*, 10 LEGAL WRITING 23, 38-39 (2004). Leading clinical teachers and scholars have argued that the clinical methodology should be an integrated part of non-clinical courses. See, e.g., Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 46 (2000) (arguing that "[t]he most effective approach to clinical studies is to integrate clinical methodology throughout the law school's course offerings while at the same time constructing a series of progressive clinical experiences.") Adding clinical components to LRW courses is a logical step in this integrative process.

D. A clinical course taught by a clinical teacher that includes a LRW component, for example, an appellate advocacy clinic taught by a clinical teacher in which second-year students satisfy a LRW appellate advocacy course requirement by representing actual clients in appeals.⁹

To support our arguments, we describe two experimental courses that we co-taught, which fit the B and C profiles above. They were the second and third courses in our required LRW sequence, which we call Legal Analysis, Writing and Research (“LAWR”).¹⁰ We used actual legal work drawn from a clinic and from outside public and private law firms to generate the assignments in these two courses.

We offer four justifications for our proposal.

First, by using actual legal work, LRW professors can teach basic LRW skills more effectively. Students learn the basic skills better because they take the course more seriously. The closer the student comes to being responsible for some aspect of the client’s matter, the greater the motivational and therefore educational value of the work.

This teaching-with-responsibility method is the centerpiece of clinical education. What we found interesting is that it worked well in a two-credit, 27-student LRW course, even though the students’ responsibility for the client’s matter was *indirect* (secondary to that of the lawyers),

⁹ A member of our faculty, Renee M. Hutchins, is teaching such a course. *See infra* note 106.

¹⁰ To be clear on our acronyms: We use “LRW” to refer generically to legal research and writing courses, and “LAWR” to refer to the sequence of LRW courses in our school, called Legal Analysis, Writing and Research I, II and III. Students take the required LAWR courses in their first three semesters of law school: LAWR I for three credits; LAWR II for two credits (with a third credit for a separate research unit); and LAWR III for two credits. LAWR I introduces students to the structure of the American legal system and sources of legal authority. Students are taught to read and understand cases and statutes, and to understand the relationships among cases, statutes and regulations. Students learn to communicate their analysis by writing office memoranda to supervising attorneys, advice letters to clients, bench memoranda to judges, and other standard practice documents. LAWR II and LAWR III are described *infra* Part III(A) and (B).

shared (with many other students), and *limited* (to one issue in a multi-issue case).¹¹ In short, a little responsibility will go a long way to motivate students to do their best.¹²

LRW teachers also can use actual legal work to teach students additional dimensions of core LRW skills, including how to work with factual and legal indeterminacy. In many “canned problems,” which we define in Part II (C), the teacher *gives* the students a limited set of fixed and unambiguous facts. In practice, lawyers must *discover* and *recreate* facts, and they often are dynamic and ambiguous. The use of actual cases gave our students opportunities they would not have had with canned problems to act as factual investigators, organizers, interpreters, and advocates.¹³

The legal issues also usually are more indeterminate in actual cases than in canned problems. Many consider this to be a pedagogical weakness, but we found it to be a strength. It required the students to be active learners and creative thinkers and underscored the importance of continuing theory-of-the-case analysis. It thereby introduced students to the dialectical process that good lawyers use to develop, test, refine, and eventually select legal arguments.¹⁴

This is not our pedagogical version of “chaos” theory.¹⁵ Some ambiguity, like some responsibility, goes a long way in inviting students to assume more control in selecting and

¹¹ See *infra* Part III(A) for a description of this two-credit appellate advocacy course, Legal Analysis, Writing and Research III.

¹² In Part III(A), *infra*, we describe the motivational qualities of the post-conviction case that we used to teach the LAWR III course, and in Part IV(A)(1)(a), *infra*, we describe its impact on the students. In our experience, the teaching-with-responsibility method works even when the “client” is a *potential* future client, e.g., the legal work is in the planning phase, as long as the students can identify real people who have the legal problem on which they are working and who can benefit from their work. It is important that the teacher “introduce” to the students, either in person or through descriptions, the people who might benefit from the students’ legal work. See *infra* Part III(B) (describing the civil right-to-counsel project).

¹³ See *infra* Parts III(A)(2)(b), IV(A)(1)(b)(i).

¹⁴ In Part IV(A)(1)(b), *infra*, we describe how fluidity of facts and indeterminacy of legal issues in our actual legal work helped us to achieve important educational goals.

¹⁵ See generally JOHN BRIGGS & F. DAVID PEAT, *TURBULENT MIRROR: AN ILLUSTRATED GUIDE TO CHAOS THEORY AND THE SCIENCE OF WHOLENESS* (1990) (providing an introduction to the many faces of chaos; revealing how chaos theory directs most of the processes of everyday life and how it appears that everything in the universe is interconnected).

making legal arguments. Too much indeterminacy can be immobilizing. The goal is to find the right balance.

Second, teaching with actual legal work serves important secondary educational goals.¹⁶ It introduces students to: a) a client-centered, problem-solving method of work; b) professional responsibility issues, especially access-to-justice and pro bono issues; and c) critical legal analysis of law and justice systems. Integration of actual legal work into LRW courses, particularly in the first year, gives law schools a special opportunity to begin to teach professional responsibility more “pervasively,” as Deborah Rhode has proposed.¹⁷

Third, engaging first year students in actual legal work can help to change the culture of traditional first-year legal education, which now is dominated by theoretical and Socratic instruction. Adding a practice-based, public interest component can reduce students’ disengagement and nourish their idealism.

Fourth, using actual legal work to teach LRW courses can help people to obtain more effective access to justice. This is both socially useful and educational for the students. In the latter respect, it is a source of student motivation, and thus enhanced education.

In Part II, we briefly review the history of LRW education in law schools. One striking feature of this history is the failure to link LRW and clinical education. We believe that law schools should do more to foster LRW-clinical partnerships and that our proposal is one way to do this.

In Part III, we describe the two experimental LAWYER courses that we co-taught using actual legal work.

¹⁶ See *supra* note 5 for our caveat about the term “secondary.”

¹⁷ See, e.g., Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 32 (1992) (proposing “teaching professional responsibility . . . as a topic to be addressed throughout the curricula”). Similarly, LRW scholars recommend teaching writing pervasively. See, e.g., Carol McCrehan Parker, *Writing Throughout the Curriculum; Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997).

One was a two credit appellate advocacy course: LAWR III.¹⁸ We developed the assignments for the twenty-seven students' appellate briefs and oral arguments from a post-conviction matter, which came from a newly-created post-conviction clinic. The clinic students worked closely with the LAWR III students. In 1970, our client was sentenced to prison for life for felony murder. In fact, he did not commit the crime. We used the students' work to represent the client with a dramatic result: The client was released from prison after thirty-six years when the governor commuted his sentence.

To create the second course, we added a three-credit clinical component called "Legal Theory and Practice"¹⁹ to a two credit LAWR II course that focuses on the pretrial, civil process. We accepted fifteen second-semester students in this elective course.²⁰ The actual legal work included a group of police brutality cases from a small, private law firm and a civil rights project from a public interest organization (the goal of which is to develop a qualified right to counsel in civil cases).²¹ The outside lawyers were responsible for the representation. We made the assignments and supervised and taught with the students' work.

¹⁸ See *infra* Part III(A).

¹⁹ See *infra* Part III(B). The students in this course received a sixth credit for a research unit of the LAWR II course that other faculty members taught. Our Legal Theory and Practice ("LTP") components add a practice piece to the theory that is the focus of the course to which it is attached, as well as professional responsibility, justice, and critical legal theory segments. From time to time, we have added LTP components to first-year Torts, Contracts, Criminal Law, Property, Legal Profession, and Civil Procedure courses, as well as to the LAWR II course that we describe in Part III (B), and to a variety of second-year courses and seminars as well. In all of the LTP courses, students have studied law and legal systems in theory and practice, helped to provide legal services to poor and underrepresented persons and communities, and analyzed and often participated in efforts to reform the law and improve access to justice. Day division students at our law school are required to take an experiential course as a condition of graduation. LTP courses as well as clinical courses satisfy this requirement. Named for School of Law alumnus Representative Benjamin Cardin, who helped to generate the resources for new LTP faculty members, this "Cardin requirement" helps to make experiential education a key component of our curriculum. See generally Barbara Bezdek, *Reconstructing a Pedagogy of Responsibility*, 43 HASTINGS L.J. 1159 (1992); Richard Boldt & Marc Feldman, *The Faces of Law in Theory and Practice: Doctrine, Rhetoric, and Social Context*, 43 HASTINGS L.J. 1111 (1992); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992); Homer C. LaRue, *Developing an Identity of Responsible Lawyering Through Experiential Learning*, 43 HASTINGS L.J. 1147 (1992).

²⁰ In our school, students in the second semester can take one three-credit elective.

²¹ There are a number of organizations nationally involved in similar "Civil Gideon" Projects. Some of these organizations include the Brennan Center for Justice and the Public Justice Center. See Brennan Center, Access to

In Part IV (A), we make our four sets of arguments. In Part IV (B), we identify the challenges posed by using actual legal work to teach LRW courses and we respond to them.

Part V is our conclusion.

Before moving on, we add an important qualification. To avoid repetition, we do not reiterate it as we make each of our arguments, but we ask the reader to keep it in mind throughout the article. Consider it a continuing caveat.

In contrasting actual legal work and canned problems, we do not mean to suggest that canned problems are bad or are all the same. In recent years, many teachers, including those who teach LRW courses, have developed sophisticated teaching problems and materials that have features of actual legal work, e.g., nuanced descriptions of clients (including of real clients in actual cases), real case materials (pleadings, depositions, and trial transcripts), and complex and even evolving facts. Some problems are based on actual matters and include documents, press accounts, and party interviews related to them. Other problems are accompanied by creative, multi-media, and dynamic teaching materials, e.g., videotaped interviews, depositions, and negotiations; exercises that parcel out additional “facts” in response to student “discovery” requests; and retrospective interviews with clients, parties, and counsel in concluded cases. Much of this work has been creative and coordinated across the legal writing community, and has resulted in an array of rich and highly realistic simulations.

We applaud these developments. They have added badly needed diversity, depth, and simulated experiences to legal education. In varying degrees, they can achieve some of the educational goals that we identify in this article. As we make our arguments, and especially in

Justice: Civil Gideon, http://www.brennancenter.org/programs/pov/civil_gideon.html (last visited Aug. 30, 2005); Public Justice Center, Current Focus Areas: Civil Gideon, <http://www.publicjustice.org/current-focus-area/index.cfm?subpageid=36> (last visited Aug. 30, 2005).

Part V, we do our best to identify the unique contributions of actual legal work, as well as some of the common benefits of actual legal work and good problems.

II. THE DEVELOPMENT OF LEGAL RESEARCH AND WRITING COURSES

A. *An Abbreviated History*

In the 1920s, law schools began to offer “Bibliography” courses that taught students how to find the law.²² The method was mechanical, with little instruction in analysis or writing.²³ During the 1930s and 1940s, courses like this became common in law schools.²⁴

The prevalent disdain for skills education, grounded in the rejection of education by apprenticeship, tainted these courses and those who taught them. Most of the LRW articles published in the *Journal of Legal Education* in the 1950s “describe the various efforts by law schools to farm out legal writing courses to teaching fellows, adjunct faculty, students—anyone other than regular faculty.”²⁵

During the 1960s and ‘70s, law schools developed more holistic “Legal Writing” and “Legal Method” courses.²⁶ The legal writing courses sought to ensure that law school graduates

²² This era in LRW instruction began with a publication by Frederick C. Hicks. See FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH (1923). See also Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 539 (1973); Emily Grant, *Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession*, 27 VT. L. REV. 371 (2003).

²³ David S. Romantz, *The Truth about Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 128 (2003) (noting that Hicks’s text, and courses that followed it, “focused largely on the mechanical aspects of legal bibliography”).

²⁴ See Robert A. Leflar, *Survey of Curricula in Smaller Law Schools*, 9 AM. L. SCH. REV. 255, 258 (1939) (noting that twenty-three of the surveyed forty-five schools required first-year courses in “Use of Lawbooks” or a similarly-designed course).

²⁵ Romantz, *supra* note 23, at 132 (citing Stewart Macaulay & Henry G. Manne, *A Low-Cost Legal Writing Program—The Wisconsin Experience*, 11 J. LEGAL EDUC. 387, 404 (1959); Irwin O. Spiegel, *Experimenting in Legal Method at the University of Southern California*, 9 J. LEGAL EDUC. 92, 96-97 (1956)). But see Rombauer, *supra* note 22, at 540-41 (describing some legal educators’ development of courses that integrated “writing and ‘legal thinking’ abilities” as the existence of “[o]ther currents running at the same time” and noting that “the first popular legal method course book . . . was being used in more than fifty schools” by 1948).

²⁶ See Rombauer, *supra* note 22, at 550-51 (discussing the results of the author’s 1970 survey of legal writing courses).

were competent writers as well as researchers.²⁷ The legal method courses added case analysis and synthesis. The newer courses co-existed with the older ones, providing a mixture of “Bibliography,” “Legal Research,” “Legal Writing,” and “Legal Method” courses.

By the 1980s, many law schools had created courses that combined legal research analysis and writing. However, these courses and the faculty who primarily taught them retained a second-class status in many schools.²⁸

In 1992, the ABA published the “MacCrate Report.”²⁹ The Report criticized legal educators for neglecting skills education and emphasized the importance of legal writing and research, among other skills.³⁰ The Report helped to put skills education, including skillstaught in LRW courses, on the educational agendas of many law schools.

B. *Today’s LRW Courses*

Today, the substantial majority of LRW courses focus on research, writing and analysis.³¹ Most schools require a sequence of LRW courses beginning in the first semester.³² In the typical course, the students perform research and produce written products. Frequently, the products in

²⁷ *Id.* at 540. *See, e.g.*, Daniel R. Mandelker, *Legal Writing—The Drake Program*, 3 J. LEGAL EDUC. 583 (1951).

²⁸ William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 235-36 (1996) (noting that “[l]egal writing in particular has long been the pariah of the law school curriculum”). *See also infra* text accompanying notes 47-50.

²⁹ SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP: LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992). This report is universally referred to today as the “MACCRATE REPORT.”

³⁰ The Report identified ten “Fundamental Lawyering Skills:” (1) Problem Solving, (2) Legal Analysis and Reasoning, (3) Legal Research, (4) Factual Investigation, (5) Communication, (6) Counseling, (7) Negotiation, (8) Litigation and Alternative Dispute-Resolution Procedures, (9) Organization and Management of Legal Work, and (10) Recognizing and Resolving Ethical Dilemmas. *Id.* at 138-40.

³¹ Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245, 253 (1996). “Of 111 respondents” in a 1995 LRW course survey, “83 defined their programs as ‘traditional,’” *id.*, with “research, writing, and analysis [at the top of] the lists of subjects covered in first year skills courses . . .” *Id.* at 257. Of the two major skills, the attention given to “legal writing skills seemed to outweigh [that given to] legal research skills by a fairly significant margin.” *Id.* Only 17 schools said their programs followed a “lawyering skills” model,” *id.* at 253, which adds instruction in other skills, e.g., interviewing and negotiation, to that in basic LRW skills.

the first semester are legal memoranda like those that would be submitted to partners in law firms (usually with critiques and rewrites) and other kinds of documents aimed at developing related communication skills.³³ In a later semester, students most typically prepare appellate briefs, usually with at least one draft for critique.³⁴

The centerpiece of most courses is a hypothetical case, which we call a “canned problem.” It includes fictional characters and facts. We describe a prevalent type of canned problem—and the process by which it is created—in Part II (C).

The “reforms and changes” that LRW directors are making or contemplating making are consistent with teaching with actual legal work. They include “addition of client interviewing and negotiation training, incorporation of fact-finding exercises . . . increased attention to professional responsibility issues, fuller integration of research and writing [and] combination of skills training with other first year courses”³⁵

³² ASS’N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., 2002 SURVEY RESULTS 5 (2002), *available at* www.alwd.org/alwdResources/surveys/2002survey/2002survey.pdf. A small minority of the schools responding to the survey waited until after the first semester to begin. *Id.* The norm is two LRW courses in the first year. Most schools award two credits for each semester; some only one. *Id.* Most schools add LRW grades into the student’s GPA, although over twenty do not, including some that offer LRW courses on a pass/fail basis. *Id.* at 6.

³³ Terry Jean Seligmann, *Beyond “Bingo!”: Educating Legal Researchers as Problem Solvers*, 26 WM. MITCHELL L. REV. 179, 184-85 (2000). Professor Seligmann provides a clear picture and useful critique of modern LRW courses. *See also* RALPH L. BRILL ET AL., AM. BAR ASS’N, SOURCEBOOK ON LEGAL WRITING PROGRAMS 13 (1997).

³⁴ *Id.* at 14-15. The writing curriculum at some schools, like ours, includes a civil pretrial writing course in the second semester in which students engage in various pretrial writing exercises based on a hypothetical case file. Although legal research and legal writing are two separate skills, there is certainly significant overlap between the two, and they are often taught in conjunction. A survey of legal writing courses conducted by the Association of Legal Writing Directors and the Legal Writing Institute in 2003 asked, “How do you teach legal research in your program?” One hundred twenty-eight respondents replied “integrated with writing,” while forty-nine responded “taught separate from writing.” ASS’N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., 2003 SURVEY RESULTS 8 (2003), *available at* <http://www.alwd.org/alwdResources/surveys/2003survey/PDFfiles/1coverpageadhighlights2003survey.pdf>. At any rate, legal research and legal writing can never be truly separated; for the purposes of this article, “legal research and writing” is largely considered a single concept.

³⁵ Silecchia, *supra* note 31, at 258 (footnotes omitted). “[F]orty-three” of the 111 respondents to the LRW survey “would like to have more time to teach ‘additional skills,’” with “professional responsibility and legal ethics ranked among the most popular [of the suggestions for additional skills].” *Id.* at 263.

LRW scholars debate the merits of “limited” versus “expanded” LRW courses.³⁶ Lucia Silecchia recommends a midpoint model that adds to the core skills those additional skills and topics that arise naturally from the context of the assignments and the nature of the writing.³⁷ We believe it is possible to use actual legal work in much the same way, but to greater benefit. The focus remains on the core skills. Through the legal work, the teacher and students use experience to explore related skills, professional responsibility and justice issues, and credibly to critique law and process.³⁸

³⁶ For a summary of some of the arguments on both sides of the debate, see *id.* at 265-83. For additional arguments in favor of limited LRW courses, see, for example, Donald J. Dunn, *Why Legal Research Skills Declined, or When Two Rights Make a Wrong*, 85 LAW LIBR. J. 49 (1993); Robin K. Mills, *Legal Research Instruction in Law Schools, The State of the Art or, Why Law School Graduates Do Not Know How to Find the Law*, 70 LAW LIBR. J. 343 (1977); Helene S. Shapo, *The Frontiers of Legal Writing: Challenges for Teaching Research*, 78 LAW LIBR. J. 719, 720 (1986). For additional arguments in favor of expanded LWR courses, see, for example, Charles R. Halpern, *A New Direction in Legal Education: The CUNY Law School at Queens College*, 10 NOVA L.J. 549 (1986); MACCRATE REPORT, *supra* note 29; Philip N. Meyer, “*Fingers Pointing at the Moon*”: *New Perspectives on Teaching Legal Writing and Analysis*, 25 CONN. L. REV. 777 (1993).

³⁷ Silecchia, *supra* note 31, at 287-88. As a “context” example, she says that “a study of fact development in a case might” help “students write about facts, draw analogies between the facts of their problem and precedents, and discern where the factual gaps in their writing are.” *Id.* at 288. As a “nature-of-the-writing” example, she notes that “a writing project involving a complaint is a logical opportunity for a discussion of the ethical rules governing complaints, court rules dictating drafting form, filing deadlines, choice of forum, pre-trial discovery and so on.” *Id.* at 286-87.

³⁸ For other descriptions of the features of today’s LRW courses, see, for example, Jo Anne Durako, *A Snapshot of Legal Writing Programs at the Millennium*, 6 LEGAL WRITING 95 (2000); Kristin B. Gerdy, *Continuing Development: A Snapshot of Legal Research and Writing Programs through the Lens of the 2002 LWI and ALWD Survey*, 9 LEGAL WRITING 227 (2003); Jan M. Levine, *Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching*, 7 SCRIBES J. LEGAL WRITING 51 (1998-2000); Susan P. Liemer & Jan M. Levine, *Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching (Three Years Later)*, 9 SCRIBES J. LEGAL WRITING 113 (2003-2004). To explore some of the hybrid courses, see, for example, Debra Harris & Susan D. Susman, *Toward a More Perfect Union: Using Lawyering Pedagogy to Enhance Legal Writing Courses*, 49 J. LEGAL EDUC. 185 (1999) (describing educational benefits of adding instruction on lawyering skills to a LRW course, including more effective writing and better understanding of the relationship between law and facts); Nancy M. Maurer & Linda Fitts Mischler, *Introduction to Lawyering: Teaching First-Year Students to Think Like Professionals*, 44 J. LEGAL EDUC. 96 (1994) (describing a course developed by the authors which sought to integrate elements of a clinical legal studies program and a traditional LWR program by using an elaborate hypothetical). See generally, Arturo López Torres, *MacCrate Goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom*, 77 NEB. L. REV. 132 (1998) (providing bibliography of articles that purport to integrate lawyering skills into traditional law school courses; bibliography organized according to the ten fundamental lawyering skills identified in the MacCrate Report).

These are not new ideas. In 1947, a parent of clinical education, Judge Jerome Frank, skewered legal education for its excessive reliance on the appellate case method.³⁹ Many view Frank's recommendations as an early blueprint for clinical education.⁴⁰ His words, however, also describe the value of teaching legal research and writing with actual legal work.

Frank urged law schools to immerse their students in the world. "If it were not for a tradition which blinds us, would we not consider it ridiculous that, with litigation laboratories [courthouses] just around the corner, law schools confine their students to what they can learn about litigation in books?"⁴¹ Today, practice laboratories are closer than "just around the corner;" they are inside the law schools themselves in the forms of clinical courses, programs and law offices. *These should be laboratories for LRW courses.*

As a start, Frank suggested that law schools supplement the case method with "one or two elaborate court records, including the briefs [in the cases]"⁴² Frank warned, however, that case histories have their limits. "At best, dissection of court records would merely approximate the cadavers which first-year medical students learn to dissect."⁴³

³⁹ He said: "American legal education went badly wrongly seventy years ago when it was seduced by a brilliant neurotic." He was referring, to "the well-known founder of the so-called case system, Christopher Columbus Langdell." Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1303 (1947). Frank emphasized that he was not recommending that law schools "produce mere legal technicians," *id.* at 1312, or return to the "old system" of legal apprenticeships. *Id.* at 1313. Instead, Frank urged law schools only to "repudiate Langdell's morbid repudiation of actual legal practice" *Id.* Frank made his comments at the dinner of a conference on legal education that law students organized and "125 law students, representing forty-two law schools" attended. Harold W. Solomon, *National Law Student Conference*, 1J. L. EGAL EDUC. 68, 68 (1948). Solomon says the conference "was perhaps the most ambitious enterprise ever undertaken by law students in the United States." *Id.*

⁴⁰ See, e.g., Barry, Dubin & Joy, *supra* note 8, at 8; Suzanne Valdez Carey, *An Essay on the Evolution of Clinical Legal Education and Its Impact on Student Trial Practice*, 51 U. KAN. L. REV. 509, 513-15 (2003); Stephen Wizner, *The Law School Clinic: Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1932-33 (2002).

⁴¹ Frank, *supra* note 39, at 1311.

⁴² *Id.* at 1315.

⁴³ *Id.* Frank considered mock trials, which he called "fake" trials, to be both useful and limited in the same way: "They are not the equivalent of serious lawyer-work." *Id.* at 1316.

Frank proposed that each law school develop “a legal clinic”, like the clinics and dispensaries in medical schools,⁴⁴ and he recommended that students help to prepare “briefs, both for trial courts and on appeals,” to “learn legal rules and doctrines in the exciting context of live cases.”⁴⁵ He contended that “[t]he difference is indescribable between that way of learning and that to which students are now restricted in the schools.”⁴⁶

In developing our two experimental LRW courses, we built on Frank’s conception of the best way to teach legal research and writing offered over half a century ago, as well as on the many successful and diversified forms of clinical teaching that have been developed since then.

C. *Criticisms of Today’s LRW Courses*

Some criticize LRW courses because they do not teach law students to write well. Since writing is a skill developed through repetition and experience, we are dubious that one, two or even three courses, by themselves, can make students polished legal writers.⁴⁷

Commentators offer a variety of reasons for lawyers’ writing deficiencies. They point out that “it is only in the last fifteen to twenty years that law schools have begun to see the importance of rigorous legal writing courses.”⁴⁸ Still, today, many “law schools devalue legal writing classes.”⁴⁹ These courses often have “second-class status,” as “evidenced by the staffing

⁴⁴ *Id.* at 1316. In describing what he meant, Frank sketched the outlines of many of today’s clinical law programs.

⁴⁵ *Id.* at 1317.

⁴⁶ *Id.* Frank also urged law schools to teach “‘creative draftsmanship,’—the use of novel fact-materials thrown at the lawyer by his client and sometimes worked out in negotiations with counsel representing the other party to the bargain . . .” *Id.* at 1318.

⁴⁷ The critics rely on writing-proficiency surveys, including a recent survey of judges, lawyers and legal writing teachers, which finds “widespread agreement that new lawyers do not write well.” Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80, 80 (2003). Over fifty-seven percent of the respondents “thought that new members of the profession do not write well.” *Id.* at 86. Among the major problems cited by the survey were the failures of new lawyers in their writing to *develop a coherent theory of the case* and to *be persuasive*. *Id.* We believe, as we explain below, that practice-based writing offers students better opportunities to develop these particular competencies.

⁴⁸ *Id.* at 93.

⁴⁹ *Id.* at 94.

models [for legal writing courses], pay inequity, and professional status disparities [of legal writing teachers] at many law schools today.”⁵⁰ This message of devaluation is particularly damaging given that LRW courses often are the “only true opportunity for students to practice the sorts of writing and advocacy skills they will need . . . as attorneys.”⁵¹

We believe these structural problems are amplified by the predominant LRW method: basing writing exercises on canned problems. The canned problem usually is a complex hypothetical involving imaginary parties and legal issues. It can come from a commercially published “case file,”⁵² a well-known case with notable legal issues, or a teacher’s imagination.⁵³ In contrast to actual legal problems, there are four important features of the type of canned problem that we have in mind. First, the “clients” are not real people and the “facts” are hypothetical. Second, the problems are carefully balanced and controlled to focus students’ development narrowly on discrete analysis and basic communication skills. This is a highly simplified environment, free of many of the complications of practice. Third, the problems are the product of a kind of reverse engineering in which the teacher creates the canned problem by working backwards from the relevant authorities and arguments. The “question” posed to the students is thus derived in substantial part from the pre-determined “answer.” Fourth, the

⁵⁰ *Id.* at 95.

⁵¹ *Id.* See also Kenneth D. Chestek, *Reality Programming Meets LRW: The Moot Case Approach to Teaching in the First Year*, 38 GONZ. L. REV. 57, 58 (2002) (noting that “some students think of [the legal research and writing course] as an anomaly, unworthy of the same level of attention as the other more ‘substantive’ courses”); Terrill Pollman, *Building a Tower of Babel or Building a Discipline?: Talking About Legal Writing*, 85 MARQ. L. REV. 887, 910 (2002) (observing that “legal writing has enjoyed less respect in the legal academy than other areas of instruction”); Trail & Underwood, *supra* note 28, at 235-36.

⁵² See, e.g., DAVID W. MILLER, MICHAEL VITIELLO & MICHAEL R. FONTHAM, PRACTICING PERSUASIVE WRITTEN AND ORAL ADVOCACY: CASE FILE I (2002); CASE FILE II (2003); CASE FILE III (2005). The National Institute for Trial Advocacy (“NITA”), among other organizations, also publishes canned case files upon which legal research and writing problems are based.

⁵³ For example, a great resource for legal writing faculty designing appellate advocacy problems is the “Circuit Split” section of U.S. Law Week. Writing faculty create hypothetical trial records that raise these issues on appeal.

research and writing that the problem generates will not be used to represent an existing or future client.⁵⁴

This traditional approach to teaching legal writing is understandable given the structural problems and limitations mentioned above, including large classes taught by undervalued and estranged writing faculty or over-extended adjunct faculty. These faculty members quite reasonably adopt problems that permit them to teach basic skills to many students in a pedagogically sound way.

Ironically, however, this approach reinforces the structural problems. A writing curriculum based on hypothetical cases, divorced (at least formally) from the doctrinal and clinical curricula, tends to alienate the writing faculty and devalue their work. Educational partnerships between clinical and LRW faculty should help to enhance the institutional status, and support the educational goals, of both sets of faculty. While our proposal does not seek directly to remedy the structural problems, we believe a secondary effect of it may be to help to break this self-perpetuating cycle.

Our critique of the prevalent model of the canned problem follows from its features.

1. Hypothetical Clients and Facts

The problem may incorporate timely legal issues that are “real” in someone else’s case. They may be topical. However, neither the writing faculty nor the students have any relationship to the actual case, and the canned problem has no *real* connection to the faculty or the students.

Legal writing faculty using this approach can go to great lengths to create “realistic” facts that mirror those of cases that a young lawyer might encounter in practice. They may develop extensive hypothetical records with factual complexity and indeterminacy that approach that of real cases. The imaginary parties and witnesses may possess the rich personalities and diverse

⁵⁴ See *infra* Part II(B).

characteristics of real people. The faculty may even make actual cases—their own, or others—the bases of their problems. Or, they may draw upon a small market of outside contractors who design factually rich problems for use in legal writing programs, or use a growing commercial publishing market in hypothetical case files.⁵⁵ They may even use actors to play the roles of parties or witnesses to introduce a “human” element into an otherwise impersonal paper record.

We do not contend that these efforts are without value. Students may become more involved in a writing project when it closely mirrors reality or touches on issues they care about. And this may translate into more engaged learning. One informal measure of this occurs when students start talking about their imaginary clients as if they were real people. When this happens, the vigor and energy in the class—and, more importantly, the learning—can be enhanced.

In short, writing faculty go to great and admirable lengths to make their problems *realistic*, but they stop conspicuously short of making them *real*. Taking the extra step adds substantial educational value, we believe.

Even if they are based on actual people, purely hypothetical “clients” have little of the teaching potential of actual clients. We believe the valid criticisms that Ann Shalleck directs at classroom courses apply to many canned problems in LRW courses as well. She argues that the non-clinical curriculum “strips the clients of individual identity, wiping out any of their unique understandings of, or experiences in, the world.”⁵⁶ As they do with clients in casebooks, “[p]rofessors and students easily presume agreement as to who [clients in canned problems] are and what they want.” Hypothetical clients are “unproblematic figures.”⁵⁷ Even when they are well-formed—hypothetically, at least—these clients “are seen as having subjective, determinate,

⁵⁵ See, e.g., MILLER ET AL., *supra* note 52.

⁵⁶ Ann Shalleck, *Constructions of the Client within Legal Education*, 45 STAN. L. REV. 1731, 1733 (1993).

⁵⁷ *Id.* at 1731.

articulated interests constituted prior to their interactions with a lawyer.”⁵⁸ That is, “[t]hese clients come to lawyers already knowing what they want. The job of the lawyer is to discover what these clients want and, having identified their desires, to offer choices about how to achieve their legitimate goals within the legal system.”⁵⁹ By definition, hypothetical clients cannot interact with the students, or give students a sense of real responsibility for the life, liberty, or property of another.⁶⁰

Angela Campbell questions whether canned problems can adequately motivate students to do their best work. She points out that “[w]riting teachers have suggested that one reason many students do not write well in class is that they place little importance on classroom assignments,” and argues that “[s]tudents are more motivated to write when they feel that a task must be accomplished and when they believe their writing will be taken seriously.”⁶¹ She recommends courses that combine legal clinics with law school writing and research programs because “[t]he real world consequences of the clinic give students strong incentives to improve their writing.”⁶²

Peter Hoffman contends that “simulation cannot approximate the greater factual richness and uncertainty introduced by real cases.”⁶³ We agree. In simulations, fictional clients become unnaturally sanitized, stripped of social context, and denied complexities that make live clients

⁵⁸ *Id.* at 1738.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1731. There are teaching problems that contain comprehensive descriptions of clients, including actual clients in real cases, and include related teaching materials that introduce students to these clients in effective ways, e.g., through videotaped interviews, transcripts of testimony, and written accounts (including by clients). We acknowledge that these can help to bring clients, and their perspectives, into classroom courses.

⁶¹ Angela J. Campbell, *Teaching Advanced Legal Writing in a Law School Clinic*, 24 SETON HALL L. REV. 653, 659-60 (1993) (footnotes omitted).

⁶² *Id.* at 659. There is a “common complaint of law students that they feel alienated from their writing in law school and that they have little personal investment in it.” J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 51 (1994).

⁶³ Peter Toll Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L.J. 277, 291 (1982).

and actual matters interesting, challenging, and real.⁶⁴ As a result, students are left to deal only with the artificially narrow legal issues assigned to them; they can only speculate about alternative issues or deeper interests that their fictional clients might have. As realistic as we can make our fictional characters and hypothetical facts, canned problems can not transcend their limitations.

We also agree with Campbell that “[a]ctual cases can provide data for the study and critique of issues involving professional responsibility and the legal system in general.”⁶⁵ By comparison, hypothetical clients and cases generally do not provide credible bases for analyzing access-to-justice or pro bono issues, or for critiquing law and systems of justice. Rebecca Cochran argues that LRW instructors are well positioned to deal with these issues:

LRW courses already explore the lawyering skills essential to legal competence in practice. Within this context, the same faculty can use the skills experience to consider the ethical issues arising from entering into the profession, issues which are foremost in first-year students’ minds. LRW faculty undisputedly have the first, best chance to link professional skills training to professional ethics “training.”⁶⁶

Cochran also describes the missed opportunity to engage LRW students in work that could help others and in the process motivate and reward students:

[A]s I walked around the library [after the assignment was completed], I felt frustrated by the evanescence of the entire process. Once the assignment was turned in, the students, quite understandably, cleared out the masses of notes, copies, and printouts of their materials

Not only was the research wasted, but in some sense, the intensity that drives the research [and] also drives first-year students to grapple with the essential issues of why and how to be a good lawyer had also been lost. The project was, after all, just a simulation, not “real.”⁶⁷

⁶⁴ A very similar complaint is also frequently lodged at another standard of the law school curriculum: the Socratic Method, with its focus on appellate opinions, in which facts are similarly static and sanitized.

⁶⁵ Campbell, *supra* note 61, at 658-59 (footnotes omitted). We acknowledge that a single client’s story has its limits in performing the critiquing function. With additional information that indicates the ways in which it is representative, it can be more broadly useful.

⁶⁶ Rebecca A Cochran, *Legal Research and Writing Programs as Vehicles for Law Student Pro Bono Service*, 8 B.U. PUB. INT. L.J. 429, 446 (1999).

⁶⁷ *Id.* at 439.

The emptiness that some students feel after working on a traditional LRW assignment is only part of the loss. The considerable effort that students give to canned problems does not benefit anyone other than the students, and it benefits them only in a narrow sense. They have not helped others who badly need it, and therefore have not experienced the self-satisfaction and professional growth that come from helping another.

We believe teaching a LRW course with actual legal work—i.e., taking that next step from *realistic* to *real* problem—avoids many of these problems. It allows the teacher to engage students fully, teach core LRW skills effectively, introduce students to professional responsibility and access-to-justice issues, and provide legal help to unrepresented and under-represented clients.

2. Balance and Control

The canned problem that we have in mind features balance and control. There are equally persuasive arguments on both sides of the legal question (balance), because the facts and legal authorities are limited (control). These are characteristics of canned problems whether students write a “predictive” memo or “persuasive” brief.

3. Reverse Engineering

The balance and control are created through reverse engineering. The creator forges the analytical paths *retrospectively*, working from the legal authorities, the analysis, and the arguments, back to the facts. This pre-establishes a limited number (perhaps just one) of acceptable pathways for the students to follow. As part of this reverse engineering, the “question” for the students is defined by the pre-determined “answer.”⁶⁸ And when the students’

⁶⁸ We use “question” here to denote the issues in the problem; we use “answer” to denote the range of acceptable authorities, the material facts, the arguments, and the reasonable theories on either side of the case—the

authorities, analysis, and arguments comport with the teacher's expectations (i.e., when the students' *prospective* paths fall more or less in line with the faculty member's *retrospective* paths), we say that the problem has "worked."

There are sound reasons for reverse engineering and the balance and control it produces. It creates workable hypothetical cases without any surprises, such as unexpected (and intractable) legal authority.⁶⁹ It also allows students to develop skills incrementally and provides a uniform basis for evaluation.

But this approach comes with significant drawbacks. Most important, it encourages students to *find*, rather than *construct*, legal arguments. Having created a limited set of acceptable pathways to an established answer, the LRW faculty member largely has predetermined the outcomes. Students begin with the assumption that there are pre-established legal arguments in every canned problem. They are embodied in a pre-selected and limited set of case decisions. The goal is to find the "right" set of decisions and thereby to find the "right" answers.

These features give the canned problem the hallmarks of a scavenger hunt, with the same payoff: a prize (high grade) to the winner. In the process, students will learn and develop good "retrieval" skills. They will learn how to conduct basic research and find legal authorities. Once they find the authorities, they will apply them to the predetermined facts and make the best arguments they can.

In actual legal work, however, there is no preplanned design, no "higher intelligence" (i.e., that of a professor) behind the problem. Instead, it is the lawyer's intelligence—in our case,

various paths of analysis and argumentation for and against—not the more narrow and colloquial sense of the term answer.

⁶⁹ Many LRW faculty also control for deviations from the paths by assigning an outside "checker" (such as a student research assistant) to work the penultimate iteration of the problem *forward*. Any unanticipated deviations can then be controlled in the final version.

the student's intelligence--that counts. The lawyer must use that intelligence to *build* arguments through a dialectical process in which facts, legal authority, policies, strategic considerations, and client goals interact. Lawyers describe this as "making a case," by building a factual record (in the hypothetical, it is more or less static) and creating a legal strategy (in the hypothetical, it has been predetermined). To do these things, students need to learn how to *create* balance (at least, counter-balance in facts and arguments) and control, which they cannot do when they are *given* both.

In the end, many canned problems discourage students from developing alternative factual theories, legal arguments, and theories of the case, and ill-equip them to work with uncertainty and indeterminacy, as they must in practice. That is, they discourage creativity. Students learn to *trace* paths, not to *forge* them.

Moreover, this approach reinforces the teacher-centric model that underlies most of the first-year curriculum. It casts the teacher as the source of knowledge (here, the paths to the "answer"), and students as "discoverers" of the teacher's knowledge.⁷⁰ With reverse engineering, the canned problem has the hallmarks of a grand semester-long Socratic dialogue, with all the attendant pedagogical baggage, e.g., students do not assume control of the exercise; they tend to become passive, rather than active participants; and they are more likely to become disengaged.

4. Research and Writing of No Value to Others

Every year, hundreds of law professors make research and writing assignments to thousands of first- and second-year students, who spend tens of thousands of hours on them. At

⁷⁰ Seen in this light, the approach bears more than a passing resemblance to the "banking" theory of education, so roundly criticized by Paulo Freire, among other progressive educators. See PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 52-67 (Myra Bergman Ramos trans., Continuum Press 2000) (1970) (comparing the "banking" concept of education with "problem posing" education).

the end of this process, the professors grade the papers, return them to the students, and discard their copies. This is an extraordinary waste, akin to gratuitously destroying food in a community that has many malnourished and hungry people.⁷¹

It also sends disturbing messages to our students and to the communities in which our schools are located: that we do not believe law students have the ability to produce work that is useful to others, or that we cannot find ways to put their work to good use. These are implicit, not explicit messages, but, we agree with Howard Lesnick that “much of what we teach is taught implicitly.”⁷²

In any of the four course models that we identify in Part I, which base LRW assignments on actual legal work, students can effectively learn basic skills (and more), while producing work that can be helpful to others.

Before we move on, we consider the general defense of canned problems that “students must walk before they can run,” and that canned problems teach them to walk.

We accept that hypothetical problems may be a reasonable way to teach basic aspects of legal research and writing, at least initially, in the same way that scales are a reasonable first step in learning to play the piano. But this speaks to the perceived need for such assignments in the first semester, or perhaps in the first half of the first semester. Moreover, it would be possible, even at these early stages, to base assignments on actual legal work that has the characteristics of

⁷¹ See *supra* note 3 for summary of unmet legal needs in the United States.

⁷² Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum*, 37 UCLA L. REV. 1157, 1158 (1990). We accept that resources are limited. It does not, however, require much in the way of additional resources to consult with others about ways in which LRW course products might be useful to those who need help. It does take time to convert legal work, including outside projects, into appropriate assignments for LRW students. But, some of this is time LRW teachers would spend developing or revising canned problems, and we believe the extra work is well worth it. See *infra* Part IV(B)(1).

canned problems, i.e., controlled facts and limited legal issues. This would allow students to focus on rudimentary skills, but in a course that is enriched in the other ways we identify.

In second-semester and upper-level writing courses, the “walk-before-you-run” argument loses much of its steam. Assuming control is pedagogically useful, the LRW teacher can retain a significant measure of it by carefully selecting and preparing the actual legal work; at the same time, the teacher can use the legal work to reinforce the idealism and enthusiasm for practice that many students bring with them to school. These are qualities that too often are stifled by lifeless appellate opinions and canned problems that comprise much of the traditional first-year curriculum.

The standard curriculum perpetuates the illusion that the legal world is orderly, rational, and controlled. Canned problems reinforce this illusion. We then expect students to cope intuitively with, and bring order to, the disorderly world they will find in practice. In this sense, we may be teaching students to walk before they can run, but for a profession that values good swimming, especially in choppy and uncharted waters.

We take the next steps in our argument by describing the two experimental LRW courses that we taught with actual legal work.

III. USING ACTUAL LEGAL WORK TO TEACH LEGAL RESEARCH AND WRITING COURSES: TWO EXPERIMENTS AT THE UNIVERSITY OF MARYLAND SCHOOL OF LAW

A. *Legal Analysis, Writing and Research III*

We taught this appellate advocacy course in fall semester, 2003. The standard course description says that “[s]ynthesizing what they have learned in the earlier courses, the students research and write an appellate brief and deliver an oral argument on the brief.” This final (and

third) course in the LAWR sequence is “taught in the fall semester of the second year” and “coordinated with the fall competition of the Moot Court program.”⁷³

1. The Students

We did not select the students, nor did they take the course knowing it would be taught with an actual case. It was only after registration that we decided to co-teach this course and to use actual legal work to do so. When the students enrolled in the course, they thought Schwinn would be teaching it by himself.⁷⁴

About half of our twenty-seven students were contemporaneously enrolled in other experiential courses.⁷⁵ Before we decided to co-teach the course, Schwinn had encouraged students who would be taking experiential courses at the same time to register for his LAWR III course. He intended to tailor the course to accommodate their clinical obligations. Since all day division students at our law school are *required* to take an experiential course as a condition of graduation,⁷⁶ the recruitment of students taking experiential courses did not mean that these students were more predisposed than others to accept our experiment. Ironically, adding actual legal work to the LAWR III course increased rather than decreased the workloads of the experiential-course students, nullifying Schwinn’s original purpose in recruiting those students.

2. Selecting the Legal Work

⁷³ This description came from the then-existing Course Catalogue of University of Maryland School of Law. The course we taught combined two sections of LAWR III. Students who participate in the Moot Court competition are required to write an additional brief and to present additional oral arguments.

⁷⁴ Third semester students have a right, depending on their “priority number,” to select a section of LAWR III. There were ten LAWR III sections offered to students in fall 2003, listed by teacher and time slot, including the double section Schwinn was scheduled to teach. After the students registered for the course, and during a period when they could have dropped the course, Schwinn notified the students that the course would include actual legal work and that Millemann would co-teach it. One student dropped it, apparently for unrelated reasons.

⁷⁵ Of the twenty-seven students who enrolled in our course, nine were taking clinical courses and four more were enrolled in Legal Theory and Practice courses. *See supra* note 19.

⁷⁶ *See supra* note 19.

We selected the case that we intended to use to teach the fall course in the preceding summer. The client was Nathaniel Anthony.⁷⁷ Millemann also created a post-conviction clinic to respond to Anthony's request for legal assistance, as well as to requests from several other prisoners who had meritorious claims, including credible claims of innocence.⁷⁸ Thus, we developed the experimental LAWR III course and the new post-conviction clinic in tandem, with the students in each working together.⁷⁹

a. The Anthony Case

Anthony was arrested in 1968 when he was nineteen-years old, and charged with felony murder. At the time, this was a capital offense. He had never been arrested or in trouble before. He was convicted after a bench trial that lasted about *half a day*. The trial transcript was a total of ninety-three pages.⁸⁰

In sum, the facts were these. Alan Johnson, a young man who was intoxicated on drugs and alcohol, murdered a randomly selected pedestrian with a baseball bat during a robbery. Before the homicide, five youths, including Johnson and Anthony, had been together in a house near the crime scene. The state indicted all five youths for murder.

The key testimony in Anthony's case came from one of the five indicted youths, Edward Hollis, who was thirteen-years old at the time of the crime. He testified that after Anthony left the house, Johnson talked briefly about robbing someone.⁸¹ Then, Johnson, with bat in his hand,

⁷⁷ The name is fictitious, as are the names of all of the participants in this case who are described in this article.

⁷⁸ Initially, Millemann co-taught the clinic with Michele Nethercott, an assistant state public defender who directs that office's innocence project. Later, he co-taught the clinic with Renee Hutchins, a newly hired professor. Both supervised students who worked on the Anthony case and helped to represent Anthony.

⁷⁹ See *infra* Part III(A)(1)(i).

⁸⁰ Trial transcript. The information about the Anthony case comes from records of pretrial and related proceedings, the trial and sentencing transcripts, the transcript of the hearing on Anthony's motion for a new trial, the trial judge's decision, appellate records including the appellate briefs, the appellate decision, the *pro se* pleadings that Anthony filed after the appellate decision, and the decisions in those proceedings [hereinafter Case Record].

⁸¹ Trial transcript. Before Hollis testified at Anthony's trial, he testified at the trial of a co-defendant whom Anthony's lawyer also represented. In both trials, he testified that Anthony had left the house before Johnson made

ran out of the house after a pedestrian. The other three youths followed Johnson. Anthony was standing in front of a store about a block or so away. He trailed the others up the street to see what was happening. As he ran up the street, he saw Johnson hit the victim over the head with the bat. After he arrived, it is clear that Anthony did nothing whatsoever to assist Johnson. Anthony testified that he pulled Johnson off the victim.⁸²

Anthony's mother paid \$300 to the lawyer who represented Anthony at trial.⁸³ The lawyer was known for his lack of preparation, bragging that the only documents he brought with him to trial were those he could carry in his sports coat pockets.⁸⁴

In a conflict of interest, Anthony's lawyer also represented one of the co-defendants who had helped to rob the victim. A judge severed the two trials, and, after a bench trial, acquitted that co-defendant of felony murder.⁸⁵

A different judge tried Anthony.⁸⁶ Anthony's lawyer called no witnesses, other than Anthony,⁸⁷ although there were several who we believe would have given exculpatory testimony. The judge concluded that although there was no evidence that Anthony had done

his comments about mugging someone. At Anthony's trial, Hollis also testified, inconsistently, that Johnson began talking about mugging someone as Anthony was leaving, but he added that Anthony did not know what Johnson was talking about. Hollis was unequivocal in his testimony that Anthony did nothing to assist Johnson when Anthony arrived at the scene. *Id.*

⁸² *Id.* Anthony did nothing to assist Johnson when Anthony arrived at the scene. Both Anthony and Hollis testified that all five of the youths, including Anthony, went back to the house after the incident. Hollis, whose charges were dismissed after he testified in Anthony's case, said that Johnson gave some of the change taken from the victim to the others, including Anthony. Anthony testified that Johnson offered change to him, but that he refused it.

⁸³ Statement of Anthony's mother.

⁸⁴ Millemann practiced at the same time as this lawyer, observed him in court on several occasions, and talked to a number of lawyers and judges who had first-hand information about this lawyer.

⁸⁵ Case Record, *supra* note 80.

⁸⁶ *Id.* Anthony's lawyer directed Anthony to waive a jury trial, "explaining" to Anthony that it was clear that he was innocent and therefore a jury trial was unnecessary. We believe the lawyer made this decision for reasons of economic self-interest, i.e., he did not want to spend the time it would have taken to impanel a jury and try the case to that jury.

⁸⁷ Trial transcript. The lawyer's primary argument was that since the first judge had acquitted the co-defendant, the second judge was bound to acquit Anthony, an argument that lacked legal merit and may well have antagonized Anthony's judge.

anything to assist Johnson, he believed Anthony was prepared to help if necessary and may have acted as a look-out.⁸⁸ These conclusions, however, were contradicted by the evidence.⁸⁹

The court sentenced Anthony to imprisonment for life, believing, erroneously we think, that it had no power to suspend all or part of the sentence. There were compelling grounds, in addition to the facts of the incident, to suspend all or part of the sentence.⁹⁰

Anthony's trial lawyer sought appointment and was appointed to represent Anthony on appeal. (The case predated the creation of Maryland's public defender program.) The lawyer wrote a brief that contained inaccuracies, grammatical errors, conclusory arguments, and a total of two case citations. In the third and last argument, which was a page and a half long, the lawyer contended that there was insufficient evidence to support the conviction.⁹¹

Maryland's intermediate appellate court affirmed the conviction, deferring to the trial court's conclusions, despite the contrary evidence. Anthony's lawyer failed to file a certiorari petition in the state's highest court, although a then-applicable state rule required him to do so or help Anthony to do so.⁹²

With the assistance of fellow prisoners, Anthony subsequently filed two *pro se* pleadings. Although he had a number of meritorious claims, the pleadings were incompetently prepared and were unsuccessful.⁹³

⁸⁸ Trial transcript and transcript of hearing on motion for a new trial.

⁸⁹ *Id.* For example, Anthony left the house before Johnson made his comments about "mugging" someone; he went in the opposite direction of the eventual robbery; Johnson was high on drugs, and apparently decided to go after the victim on the spur-of-the-moment; Anthony followed the group up one street, around a corner, and up a second street, rather than remaining at the intersection where he could have "looked out" for police; Anthony was not looking around, calling out information to Johnson, acting in any respect like a look-out, or assisting in any other way; and Johnson was openly brandishing a baseball bat, with no apparent concern about being seen. *Id.*

⁹⁰ *Id.* Anthony had no record. At the time of the crime, he was employed, and was living at home with and helping to support his mother. Anthony had learning problems and had "aged out" of high school in the 10th grade.

⁹¹ Appellate brief.

⁹² See MD. R. 719(b)(7)(b) (1971) (repealed 1972).

⁹³ Case Record, *supra* note 80.

Anthony became a model prisoner and by the early 1990s he was living in a minimum security prison, working outside the prison (on work release), and living at home with his mother on weekends.

In 1993, however, in response to a murder by another work-release inmate, the governor of Maryland revoked the minimum security status of all life-sentenced murderers, and a subsequent governor adopted a no-parole policy for them.⁹⁴ As a consequence, Anthony was transferred back to a maximum security prison and subsequently was denied parole despite the unanimous recommendation of the Parole Commission that he be paroled.

In late 2002, Anthony requested assistance from Millemann, who read his ninety-three-page trial transcript and was shocked by the apparent miscarriage of justice. We were convinced that Anthony had viable post-conviction claims and decided to make these claims the basis of the assignments in the LAWR course. Later, we converted the students' work into a clemency petition.

b. Deciding to Use the Anthony Case to Teach Appellate Advocacy

A post-conviction proceeding is a hybrid.⁹⁵ Although it is an extension of the criminal process, many states consider it to be a civil proceeding.⁹⁶ It can be based both on facts in the trial and appellate records and on new facts established after trial and appeal.⁹⁷

A post-conviction proceeding follows the direct appeal.⁹⁸ It therefore may seem counter-intuitive to use a *post-conviction* case to teach an *appellate* advocacy course. We found,

⁹⁴ See *Watkins v. Sec'y, Dep't of Pub. Safety & Corr. Servs.*, 831 A.2d 1079 (Md. 2003) (upholding the constitutionality of the policies).

⁹⁵ See 1 DONALD E. WILKES, JR., *STATE POSTCONVICTION REMEDIES AND RELIEF* § 1-5, at 16-18 (2001 ed.).

⁹⁶ *Id.*

⁹⁷ *Id.* § 1-7, at 34-36; §1-13, at 53-61.

⁹⁸ *Id.* § 1-5, at 18.

however, that the fit between the Anthony case and our LAWR III objectives was excellent in most respects.

The record in Anthony's case was fixed in some respects and fluid in others. It included the historical documents,⁹⁹ but we added a dynamic feature by connecting the LAWR III course to the post-conviction clinic. As the LAWR III students analyzed the existing record, they identified additional facts they wanted to know, and transmitted their requests for information to the post-conviction clinic students. The clinic students, who were doing additional factual research, sometimes knew the answers to the questions. If they did not, they often conducted the additional investigation necessary to answer the questions.

This process produced several categories of information: 1) information an appellate party can add to the record through rules allowing parties to supplement the record or courts to take judicial notice of facts; 2) information that can not be added to the record, but is relevant in interpreting facts already in the record; and 3) information that can not be shoe-horned, post facto, into an appeal, but rather can be asserted in a new or reopened post-conviction proceeding.

The process, therefore, not only engaged the students in the search for the truth (what actually happened), but also helped us to explore the different rules governing trial, appellate, and post-conviction evidence.

At a mid-point in the semester, we froze the "record" in the LAWR III course, although the post-conviction students continued their investigations. Where there were factual gaps, we supplemented the record with a limited number of "stipulated" facts. This gave the LAWR III students a fixed and uniform evidentiary foundation for their briefs. We thus struck a balance between the competing educational interests in fixed and fluid records.

⁹⁹ See *supra* note 80.

The nature of the post-conviction process also made the Anthony case good teaching material for our appellate advocacy course. The process begins with the legal equivalent of an autopsy. In our case, the “body” was the Anthony litigation, from arrest through trial, appeal, and post-appellate litigation. This helped the students to understand the role of the appeal in the criminal process and its relationship to the other steps in the process.

Common post-conviction claims include ineffective assistance of counsel, the prosecution’s failure to disclose exculpatory evidence, and violations of other “fundamental rights,” such as the right to jury trial, that only can be waived personally and on the record by the defendant.¹⁰⁰ Anthony had meritorious claims like these, as well as others. In post-conviction practice, however, the rules governing procedural default are as important and at least as complicated as those governing substantive claims.¹⁰¹ The students had to deal with these issues as well.

To evaluate the legal claims, the students had to ask, with legally required deference to Anthony’s prior lawyer’s judgments, whether counsel’s performance before, at, and after trial and appeal, was “deficient,”¹⁰² and if so, whether counsel’s “deficient performance prejudiced the defense.”¹⁰³ To answer these questions, the students had to understand the criminal process and the normative standards of criminal defense (today and in 1969 and 1970, the years of the trial and appeal). They had to master the record in Anthony’s case and identify with specificity

¹⁰⁰ 1 WILKES, JR., *supra* note 95§ 1 -11, at 46-47; *Curtis v. State*, 395 A.2d 464 (Md. 1978).

¹⁰¹ 1 WILKES, JR., *supra* note 95§ 1-7, at 34-35.

¹⁰² *Gross v. State*, 809 A.2d 627, 635 (Md. 2002) (quoting *Wiggins v. State*, 724 A.2d 1, 12 (Md. 1999)). To establish this, a petitioner “must (1) demonstrate that counsel’s acts or omissions, given the circumstances, ‘fell below an objective standard of reasonableness considering prevailing professional norms,’ and (2) overcome the presumption that the challenged conduct could ‘be considered sound trial strategy.’” *Id. Accord Strickland v. Washington*, 466 U.S. 668, 686-89 (1984); *Bowers v. State*, 578 A.2d 734, 738 (Md. 1990).

¹⁰³ *Gross*, 809 A.2d at 635-36 (quoting *Wiggins*, 724 A.2d at 12). This requires more proof than that “the errors had some conceivable effect on the outcome of the proceedings,” but less proof than “that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Bowers*, 578 A.2d at 738 (quoting *Strickland*, 466 U.S. at 693). The test is whether there is a “substantial possibility” that counsel’s errors altered the outcome in the case. *Id.* at 739. For applications of these tests, see, for example, *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. State*, 605 A.2d 103 (Md. 1992).

what Anthony’s lawyer did wrong and how it likely affected the verdict and sentence in his case. They also had to explain why Anthony should be able to assert these claims now, and then had to brief and argue these and other points.¹⁰⁴

One aspect of the actual case presented a special educational challenge in an appellate advocacy course. We asked some of the students to brief and argue whether Anthony’s lawyer had provided effective assistance of counsel to Anthony *on appeal*. In explaining why Anthony’s lawyer’s performance had been deficient and prejudicial, the students, in effect, had to rewrite at least one of the arguments that Anthony’s lawyer had made on appeal—there was insufficient evidence to support the conviction. Their product was a brief (arguing there was insufficient evidence to support the conviction) within a brief (arguing that counsel had been ineffective in making this argument on appeal).

We worried about both the complexity of the exercise for an initial brief-writing experience and whether the existence of the actual briefs would provide too much help to the students. When the students submitted their drafts, it became clear that our fears were unwarranted. In part, this was because the brief of Anthony’s lawyer was so bad.

3. Preparing to Teach with the Legal Work

There are a variety of challenges in using an actual case to teach a non-clinical course.¹⁰⁵

¹⁰⁴ Among the issues in the case were these:

1. Did Anthony voluntarily, knowingly, and intelligently waive his right to a jury trial?
2. Did Anthony’s lawyer fail to provide him with the constitutionally required effective assistance of counsel on appeal by failing to adequately make the argument that there was insufficient evidence to convict him, and then failing to advise him about his right to seek certiorari from the Maryland Court of Appeals after the Court of Special Appeals decided this issue against him?
3. Did the trial judge err in concluding that he had only two sentencing options, either to sentence Anthony to death or life, and that he could not suspend all or part of the life sentence?
4. Was counsel ineffective at trial in a variety of ways?

There also were a number of procedural issues related to whether Anthony could now assert these claims, including whether Anthony or his lawyer had waived these claims or whether they had been finally decided in a prior proceeding.

¹⁰⁵ One of the major issues is how to preserve the confidences of clients, which we discuss *infra*, Part III(A)(7) and Part IV(B)(2).

One is the winnowing process of distilling teaching material from a complicated case. We needed to limit the parts of the Anthony case that we would use in the course and to put those parts into usable forms.¹⁰⁶

The first step in this process was to reconstruct the record in the case. One of the threshold obstacles in representing long-term prisoners is that states often destroy major parts of their case records even while the prisoners remain confined.¹⁰⁷ We were happy to discover that Maryland has an excellent legal archivist.¹⁰⁸ With his considerable help, we were able to obtain the central records in Anthony's case from the archives.

We then organized these records, conducted the basic preliminary research necessary to identify viable issues, and compiled a set of related teaching materials.¹⁰⁹

4. Involving the LAWR III Students in the Case-Selection Decision in a Limited but Important Way

Initially, the clinic, acting through Millemann, committed to investigate Anthony's case. After reading the ninety-three-page trial transcript of this half-day capital trial, it became impossible to really consider rejecting the case.

¹⁰⁶ By comparison, there are some clinical/LRW hybrids in which the teacher can teach with the entirety of a legal matter. Beginning fall semester, 2005, Professor Renee M. Hutchins on our faculty is using actual criminal appeals to teach our LAWR III appellate advocacy course. The LAWR III semester-long course is included in a year-long Appellate and Post-Conviction Advocacy Clinic. She is teaching with the full appellate record and process in the cases.

¹⁰⁷ At a minimum, the law should require that a prisoner's case records be retained until he is free from any restraint imposed in that case. *See, e.g.*, UTAH CODE JUD. ADMIN. APP. F. (Utah State Courts Records Retention Schedule).

¹⁰⁸ Dr. Edward C. Papenfuse. He currently holds the positions of Maryland State Archivist and Commissioner of Land Patents.

¹⁰⁹ Specifically, we read and excerpted the trial transcript; identified the elements of the crime (felony murder, with robbery as the felony); evaluated the trial court's decision (guilty of felony murder based on the "ready-to-assist" and "look out" theories); evaluated the very summary sentencing proceeding (about one page total in the transcript); determined the results of Anthony's co-defendants' cases (one acquittal, one dismissal of charges, and two convictions, with both of the convicted defendants—including Johnson, who murdered the victim with the bat, having been released from prison); evaluated the performance of trial counsel and the trial judge; read and analyzed the appeal, and evaluated the performance of appellate counsel; read and analyzed the post-appeal proceedings; and with this information, identified and evaluated Anthony's potential claims and the grounds to assert these claims at this stage of Anthony's case. The course materials included the core components of the record and explanatory memoranda, instructions, issue statements, articles, statutes, and case decisions.

When we introduced the Anthony case to the LAWR III students, therefore, we knew that the post-conviction clinic, at least, would represent Anthony. Although we planned on using the Anthony case in the LAWR III course as well, we would have listened to the LAWR III students if they had presented compelling arguments in support of different legal work. In prior courses, we had made significant changes in course plans, including in the type of planned legal work, in response to persuasive student arguments.

Therefore, after we discussed the basic facts of the case with the students, we posed the question: should we—the students and the two of us—spend our considerable resources representing Mr. Anthony? Or, should we generate some other form of actual legal work for the students that might benefit a larger number of people?

In the end, there was a virtual consensus that we should represent Anthony. This was a good discussion in which we talked about the role of a law school, especially a state school like ours, in providing legal assistance to the poor, and the issues that arise in allocating scarce legal resources.¹¹⁰ Through this confirmation of our initial decision, the students made an initial commitment to Mr. Anthony. This was a radically different way to begin a LRW semester, and it invested the students in their semester's work by making them responsible, in a limited but important way, for that work.

This commitment had important consequences for us, the teachers, as well. It made us accountable to our students, including for what we taught them and for the legal services that together we would provide to Mr. Anthony. It thus helped to create a special working partnership between the students and us.

¹¹⁰ See, e.g., Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101 (1990); Stephen Wizner, *Rationing Justice*, 1997 ANN. SURV. AM. L. 1019.

5. Dividing the Students into Issue-Specific Workgroups and Co-Counseling Teams

We identified preliminarily seven sets of substantive and procedural issues that we intended to assign to the LAWR III students. The issue descriptions were general, leaving the students substantial room to refine, vary, or for good reasons, discard the issue and work on another and better one.

Many of the issues were very challenging. Students had to identify and explore several potential theories and select one. Having committed to a theory, they had to be creative with often ambiguous and sparse legal authority. The students also had to work with an indeterminate factual record.

We structured each of the issues as a freestanding appeal. Thus, there were seven separate appeals. The students had to identify the portion of the total record that applied to their issue, and use that portion of the record to develop the statement of facts in their appeals.

We divided the twenty-seven students into seven groups, and assigned one issue to each group. We divided each group of four (in one case three) students into two teams of two students, and we assigned one team to represent Mr. Anthony and the other to represent the State.¹¹¹ Our strategy here, which is familiar to those in the legal writing community, was to produce the best work on behalf of Mr. Anthony by predicting how the State was likely to argue against him and responding to those arguments. Although “co-counsel” worked together, each was responsible for his or her own brief and each made a separate oral argument.

In what became one of the most interesting parts of the course, we met weekly with each of the seven workgroups, which were comprised of two sets of opposing co-counsel and the

¹¹¹ Given that we had twenty-seven, not twenty-eight, students, in one of the seven groups, only one student represented a party individually.

student from the post-conviction clinic who had been assigned to that workgroup. This connected the two courses, although each largely retained a separate identity.

We conducted these meetings as case rounds and strategy sessions. In the give and take of these meetings, the students identified their initial “theories of the case” (really, “theories of the issue”); refined their theories; developed new theories that we had not initially identified; and refined those theories.

In these meetings, we used facilitated group-writing (engaging the class, as a whole, in exemplary writing exercises) and modified peer-editing techniques (in which one student edited the work of another) to develop argumentation and writing skills. The small size and relative informality of the meetings created an environment in which each student’s ideas were carefully considered. There were high levels of student participation and engagement, and this became the forum in which we did our best collaborative work. Mr. Anthony benefited the most from this issue-vetting process, which had a great dialectical quality.¹¹² Clinical teachers will recognize this as a core feature of clinical education.

6. Adding Limited Hypothetical Components to the Actual Case

We added some limited hypothetical features to the real-world facts. This included a lower court opinion from which Anthony would appeal. We hypothesized that Anthony had filed a post-conviction petition in which he raised seven issues. The opinion summarily denied relief on all of the issues thereby presenting all of them for appeal.¹¹³

7. Insuring Client Confidentiality

¹¹² For analysis of educational benefits of teacher-student dialectical learning, see, for example, Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 333-44 (1982); PAULO FREIRE, TEACHERS AS CULTURAL WORKERS: LETTERS TO THOSE WHO DARE TEACH 63-68 (Donaldo Macedo et al. trans., 1998).

¹¹³ We made the appeal to the Maryland Court of Special Appeals, Maryland’s intermediate appellate court, which tracked the real world. (If we lost the actual case, we would appeal the decision to that Court.) The students had to comply with the rules of that Court in preparing their briefs.

Our Clinical Law Program represented Mr. Anthony. Millemann was the primary clinical lawyer in the case. The work of the students in both LAWR III and the post conviction clinic was carried on within the scope of the Clinical Law Program's attorney-client relationship with Anthony, and was part of the work-product in the case. The students "posted" their work on a secure computer system, and they discussed the case outside the classroom only in private settings and only with other students in one of the two courses.¹¹⁴

8. Apportioning Teaching Responsibilities

We apportioned responsibility for the course in ways that were consistent with our backgrounds and expertise.¹¹⁵ Schwinn did the majority of the LRW teaching, and Millemann most of the teaching about criminal law and the post-conviction process. We both, usually together, participated in the seven weekly work-group meetings. Although we both read and critiqued the first and final drafts of the students' briefs, Schwinn sat as judge for the students' mock arguments and had ultimate responsibility for grading the students. Millemann had

¹¹⁴ See *infra* Part IV(B)(2) for analysis of professional responsibility and liability issues. Writing about clinic cases raises additional issues. We have been aided by Professor Nina W. Tarr's analysis in writing this article. See Nina W. Tarr, *Clients' and Students' Stories: Avoiding Exploitation and Complying with the Law to Produce Scholarship with Integrity*, 5 CLINICAL L. REV. 271 (1998). We have done the following to protect the interests of the clients whose cases we discuss in this article: 1) either disclosed in this article no client-identifying information, or limited the disclosed factual information to that which appears in court records, *see supra* note 80, judicial opinions, *see supra* notes 80, 125-26, or other public documents; 2) assured ourselves that we have not disclosed confidential or otherwise sensitive client information or waived any applicable confidentiality privilege; 3) tested these conclusions by submitting a copy of the final draft of this article to an ad hoc committee of our colleagues ("Committee") for their review (the Committee agreed with our assessment); 4) provided the client whom we call Mr. Anthony with a copy of the final draft of this article, discussed it with him, and helped him to obtain independent counsel to advise him in this respect; 5) determined that the client had no objection to publication; 6) provided a copy of the final draft of this article to and discussed it with the lawyers who represent the other clients (we have disclosed no information about these latter clients that reasonably could be deemed to be confidential); 7) determined that these lawyers had no objection to publication; and 8) asked the Committee, which includes faculty members who are familiar with human experimentation guidelines, including the guidelines of the University of Maryland, to apply to this article the principles underlying those guidelines, and to tell us whether it believes this article is consistent with them (it has done so, providing a positive answer to our question). In the last respect, *see Tarr supra*.

¹¹⁵ Millemann has taught many clinical courses (including an appellate clinic) and practiced in the Clinic Law Program (as well as outside of it) for many years. He also has taught a number of LRW courses in various forms, e.g., "legal method" and "LAWR" courses. Schwinn has taught many LRW courses in many different forms, often integrating his former full-time practice and recent pro bono work into those courses. He also teaches a first-year Legal Theory and Practice course. *See supra* note 19.

ultimate responsibility for the Anthony case. Many of the best moments in the course occurred when we were both present and involved in the classroom and in our work-group meetings.

We often had differing perspectives, for example, on how to build a case. We had differing styles as well. Although we both regularly used some form of a dialectic process, Millemann tended to be more directive and Schwinn more open-ended. Together, our two perspectives and styles offered students a range of options they could use to make their own decisions.

9. Coordinating the LAWR III Course with the Post-Conviction Clinic

The clinical students had primary responsibility for interviewing Anthony, maintaining the relationship with him, developing the facts in the case, and drafting the pleadings. The LAWR III students did legal research on and wrote about a number of the issues.¹¹⁶ Both sets of students worked simultaneously on the case and in cooperation with one another. As noted previously, the clinical students were the investigators for both the client and the LAWR III students, and one clinic student was assigned to each of the LAWR workgroups.¹¹⁷

10. Inviting Student Evaluation of the Course

We devoted one class session to student evaluation of the course, including the use of the Anthony case.¹¹⁸ We have prepared a transcript of this discussion from which we quote liberally in Part IV (A).

B. Legal Analysis, Writing and Research II/Legal Theory and Practice

¹¹⁶ There was some duplication of effort. Although this would have been a problem in a private practice setting, it was not in an educational setting. Indeed, it often gave us an additional check on the thoroughness of the students' research.

¹¹⁷ In retrospect, we should have reserved some places in the clinical course for students who wanted and were qualified to be teaching assistants in the LAWR III course. Ideally, these students would have been advanced (second-time) clinical students who previously had been teaching assistants. This would have enabled us to tie the two courses more closely together and to get some additional help in teaching the course.

¹¹⁸ Millemann skipped this class. As the faculty member most identifiable as Anthony's lawyer, we wanted to encourage students to give their frank and critical assessments of this experimental component of the course.

Our second experimental course was LAWR II, which first year students take in their second semester. The standard course description reads:

LAWR II continues the students' instruction in analysis, writing and research by introducing students to a [civil] case at the trial level. Working on a *well developed case file*, students learn to work with facts, to develop a theory of the case, and to use their research and writing skills to develop and advance that theory. Over the course of the semester, students write several different documents to a court, such as a motion to dismiss, a motion for summary judgment, or a trial brief.¹¹⁹

We added a three-credit “Legal Theory and Practice” (“LTP”) component¹²⁰ to the two-credit LAWR II course, for a total of five credits. We substituted actual cases for the “well developed case file” in the standard LAWR II course, and expanded the course to include an experiential component.¹²¹

The usual focus of the LAWR II course is on the pretrial process in civil cases and the research and writing related to it. By adding actual legal work to the course, particularly police brutality cases and a civil right-to-counsel reform project, we added civil rights and access-to-justice issues to the course.

This LAWR II/LTP course was different from our LAWR III course in important respects.

1. The Students

¹¹⁹ This description came from the then-existing Course Catalogue of University of Maryland School of Law (emphasis added).

¹²⁰ See *supra* note 19.

¹²¹ The students also simultaneously took a separately taught one-credit research course. See *supra* note 19.

We had fifteen students in the course, all of whom selected it as their second-semester elective.¹²² Although this was half the number of students in our LAWR III course, the LAWR II course was for more than twice the credits and we were supervising first-year students.

2. Selecting the Legal Work

We generated the actual legal work for the course from outside the law school. Neither of us was counsel in the cases. Rather, the clients were represented by outside lawyers. A small, private law firm represented the plaintiffs in the police brutality cases, and a public interest organization was representing one client in the right-to-counsel case and preparing to represent additional clients. The private law firm and public interest organization, as well as their clients and cases, were part of the teaching material in the course

We chose to teach with a small private law firm for several reasons. Many of our law school graduates eventually practice in small private firms. These firms provide the bulk of legal services to individuals, including the “working poor” and people of modest means. Many students would like to find ways to integrate public interest and private practices, i.e., to make a living representing people and communities that need legal assistance. The firm we picked was a good model of this integration.

Moreover, we wanted to debunk two common stereotypes. One sharply contrasts public interest practice with for-profit private practice. It sends the message that public interest work should be governmentally-funded or reserved for saints, and that private practitioners cannot substantially contribute to the public interest.

The second stereotype contrasts professionalism, which is good, with commercialism, which is not. However, most lawyers are in the private practice of law and have to make a living.

¹²² All second-semester students are required to take LAWR II, but because we added the three-credit LTP component to it, the course became an elective course. *See supra* note 20.

If professionalism is not consistent with responsible commercialism, professionalism cannot exist at all.¹²³

By introducing first-year students to a private practice that represents the victims of police brutality, most of whom are poor and people of color, we hoped to give the students a basis to question the private practice stereotypes, and to begin to explore ways in which, upon graduation, they can maintain their idealism in various forms of private as well as public practices.

The public interest organization provided the students with a different practice model. It was formed in 1985 to bring reform litigation through teams of volunteer lawyers and staff counsel. When Congress enacted draconian restrictions on federal funding for civil legal services,¹²⁴ this organization's independence (it does not seek or accept Legal Services Corporation funds) became even more important. Over the years, it has diversified its advocacy and become one of the leading "unrestricted" law reform organizations in the region.

Together, the private law firm and public interest organization, and their clients and projects, provided a rich context for teaching LRW skills and analyzing access-to-justice, delivery of legal services, professional responsibility, and other related issues.

3. Organizing, Teaching, and Supervising the Law Students

¹²³ Indeed, challenges to professionalism often arise not just from over-commercialism, but from incompetent commercialism—bad management that leads lawyers to handle client problems late or inefficiently and to communicate poorly, with the result that the lawyer has no time for the other functions of a good professional. *See generally* MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* (1994). In this book, Kelly demonstrates, through extended case studies of different forms of law practice, the direct link between competent business management and professionalism.

¹²⁴ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1321-53. *See* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 to be unconstitutional). For a more in depth analysis of these funding restrictions and the potential ethical issues they raise, see Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 *FORDHAM L. REV.* 2187 (1999).

We worked closely with two lawyers from the private law firm and several from the public interest organization.¹²⁵

The private lawyers provided case files to us, taught a class on litigating police brutality cases, and answered questions that the students had during the course of the semester. They obtained client approval for the students' work, and helped us to devise the assignments.

The assignments in the right-to-counsel project challenged the students to address procedural and substantive issues Maryland's courts have not resolved.¹²⁶ The students' work supported the organization's continuing representation of its right-to-counsel client, Frase, and possible future litigation on behalf of a new client or clients.

We designed the course around these two sets of cases.¹²⁷ We divided the students into groups of two to three to work on the police cases and met with each group weekly. By the end of the semester, the students had conducted client and witness interviews and drafted basic

¹²⁵ The private lawyers provided case files to us, taught a class on litigating police brutality cases, and answered questions that the students had during the course of the semester. They obtained client approval for the students' work, and helped us to make the assignments. The public interest organization's volunteer lawyer was a former United States Attorney and State Attorney General, who taught a class on the test case, *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003), which spawned the class project.

¹²⁶ In *Frase*, the public interest organization argued in Maryland's highest court that indigent parents faced with loss of custody of children have a state constitutional right to court-appointed counsel. *Id.* at 126-30. They traced this right, in part, to the law of England, including a 1494 statute that authorized courts to appoint counsel to represent indigent litigants. *Id.* at 126. This law, they argued, has been made part of Maryland's law through a state constitutional "incorporation" provision that most of the early states have in their constitutions. *Id.* at 126-67. They incorporate those provisions of English law effective in 1776 that the state has not repealed or effectively nullified. *Id.* See also Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 32-48 (1990) (describing incorporation into Maryland law of English statute providing for appointment of counsel in civil cases). The public interest lawyers also based Frase's claim on two provisions of Maryland's Declaration of Rights. *Frase*, 840 A.2d at 127. The Maryland Court of Appeals, in a 4-3 decision, failed to reach the merits of the argument. *Id.* at 126. Three judges (including the Chief Judge) concurred in the result and dissented from the failure of the majority to decide the right-to-counsel question. They would have reached the issue and resolved it in favor of the right to counsel. *Id.* at 131-39 (Cathell, J., Bell, C.J., & Eldridge, J., concurring).

¹²⁷ We taught classes on LRW skills, fact investigation (including interviewing), pleadings (the students were drafting complaints, discovery requests, and motions in their police brutality cases), sovereign immunity (a common defense in the police cases), research and writing, the procedural and substantive issues related to the civil right-to-counsel case and, professional responsibility and access-to-justice issues, among other topics.

pleadings, including a complaint, interrogatories, and requests for documents.¹²⁸ We reviewed all of the written work, as well as the development and implementation of case plans. Students did several drafts of most written work.¹²⁹

Each student wrote his or her own memorandum on the right-to-counsel issues, although we worked collaboratively with the students, and they with one another, to develop possible legal theories. As in the Anthony case, the assignments in the right-to-counsel project were relatively open-ended. The students were presented a real problem that had no clear answer and no direct precedent.

4. Insuring Client Confidentiality

Although we were not counsel in these matters, we were working under the direction of and with counsel in the cases, and thus our work was included within the scope of their work-product privileges and their clients' client-attorney privileges.¹³⁰ Because the LAWR II students also were LTP students, they had offices in our clinical space. Like the LAWR III students, these students also "posted" their work on a secure computer system, and discussed it outside the classroom only in private settings and only with other students in the course.¹³¹

IV. OUR ASSESSMENT OF USING ACTUAL LEGAL WORK TO TEACH LEGAL RESEARCH AND WRITING COURSES

¹²⁸ In preparation for the interviews, we taught a segment on interviewing that included mock interviews. We scheduled the initial interviews in the law school and one of us was present for them. After that, students interviewed witnesses and clients in their neighborhoods, but in teams (at least two students). Because these were first-year students, we held the supervisory reins a little tighter than usual. The students, however, performed as well as second- and third-year students, which has been our experience in other LTP courses. *See supra* note 19.

¹²⁹ The cumulative student product in each of the police cases was a "case file" that included all of the student's work on the case during the semester. Before we turned the files over to the law firm, we did our own "quality control" reviews of them.

¹³⁰ *See infra* Part IV(B)(2).

¹³¹ As with the LAWR III course, we devoted one class to student evaluation of the course, including the use of actual legal work to teach it. We have prepared a transcript of this discussion from which we quote liberally in Part IV(A).

Based on our two LAWR course experiments, we believe there are many good reasons to teach LRW courses with actual legal work. We begin with the benefits, and then consider the challenges. In introduction, we note that these were two of the most interesting and successful courses that we have taught in over forty years combined of law school teaching.¹³²

A. *Benefits of Teaching LRW Courses with Actual Legal Work*

1. *Teaching Core Skills*

Actual legal work can enrich the teaching of basic skills-- legal research, analysis, synthesis, and writing--in at least two ways. First, it can motivate students to learn, and thus enhance learning generally. Second, it can help students to explore in depth some dimensions of these skills that students normally do not encounter in canned problems.

a. *Enhanced Motivation*

Working on real cases may motivate students for a combination of reasons. It may be the sense of responsibility for another person and the self-fulfillment that comes from helping another; the teacher's confidence, and the student's reciprocal discovery, that she can handle the responsibility; the sense of injustice in some cases; or simply that the real case is interesting and challenging.¹³³

¹³² In both courses, the student evaluations were excellent. They were stronger than our evaluations in LAWR courses that we had taught without using actual legal work and comparable to our best evaluations in non-LRW courses. We note that evaluations in LRW courses tend to be lower than in other courses. Melissa Marlow-Shafer, *Student Evaluation of Teacher Performance and the "Legal Writing Pathology: Diagnosis Confirmed"*, 5 N.Y. CITY L. REV. 115, 127 (2002) (describing survey data that indicate students generally give lower evaluations to LRW courses and teachers than to other courses and teachers).

¹³³ Peter Hoffman describes many of the sources of real-case motivation: "The assumption of responsibility for another's welfare, the novelty of the situation, the scrutiny of the teacher, clients, judges, and lawyers, and the perception that the student's success in the clinic directly reflects on future professional success all contribute to what [Gary] Bellow labeled a 'need to know.' This intense need results in a high degree of effort by the students which, in turn, may translate into a correspondingly high level of learning." Peter Toll Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L.J. 277, 287. See also George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162 (1974). Grossman says: "The value of using live cases is seen to lie in the increase in interest and motivation which it provides for students and in the increase in student social awareness which should result from exposure, perhaps for the first time in some students' lives, to social problems [Actual cases] can also help greatly in allowing students insights into their own personalities and

In the two courses we taught, the students identified most of these as sources of motivation. One LAWR III student said: “I think it’s much more rewarding having a real client,” referring to Anthony. He added: “I find myself compelled by his situation, and I have responded, I think, significantly more to the work and the research and everything that’s involved with this class than I would with a canned case.” By comparison, in this student’s view, the canned problems in prior LAWR courses were “exercises quite frankly in tedium and boredom” in which it was “just a matter of doing it by rote” and getting it “done [so] you can move on.”¹³⁴

Another LAWR III student said: “I felt personally challenged to do the very best that I could here and I like that.” He emphasized: “It’s real. We know that this guy is actually sitting in prison and we’re doing research . . . to help him get out. [He] got hosed 35 years ago and he shouldn’t be sitting there.” Referring, by comparison, to the parties in a canned problem in a prior LAWR course, the student said: “Mary Jo and Wally are fictional, and I really couldn’t care less about their issue or whether Mary Jo wins her case against Wally and he can’t use her tapes. I mean, it’s an interesting argument . . . [b]ut, this is for real . . . [I]t’s something that we can see ourselves doing years down the line in real practice.”¹³⁵

A third LAWR III student added: The fact this was a real case was “part of the incentive to do more work whatever the nature of the research was.”¹³⁶

Indeed, the impact of the Anthony case, combined with the addition of the weekly workgroup meetings, produced the valid criticism that the students were working substantially in excess of the two-credit allocation for the LAWR III course. One student’s comment was representative: “[T]his has been a great class. I just think that comparatively it certainly should

motivations and into the art of human relations.” *Id.* at 185 (footnotes omitted). He adds: “It may simply be impossible to recreate in a simulated setting the emotional and ethical elements of law practice.” *Id.*

¹³⁴ LAWR III student comments made as part of course evaluation.

¹³⁵ LAWR III student comments made as part of course evaluation.

¹³⁶ LAWR III student comments made as part of course evaluation.

be a three-credit class, because I think people are worthy of our help. I think we get a lot from it. I think we're doing a good thing."¹³⁷

The LAWR II students also reacted positively to their work on the police brutality cases and civil right-to-counsel project. One noted that the course helped the students to understand what lawyers experience "when they are involved in a case." "[I was] living, and breathing and sleeping" the case work."¹³⁸

Another LAWR II student said: "[T]his class helped me to . . . refocus and reevaluate reasons why I decided to come here." He predicted that he "probably will wind up in public interest [T]hat's what pushes me in this class and helps me to remember that . . . this is hard and this is a lot of work and I just want to go to sleep at night, but you know, it keeps you focused, at least for me, on a different level."¹³⁹

The students' positive reactions are particularly interesting given that the students did not have attorney-client relationships with the clients and that we did not do a particularly good job in teaching with the clients and their stories, e.g., by bringing them into the classroom (when we could have), either in person or by videotape, or by having them address the students in writings or through audiotapes. We examine the students' responses in the context of the three sets of relationships the LAWR students had with the people whom they were helping.

i. Anthony: LAWR III

The LAWR III students did not represent Anthony, and did not meet him during the semester.¹⁴⁰ Still, Anthony had a virtual presence in the LRW classes and workgroup meetings.

¹³⁷ LAWR III student comments made as part of course evaluation. See *infra* Part IV(B) for our reaction to this criticism.

¹³⁸ LAWR II student comments made as part of course evaluation.

¹³⁹ LAWR II student comments made as part of course evaluation.

¹⁴⁰ The Clinical Law Program, operating through Millemann, two other clinical teachers, and three clinic students, represented Anthony.

Millemann regularly provided the students with information about Anthony, and a profile of him emerged from the record. The students' sense of responsibility for Anthony, and their reactions to the injustice in his case, animated their work during the course.¹⁴¹

ii. The Clients in the Police Brutality Cases: LAWR II

The private law firm represented these plaintiffs, but the LAWR II students met with and interviewed the clients. These personal interactions strongly motivated the students, and encouraged some to challenge common stereotypes about people whom police arrest. Many of the students came to think of these plaintiffs as *their* clients. A LAWR II student said: “[O]ne thing that I really enjoyed about the class was the chance to help [people].” From this, the student got “a sense of the kind of legal problems that people have [and] the reasons why.” During the course, the student saw “the change in my views and the views of my classmates about why certain people have certain problems and how these things come about”¹⁴²

Another LAWR II student said: “I’m never going to forget the name of my first client and I think that’s something that you don’t realize until after it happens. But, I’m so aware of what I’ve been doing and the impact this person has had on me” Speaking of this relationship, the student said: “that’s something that is going to stay forever with me. It’s really special.”¹⁴³

iii. The Client and Potential Clients in the Civil Right-to-Counsel Project: LAWR II

Ms. Frase, an indigent mother, had represented herself at the custody hearing.¹⁴⁴ With the representation of the public interest organization, she prevailed on appeal but without a decision

¹⁴¹ After the LAWR III course, two of the LAWR III students enrolled in the post-conviction clinic to continue to work on Anthony’s case, and several other LAWR III students volunteered to work on his case without enrolling in the clinic. Most of the other LAWR III students expressed continuing interest in Anthony’s case after the course ended.

¹⁴² LAWR II student comments made as part of course evaluation.

¹⁴³ LAWR II student comments made as part of course evaluation.

¹⁴⁴ See *supra* notes 125-26.

on the civil right-to-counsel claim.¹⁴⁵ The organization anticipates making a similar claim in a future case. The organization's volunteer counsel in the case introduced and personalized the existing client in his presentation to the class, explaining why he felt compelled to represent her, and she became an effective representative of potential future clients as well.

The students' enhanced motivation was manifested in several ways.

Almost all of the students participated in the classroom discussions and all participated in the workgroup meetings. The quality of the discussions was very high in both settings. In a process that clinical teachers witness regularly, the discussions spilled over into informal (but confidential) conversations in person, on the phone, and through emails. This is one of the best and most exciting forms of professional engagement. It produces high quality representation and strong collegial relationships. It can be exhilarating, challenging, draining, and fun, and it was all of these things in our two courses.

There also was an absence of student cynicism in the two LAWR courses. This stands in sharp contrast to courses taught with canned problems, which regularly produce a fair number of cynical comments.

In comparison to students' average work product in our more traditional LRW courses, the students' average work product in these two experimental courses was stronger in several, but not all, respects. The legal research was more comprehensive. The theories of the case and resulting arguments were more persuasive and nuanced. The factual statements and components of arguments were substantially better. Therefore, overall, the final briefs and oral arguments were better than in our more traditional LRW courses. Based on our observations and the comments of the students, we attribute these improvements to the students' heightened

¹⁴⁵ *Id.*

motivation and the indeterminacy of the issues and facts (which required more creativity and greater investment by the students).

On the other hand, the quality of writing--to the extent that we can separate quality of writing from strength of analysis--was not obviously better. That is, we did not observe an obvious improvement in skills related to style, tone, and fundamental organization.

It was not only the actual legal work, but also a common student understanding about canned problems that helps to explain some of the better student performances in our courses.

One LAWR III student described the difference in this way:

[W]hen you have a real . . . case you don't have the guarantee that there are some cases on each side. It's not like you're going to just [take] the requisite amount of time and find the golden ring, because it might not, in fact, be there. And, even if you find it you still have to keep looking because there might be more things. And, I understand though, that certainly plays out in a regular [LRW] class but I don't think it plays out anywhere near to the extent that it did in this class. [There were] some of the foundation cases [that] were easy. But once you got past those, it was a wide-open world and that was, I thought, a little bit more challenging.¹⁴⁶

Another LAWR III student said: "it's my understanding of the canned cases that they are built around certain court cases, and there's ten cases on the one side and ten on the other, and once . . . you've found those ten everything's good. Whereas, [in this course], you didn't know what was out there. You could push a little bit further beyond the cases." The student added that "[you did a] legislative history" when necessary and "[you did] all the research that you could possibly do versus just . . . finding those ten cases, and you're done."¹⁴⁷

Unlike traditional LRW professors, when we began our LAWR courses, we did not know the right "answers" to many of the questions in the real cases. We thought we did in some instances, and we had informed judgments in others. But, we had not retrospectively created the

¹⁴⁶ LAWR III student comments made as part of course evaluation. See related discussion *supra* Part II(C)(2) and (3).

¹⁴⁷ LAWR III student comments made as part of course evaluation.

paths as we would have with a canned problem, and thereby predetermined the students' "answers."¹⁴⁸ Rather, the students developed many of these "answers"—in the forms of theories, arguments, authorities, and facts—through a dialectical process as *we went through* the semesters.

b. Learning Different Dimensions of Core LRW Skills

The two LAWR courses introduced students to some dimensions of skills that students do not normally learn from canned problems.

i. Constructing Factual Accounts

One set of skills relates to facts. We use the LAWR III course as an example because it is most similar in structure to standard LRW courses.

The primary information in the Anthony case came from documents. Obtaining the basic story in a case from documents requires a disciplined form of investigation. One must piece together meaning from often ambiguous words, the chronology of events, the characteristics, relationships, motives, and histories of the actors, and seemingly incidental marks and notations, as well as other parts of the overall context. It is an exercise in detection, translation and interpretation.

In Anthony's case, students had to be discriminating readers. All of the documents were not relevant to any one student's single issue. Conversely, there were informational gaps in the records. The students had to identify what they knew, what they needed to know, and how they could obtain what they needed.¹⁴⁹

¹⁴⁸ See related discussion *supra* Part II(C)(2) and (3).

¹⁴⁹ They could do this by re-reading the documents to see if they had missed something, by determining whether a different interpretation of existing information was feasible, by asking the post-conviction students for information (*see supra* Part III(A)(2)(b)), and by proposing "stipulations" (adding limited hypothetical features to the actual case). *See supra* Part III(A)(6).

Through this process, the students learned they could exercise some control over the issues and arguments.

Learning to organize facts, including those obtained from documents, required the students to develop another set of skills. The students used practice-based structures for doing this, including chronologies, “elements” and “theory-of-the case” analysis, and story-telling.

Finally, the students had to construct their factual accounts in ways that would appeal to a real, not hypothetical, decision-maker. In talking about the “transcendent importance of the facts of cases,”¹⁵⁰ Jerome Frank observed that the “actual facts . . . do not walk into the courtroom.”¹⁵¹ They are produced by “the fallible subjective reactions of the trial judge or jury to the fallible reactions of the witness.”¹⁵² Using a real-world problem required our students to write with real decision-makers in mind.

In sum, working with a real case helped our students to begin to develop fact-based skills in ways that canned problems containing stipulated facts could not have.¹⁵³ This method of teaching also responds to criticisms of appellate advocacy courses that we believe have merit.¹⁵⁴

¹⁵⁰ Frank, *supra* note 39, at 1306.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1307. Frank stressed that “legal rules are never self-operative,” but rather they “are always at the mercy of those [fallible factual] findings, and often of that subjectivity.” *Id.* Part of that “subjectivity,” according to Frank, is created by the “preconceptions,” “habits” of mind (“pre-judgments”), individual “interests”, unique “points of view”, and personal “preferences” that judges, like all other human beings, have. *Id.* at 1308-09.

¹⁵³ This is particularly important given how rare it is in a classroom course that a student is “required to do his own inquiry, to structure his own investigation, to sort and select the initial set of factual descriptions with which legal analysis begins.” Gary Bellow & Earl Johnson, *Reflections on the University of Southern California Clinical Semester*, 44 S. CAL. L. REV. 664, 691 (1971). The classroom experience “seems to diminish the student’s interest in factual inquiry itself and to create an extremely static perception of the world.” *Id.* For the importance of teaching about facts, see, for example, Anthony G. Amsterdam, *Clinical Legal Education – A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 614-15 (1984).

¹⁵⁴ In 1985, the Appellate Judges’ Conference of the ABA criticized law schools for their failure to adequately teach appellate advocacy, in large part because the mock cases lack real factual records. *Appellate Litigation Skills Training: The Role of the Law Schools—Report and Recommendations of the Committee on Appellate Skills Training, Appellate Judges’ Conference, Judicial Administration Division, Am. Bar Ass’n*, 54 U. CIN. L. REV. 129 (1985). Two of the three Conference criticisms dealt with the absence of real factual records. The Conference said: “[B]ecause [law school appellate advocacy courses] lack a realistic appeal record they do not aid in the development of the skill that is unique to appellate litigation: building a case out of a record. . . . [A]s a result . . . , the issues argued in these programs are usually abstract legal questions without factual content upon which most appeals are

ii. *Dealing with Indeterminate Legal Issues*

The Anthony case in LAWR III and the civil right-to-counsel project in LAWR II presented a variety of indeterminate and contingent legal issues. Our students had to determine the relationships among issues and to construct legal arguments by proposing and justifying legal rules or components of them. This was both difficult and creative. It also is an essential part of a student's education.

Professors Jay Feinman and Marc Feldman argue that “[i]ndeterminacy and contingency are the essence of our theory of law. For practicing lawyers, and for students who would become practitioners, the message is one of freedom and its limits.”¹⁵⁵

[I]magine a continuum of certainty on which we locate all legal events—jury verdicts, judicial decisions, planned transactions, legal advice, and so forth. At one end of the continuum lie those events the outcome of which is highly predictable (though never certain). For these events, the controlling doctrine is well established, systematic or structural bias is pronounced, and social convention is clear. As we move away from that pole of the continuum, the indeterminacy of doctrine and the contingency of experience become more pronounced.¹⁵⁶

They contend that “[t]he function of legal education is to enable students to situate themselves on the continuum and to take advantage of the opportunities presented by indeterminacy and contingency.”¹⁵⁷ To do so, will call upon “the intelligence, the energy, the preparation, the skill, [and] the imagination” of a good lawyer.¹⁵⁸

decided.” *Id.* at 142. The Conference said: “The use of feigned cases for moot court instead of actual records makes a bad matter worse.” *Id.* at 129. It recommended that appellate advocacy and moot court programs be restructured. “Central to this restructuring is the use of an appeal record from a real case. Hypothetical cases based on feigned records should not be used.” *Id.* at 154.

¹⁵⁵ Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 *GEO. L.J.* 875, 888-89 (1985). See also Evan Caminker, *A Glimpse Behind and Beyond* Grutter, 48 *ST. LOUIS U. L.J.* 889, 889 (2004) (“In fact, as litigators well know, precedential cases are created; they are not handed down or found somewhere.”).

¹⁵⁶ Feinman & Feldman, *supra* note 155, at 889.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* Maureen E. Laflin argues that appellate advocacy clinics challenge students to deal with open-ended issues. Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 *GONZ. L. REV.* 1 (1997). She says that unlike simulation courses, “[I]ive client appellate clinics . . . typically provide cases with ill-defined substantive boundaries and chaotic procedural

One of our LAWR II students observed: It was a “struggle” to “sit[] down in front of a computer, in front of Lexis and WestLaw, and . . . try[] to come up with an answer that didn’t exist. And there’s so much out there.” “[We had] this big problem”, and “[we had] to make this choice about what we thought was the right answer and then go[] out and find[] cases that would back up our ideas.”¹⁵⁹

Another said: “[I]t’s . . . nice to think on our own again.” It was important that there was “no right answer”, and that students were invited to come up with different answers. This student compared this course to the first research and writing course in which, in this student’s view, the students were trying to find the single, right answer that the teacher had pre-selected.¹⁶⁰

A LAWR III student, who defended canned problems, said: “I think [this course] is . . . the next logical step in progression in legal writing and research and in terms of our own education. . . . [I]t’s easy to . . . bash the canned [case], but for LAWR II, the canned [case] is essential. In LAWR I we’re given everything. Spoon fed cases and the universe is closed. LAWR II begins with the closed universe, and expands [it]. . . . [N]ow, you’re completely opening up the universe.”¹⁶¹ This student envisions a LRW course taught with actual legal work as the final, open-ended step in teaching legal research, analysis, and writing.

2. *Achieving Other Teaching Goals*

a. *Introducing Students to Client-Centered Problem-Solving*

backgrounds. No author of a simulated problem can develop a scenario that matches the factual and procedural detail present in a real case.” *Id.* at 23.

[Such a clinic] also gives many students their first encounter with legal issues for which there are no clear answers. The lack of answers can be frustrating. Sometimes appellate students find it to be nearly debilitating if there are no cases directly on point. Yet seldom are real-life appellate cases so easily resolved. Appellate students must be good artisans. They must combine the facts in their case with relevant case law, molding them together into their own story, their theory of the case.

Id. at 28 (footnotes omitted).

¹⁵⁹ LAWR II student comments made as part of course evaluation.

¹⁶⁰ LAWR II student comments made as part of course evaluation.

¹⁶¹ LAWR III student comments made as part of course evaluation.

The fact there were actual clients in both LAWR courses motivated the students to seek solutions for their problems, even if it meant revising the assigned issues and seeking to develop new facts. As a result, the classes often evolved into problem-solving exercises but without changing the basic nature of the research and writing assignments. These were client-driven discussions. One LAWR III student described the process this way: “[You] research [an argument] and kind of hit a dead end . . . , and move[] on to something that’s maybe more of a winner to try and find a way to get this guy out.”¹⁶² The real-world complexities of actual clients present some options, and foreclose others in ways that cannot credibly be embodied in canned problems.¹⁶³

Two other features of the courses supported this problem solving approach. The issue assignments were flexible and the course structure was collaborative.¹⁶⁴

We believe that LRW courses are logical places to teach problem-solving.¹⁶⁵ However, the assignments must be flexible enough to allow students discretion to identify alternative ways to approach a problem and to make decisions based on that discretion. It is illogical to assume “that the dynamics of problem-solving and decision-making can be adequately taught without

¹⁶² LAWR III student comments made as part of course evaluation.

¹⁶³ In Anthony’s case, for example, we made case decisions—ultimately to seek clemency, rather than to file pleadings—that probably would not have been on the table with a canned problem. The post-conviction clinic students took the lead in the clemency effort, but we used much of the LAWR III student work in the clemency papers. Litigation still remains an option, however, to clear Mr. Anthony’s name and to seek to terminate release conditions that limit Mr. Anthony’s freedom today.

¹⁶⁴ As described in Parts III(A), (B) *supra*, in both LAWR courses, the students worked in teams. In LAWR III, they met in larger workgroups (comprised of several teams of co-counsel, including opposing teams) as well. *See supra* Part III(A)(5). These are common organizational structures for clinical courses.

¹⁶⁵ *See* Matthew C. Cordon, *Beyond Mere Competency: Advanced Legal Research in a Practice-Oriented Curriculum*, 55 BAYLOR L. REV. 1, 5 (2003). Professor Cordon notes the parallel between problem-solving and legal research:

The description of the process of researching legal issues parallels the treatment of problem solving . . . as a process consisting of: diagnosis of the problem; identification of the range of possible solutions; development of a plan of action; and implementation of the plan. This parallelism is appropriate because legal research is in essence a process of problem solving. *Id.* (quoting the MACCRATE REPORT, *supra* note 29, at 163). *See also* Myron Moskowitz, *Beyond the Case Method: It’s Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 249-51 (1992); Seligmann, *supra* note 33, at 189.

ever asking the student to engage in the process himself.”¹⁶⁶ If we ask students to engage in the process, we must be prepared to respect their decisions if they are reasonable, even if this requires us to make mid-course adjustments in the assignments.

b. Teaching About Professional Responsibility Issues, Especially Those Related to Access to Justice and Pro Bono

Some argue that by carefully selecting writing assignments, LRW teachers can help make students more “sensitive to the perspectives of people who are not like themselves;”¹⁶⁷ begin a process of “real social reform;”¹⁶⁸ help students “associate an awareness of ethics with use of [LRW] skills;”¹⁶⁹ and help students appreciate “their responsibility to perform *pro bono* legal work throughout their careers.”¹⁷⁰ A number of commentators have emphasized the importance of dealing with professional responsibility issues in LRW courses.¹⁷¹

We believe, however, that to effectively teach professional responsibility, and to accomplish most of the other laudable teaching objectives, the LRW assignments should be based on actual legal work. Many have identified ways in which clinical courses teach legal ethics, professional responsibility, and moral judgment.¹⁷² We think these arguments apply,

¹⁶⁶ Bellow & Johnson, *supra* note 153, at 690-91.

¹⁶⁷ Susan P. Liemer, *Many Birds, One Stone: Teaching the Law You Love, in Legal Writing Class*, 53 J. LEGAL EDUC. 284, 286 (2003).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 287.

¹⁷⁰ *Id.*

¹⁷¹ See, e.g., Brook K. Baker, *Traditional Issues of Professional Responsibility and a Transformative Ethic of Client Empowerment for Legal Discourse*, 34 NEW ENG. L. REV. 809, 810 (2000) (arguing that legal writing classes should be used for teaching “traditional” values of professional responsibility, as well as to address “more transformative issues” of professional responsibility—such as client empowerment and social justice); Margaret Z. Johns, *Teaching Professional Responsibility and Professionalism in Legal Writing*, 40 J. LEGAL EDUC. 501, 507-08 (1990); Maurer & Mischler, *supra* note 38, at 101-02; Michael E. Wolfson, *Professional Responsibility as a Lawyering Skill*, 58 LAW & CONTEMP. PROBS. 297, 299-301 (1995) (describing a course that was designed to combine lawyering skills and professional responsibility issues). Cf. James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 100-06 (1996) (tracing history of experiential legal education and noting how it can be used to teach professional responsibility).

¹⁷² See, e.g., Steven Hartwell, *Moral Growth or Moral Angst?: A Clinical Approach*, 11 CLINICAL L. REV. 115, 140-41 (2004); Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 CLINICAL L. REV. 401, 406 (1994); Laflin, *supra* note 158, at 48-50; David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 58-64 (1995); Joan L. O’Sullivan, Susan P. Leviton,

albeit in more limited ways, to LRW courses in which students have some responsibility for a client's matter, whether or not the students are representing the client themselves. The problems of actual clients generate professional responsibility issues and experiences that cannot be credibly mimicked in a hypothetical. Our students had to *act* responsibly, as well as to consider how they should act, in a variety of situations that raised professional responsibility issues.

In our two courses, we focused on access-to-justice and pro bono issues.¹⁷³ As Ann Shalleck points out, these issues arise naturally in teaching with real clients who are members of generally unrepresented groups:

First, students in the educational program can analyze who has access to the legal world, under what conditions, and why access is distributed in particular ways. Second, they can discuss the effects on legal institutions and legal concepts when groups of people have limited or no access to legal resources. . . . Third, students can investigate the meaning that the denial of access to the legal system can have in the clients' worlds. . . . Fourth, the students can explore what it means to be a lawyer for people who would otherwise be denied access to the legal system.¹⁷⁴

The access issues were pervasive in our two courses.

Mr. Anthony had been convicted and sentenced to life because his lawyer had provided constitutionally ineffective assistance to him at trial and on appeal. In LAWR III, his case

Deborah J. Weimer, Stanley S. Herr, Douglas L. Colbert, Jerome E. Deise, Andrew P. Reese & Michael A. Millemann, *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109, 110 (1996); Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 AM. U. L. REV. 859, 874-81 (1996); Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175, 184-85 (1996); Robert A. Solomon, *Teaching Morality*, 40 CLEV. ST. L. REV. 507, 508-10 (1992).

¹⁷³ In 1948, Erwin N. Griswold, Dean of Harvard Law School, criticized legal education for its failure to introduce students to "the opportunity and responsibility of the lawyer for service to the public." Erwin N. Griswold, *Report of the National Law Student Conference on Legal Education: Foreword*, 1 J. LEGAL EDUC. 64, 67 (1948). He focused on the need to provide the majority of people with more effective access to our justice systems. "For the most part legal service is a luxury, available in any real sense to only a small portion of the public." *Id.* That observation describes today's legal services delivery system as well. *See supra* note 3.

¹⁷⁴ Shalleck, *supra* note 7, at 1740-41. Shalleck criticizes the absence of real clients in most of legal education. She shows how professors ignore or dehumanize clients in the standard classroom recitations of the facts of cases and construction of legal arguments. *Id.* at 1733-37. Where clients exist, they are "cardboard clients." *Id.* at 1732. This excludes "the very people whose lives and work, whose problems and desires, bring them into contact with the legal system." *Id.* She argues that "the classroom treatment of legal ethics replicates and reinforces the construction of the client carried out in the rest of legal education." *Id.*

provided a basis to critique the legal services delivery system in criminal cases, from trial through the post-conviction process.

The ability of the plaintiffs in the police brutality cases to obtain counsel depended not so much on the egregiousness of the police conduct, but rather on whether the case was likely to generate a contingent fee, i.e., whether the plaintiffs could prove their claims and had sustained substantial injuries.

The civil right-to-counsel project revealed the large numbers of people who lose important rights, including custody of their children, without legal representation.

Speaking of the access-to-justice issue, one LAWR II student said: “I could have gone through school for three years and never ever touched it, and I could just practice my whole life and never even have to approach the subject. [The course] forced us to think about it. . . .”¹⁷⁵

Both courses presented pro bono issues in theory and practice.¹⁷⁶ In LAWR II, one of the chief lawyers in the civil right-to-counsel project was a distinguished lawyer working on a pro bono basis. In LAWR III, the students and we were engaged in academic versions of pro bono representation. The LAWR III students were working substantially in excess of the two credits allocated to the course,¹⁷⁷ and both of us were teaching this course on a “pro bono” basis. We decided to teach the course after we had negotiated our teaching loads, and we voluntarily taught it as an addition to our normal load. This gave us parity and credibility with the students.

¹⁷⁵ LAWR II student comments made as part of course evaluation.

¹⁷⁶ As Rebecca Cochran persuasively argues, by engaging LRW students in actual legal work, professors and students can help to provide substantial pro bono assistance to people and can use these experiences to analyze pro bono issues. Cochran, *supra* note 66, at 446-47.

¹⁷⁷ This was so for several reasons. The record in the case was substantial. The students not only attended weekly classes, they also worked in pairs and met once a week in the issue work groups. There were ad hoc meetings between students and us, as there are in clinical courses. Most of the students did some factual research to supplement the record. Although the post-conviction clinic students were primarily responsible for this, the LAWR III students sometimes had to, or more often wanted to, do factual research as well. Students in clinics often make the same sorts of pro bono contributions to their clients and courses. One difference, however, is that we graded our LAWR III students pursuant to a grade protocol for LAWR courses, which produces a substantially lower grade average than do the comparable understandings for clinic grades. Thus, our LAWR III students did not receive some of the “compensation” for their extra work that clinic students receive.

We cannot demonstrate empirically that as a result of our courses, the students will do more pro bono work as lawyers than they otherwise would have done, but the courses have features that make it more likely students will take the pro bono ideal seriously. Based on a major study of pro bono programs in law schools and practice, Deborah Rhode concludes that “well-designed strategies by law schools,” as well as by the bar and law firms, “can increase the quality and attractiveness of pro bono service.”¹⁷⁸ She adds: “Providing direct exposure to the human costs of social problems can also prove important.”¹⁷⁹

The survey identified problems with the predominant pro bono model in law schools today. The programs are not integrated into the curriculum, which means they are not supervised or taught by law professors. Therefore, they do not appear to students to be part of the mainstream culture.¹⁸⁰ “One of the most common complaints was that the majority of faculty did not promote or ‘appreciate’ pro bono work. Nor did they emphasize lawyers’ ethical responsibility to pursue it.”¹⁸¹

Teaching LRW courses, especially in the first year, with actual legal work addresses these problems. It integrates pro bono work into courses that have become part of the core curriculum. Faculty and students work together, and with outside pro bono lawyers, to help underrepresented people. Through the mainstream culture of the school, students are given “direct exposure to the human costs of social problems”¹⁸² and responsibility for responding to them.

¹⁷⁸ Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 423 (2003).

¹⁷⁹ *Id.*

¹⁸⁰ Perhaps because of this, “only a fifth (twenty-two percent) [of the lawyers surveyed] indicated that positive law school experiences had encouraged involvement in pro bono activities.” *Id.* at 455. “A supportive culture was conveyed through a graduation requirement or the attitudes of faculty and students.” *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 423.

Rhode makes comparable recommendations, including “curricular integration of materials concerning access to justice and pro bono service in professional responsibility courses, orientation programs, and core courses,” and “pro bono contributions by faculty at levels comparable to those expected of students.”¹⁸³

c. Providing a Basis for Critical Analysis of Law and Justice Systems

One way to evaluate law and justice systems is to see how they operate in fact on real people and legal problems. This “critiquing” function is an important part of clinical courses. We believe it belongs in LRW courses as well.

In LAWR III, Anthony’s case was a window to the criminal justice system, through which we could view problems of the past and present, and use that knowledge to think about and initiate steps to improve today’s system.¹⁸⁴

In LAWR II, the police brutality cases provided insights into the first stages of the criminal justice system (the police force occurred prior to or during arrests), the relationships between police and suspected offenders, and larger law-related issues of race, class, and culture.

¹⁸³ *Id.* at 461. Rebecca Cochran agrees in substantial part. She points out that “most pro bono requirements implicitly teach students that pro bono work is to be performed not as part of the law school curriculum taught by law school faculty, but primarily outside the law school with supervising practitioners.” Cochran, *supra* note 66, at 431. She “proposes using legal research and writing programs as a well-supervised and cost-effective means of engaging students in pro bono legal work during law school.” *Id.* She offers several arguments in support of this proposal:

First, it reaches students in their first year, when student interest in pro bono service is greatest and when students are determining why they are in law school and what it means to be a lawyer.

Second, it potentially involves larger numbers of students than existing models. Third, it provides close faculty supervision of pro bono work by utilizing LRW faculty members within the law school who already develop research and writing skills through client simulations. Finally, the proposal supports local pro bono providers in need of help.

Id.

¹⁸⁴ The case posed questions about the adversarial process and the roles of lawyers and courts in it; the reasonable doubt standard, and the state’s burden of proving guilt beyond a reasonable doubt; the justifications for the state and federal post-conviction processes; the balance between finality and individual fairness in criminal cases; the availability of parole and executive clemency in criminal cases; and more broadly, the impact of race, class, and poverty on the administration of criminal justice, among many other issues.

We do not suggest that LRW teachers should overload a two-credit course with analysis of all of the related issues that actual legal work generates. Rather, the teacher should select a limited number of social justice issues; ideally, organized around a single theme. They should be those that present the best teaching moments, which some have characterized as “disorienting moments.”¹⁸⁵ David Luban describes the use of experience to challenge legal dogma as “a kind of Copernican disorientation,” comparing experience-based legal epiphanies to the discovery that our world is neither flat nor the center of the universe.¹⁸⁶ In classes like these, the realization that the dogma is false--the disorienting moment—is not the end, but rather the first step the student takes in constructing his or her own understanding of the matter. Our goals were to mediate this process and to help students identify an array of options to choose from.

3. Changing the Culture of the First Year of Legal Education

Many students come to law school with the goal of helping people. Others whose goals are not as well-formed seek careers that will have meaning beyond material success. Helping students like these understand that they can use their developing professional skills to serve others validates their best instincts and is a first step in shaping their professional self-concepts. The sooner this comes in a law student’s education, the better. The more it is delayed, the more alienated and disengaged some law students will become.¹⁸⁷

¹⁸⁵ Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and The Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 52 (1995). *See id.* at 38 (arguing that “lessons of social justice should be a core element of the law school curriculum in general and the content of clinical courses in particular,” and that teachers should consciously seek to use a student reaction to injustice—the “disorienting moment”—as a basis for this teaching). *See also* Jane Harris Aiken, *Striving to Teach “Justice, Fairness, and Morality”*, 4 CLINICAL L. REV. 1 (1997) (criticizing failure of law schools to adequately teach about justice and proposing a model for doing so); Pamela Edwards & Sheilah Vance, *Teaching Social Justice Through Legal Writing*, 7 LEGAL WRITING 63, 64-70 (2001) (describing many of the benefits of bringing social justice topics into a LRW course).

¹⁸⁶ Luban & Millemann, *supra* note 172, at 80-81. He was speaking of the discovery that the Supreme Court may revise facts to suit its needs in deciding cases. This new knowledge upset the students’ faith in the “authoritativeness of the Supreme Court,” which had been the “terra firma in their moral worlds.” *Id.*

¹⁸⁷ *See, e.g.*, Paul D. Carrington & James J. Conley, *The Alienation of Law Students*, 75 MICH. L. REV. 887, 887 (1977) (reporting on survey results which indicated that approximately one in seven law students become “alienated”—that is, “drop[] out emotionally and intellectually”); Jill Chaifetz, *The Value of Public Service: A*

Capturing what a number of students said in different ways, one LAWR II student said the course helped in “remembering why we all came to law school. It’s really hard to remember that; it seems very jaded after one semester of just sitting in a classroom. . . . I know it was a help to me to remember why I was here.”¹⁸⁸

The feelings of self-worth that helping others can produce also can be a lifeline to students whose self-confidence is undermined by the standard first-year curriculum. A LAWR II student described this, stating: “[W]hen we first looked at the [case and the extensive legal work that had been done], I just thought to myself, do they really have enough faith in us [to] think we’re going to find something that [the lawyer] hasn’t [found] in all of these papers.” The student noted that he sometimes felt, or was made to feel, “stupid” in other courses. “But here it was more like you [the professors] had faith in us. [You conveyed that] you can do this; you can solve this problem.” This investment of confidence, and the student’s work during the semester, made the student come to believe he could solve the problem.¹⁸⁹

Introducing actual legal work into LRW courses can change a second part of the law school culture: the nature of the relationship between teachers and students. When students and faculty work together on actual matters the relationship often changes from hierarchical to

Model for Instilling a Pro Bono Ethic in Law School, 45 STAN. L. REV. 1695, 1700 (1993) (“While student attitudes change most significantly during the first year of law school, studies document a steady disengagement from law school during students’ entire three-year tenure. The further into their first year students progress, the less positive their opinions about lawyer ethicality and behavior remain.”) (footnotes omitted); Lawrence S. Krieger, *Institutional Denial about the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 117 (2002) (hypothesizing that there are four paradigms of legal education which contribute to the gradual decrease of emotional and psychological well-being in most first-year students; discussing study which seems to confirm this hypothesis).

¹⁸⁸ LAWR II student comments made as part of course evaluation.

¹⁸⁹ LAWR II student comments made as part of course evaluation.

collegial. Such relationships can improve the quality of a student's education and reduce the stress of the first-year experience.¹⁹⁰

B. Challenges of Teaching LRW Courses with Actual Legal Work

1. Overloading Teachers and Students and Stretching Past Available Resources

Overload is one of the risks of adding actual legal work and related teaching goals to LRW courses.¹⁹¹ This causes educational problems for the students and resource demands for the school. We deal with these issues together.

The resources that will be necessary to teach a LRW course with actual legal work, and the ability to add features to that course, depend upon the course model.

Our LAWR II/LTP course demanded substantial student time and teaching resources.¹⁹² However, it was for five credits (a sixth with the legal research component).¹⁹³ Despite the ambition of our teaching goals, we do not believe the course was overloaded. Most of the students thought it was hard, challenging, and full. To the extent it was overloaded, and some students thought it was, we could have unloaded it a bit by reducing the scope of the major writing assignment or eliminating it entirely. If we had chosen the latter option, we could have focused more on the practice writing that the students did, e.g., pleadings, motions, and pretrial memoranda.

¹⁹⁰ See generally Ann L. Iijima, *The Collaborative Legal Studies Program: A Work in Progress*, 12 KAN. J.L. & PUB. POL'Y 143 (2002) (suggesting that collaborative work by students, with each other and faculty members, can reduce the stress of legal education as well as improve the quality of education).

¹⁹¹ See, e.g., Silecchia, *supra* note 31, at 250-51 (warning about overloading LRW courses with skills and other matters that can and should be taught in separate courses).

¹⁹² This course falls within our C category in Part I *supra*. In this course, we worked with the outside lawyers to select the legal work, and we created the course structure (co-counseling relationships, workgroups, and classes); taught LRW skills; prepared the students for the other legal work they would do (including the client and witness interviews); supervised the students' work; conducted the classes and moderated the workgroup meetings; developed course materials; taught with some of the body of experiences—clients, legal work, organizational structures of the cooperating public and private law firms, systemic and professional responsibility issues; introduced students to the applicable procedural and substantive law; and reviewed, critiqued, and graded the student work.

¹⁹³ See *supra* Part III(B) for course description.

Our supervisory responsibilities were substantially less than they would have been in a clinic because the outside lawyers retained responsibility for the legal work, and the students did not make appearances in court or otherwise represent the clients.¹⁹⁴

It might be possible for a single LRW professor to teach a course like this.¹⁹⁵ We believe, however, that co-teaching such a course with a clinical teacher is preferable. To do this, a school might offer a clinical teacher a “rotation,” i.e., a semester “off” from clinical teaching, to develop and co-teach the course. This would enrich the LRW curriculum and should improve the quality of LRW instruction in the clinical courses when the clinical teacher returns to clinical teaching.

As the course model moves down the continuum from hybrid clinic to predominantly LRW, with fewer credits and larger numbers of students, the potential for overload is greater. Many of our LAWR III students complained that the course was overloaded.¹⁹⁶ The source of the overload, at least measured by the features of a traditional LRW course, was not primarily the LRW assignments based on the actual legal work. (There was some additional work required to supplement, organize, and use the facts of the Anthony case).¹⁹⁷ Rather, it was the weekly workgroup meetings, ad hoc student meetings, and the number of classes spent on topics other than research and writing, for example, on access-to-justice issues. However, these features were among the most important and successful in the course.

In teaching this course again, we would have four options: 1) add a third credit to the course if we could; 2) trim coverage; 3) justify the overload as a form of mandatory pro bono and teach with that issue (thereby, we say only partially tongue-in-cheek, overloading the course a

¹⁹⁴ See *supra* Part III(B).

¹⁹⁵ In fact, Schwinn has taught several LAWR/LTP courses by himself using the model that we used in our LAWR II/LTP course.

¹⁹⁶ See *supra* Part III(A) for course description. This course falls within our B category in Part I *supra*.

¹⁹⁷ See *supra* Parts III(A)(2)(b), IV(A)(1)(b). It might have been possible to narrow the scope of some of the assigned issues, but that would have further fragmented the case and the students’ responsibility for it. Indeed, one student criticized the extent to which we already had “fragment[ed]” the Anthony case in order to generate seven sets of issues, one for each of the seven workgroups.

little more);¹⁹⁸ or 4) not worry about it (accept the overload in light of the educational value of the course). We favor the first option.

Again, we think a LRW and clinical teacher should co-teach such a course. However, that was less necessary in LAWR III than in LAWR II/LTP. Substantial collaboration is needed, but the clinical teacher could “refer” a legal matter to a LRW course, consult with the LRW teacher, be available to field questions, and teach several classes, without co-teaching the entire course.

At the resource-light end of the continuum is a LRW course in which the teacher bases a problem on an actual legal problem referred by a clinical teacher or outside lawyer.¹⁹⁹ At the end of the semester, the teacher would provide the referring lawyer with the students’ work product. Such a course could satisfy the five criteria we identify in Part I without committing substantially more resources to it. Under this model, the LRW teacher would develop competence in the subject matter of the research (unless he or she already possessed it), devise assignments based on the legal work, and bring into the course and teach with the beneficiaries of the work (or a representative of the class of beneficiaries).

There is another model that makes sense for advanced LRW courses: teach them through clinics by incorporating the LRW component into a clinical course.²⁰⁰ Our school is now doing this with a year-long clinical course that combines our LAWR III course (appellate advocacy)

¹⁹⁸ Although we think there are strong arguments for a mandatory pro bono requirement, see, for example, David Luban, *A Workable Plan for Mandatory Pro Bono*, 5 REP. INST. PHIL. & PUB. POL’Y 10 (1985); Millemann, *supra* note 126, this argument would be exceedingly difficult to make if only the students in our LAWR III course were assigned this obligation, particularly in light of our school’s existing experiential course requirement, which our LAWR III course did not satisfy. *See supra* note 19.

¹⁹⁹ This course falls within our A category in Part I *supra*. There are important differences between this problem and the types of canned problems that we criticize in this article. This one presents the ultimate client—a real person or member of a real class of people—to the students; it is based on real facts, hopefully presented in original forms, e.g., transcripts, official reports, actual pleadings, and lower court decisions; it provides a factual and personal, and therefore credible and interesting, basis to analyze professional responsibility and access-to-justice issues; and it generates student work that others will be used to represent the ultimate client.

²⁰⁰ This course falls within our D category in Part I *supra*.

and an appellate advocacy and post-conviction clinic. It is an elective for second-year students that satisfies the LAWR III requirement.²⁰¹

In sum, there are a number of models that a school can use to combine LRW and clinical education in resource-sensitive ways.

2. Professional Responsibility and Liability Issues

In using actual legal work to teach LRW courses, the teacher must be clear about the relationships that this will create. Among the issues are these: Will the work create an attorney-client relationship with the beneficiary of the work? If not, what legal and ethical obligations will the teacher and students have to the beneficiary of the work and to the person who refers the work? Will the teacher and students be able to protect the confidences of the clients or prospective clients of a referring attorney? What liability, if any, will the teacher and student have for the work they provide to another person, including a referring lawyer?

We think there are good answers to these questions.

The models we propose do not create attorney-client relationships between the LRW teacher and the beneficiaries of the work. For example, in our LAWR III course, our Clinical Law Office represented Anthony.²⁰² In our LAWR II course, outside lawyers represented the clients.²⁰³ Although our students interviewed the clients in the police brutality cases, they did not give them advice or seek to represent them.

²⁰¹ See *supra* notes 9, 106. See generally Laflin, *supra* note 158.

²⁰² See *supra* Part III(A).

²⁰³ See *supra* Part III(B).

In all three sets of cases, we did not make representations about the legal work we were performing, and the lawyers understood that they would have to make independent judgments about whether and how to use the students' work in representing their clients.²⁰⁴

If a school decides, out of an abundance of caution, to bring the LRW course activities within the scope of its clinic malpractice policy, it probably can do so, at least under a model in which a clinical teacher co-teaches the course or refers the legal work to the LRW course.²⁰⁵

Although the LRW teacher and students do not have an attorney-client relationship with the beneficiary of their work under our models, the confidentiality of communications is protected. The referring attorney has an attorney-client relationship with the client, and that privilege protects the confidentiality of communications with agents of the attorney who are helping the attorney to represent the client.²⁰⁶ The LRW teacher and students are such agents.²⁰⁷

Moreover, the work-product privilege is the attorney's, rather than the client's, and is virtually absolute when the information sought to be protected is not factual, but rather opinions and legal theories.²⁰⁸ Again, this privilege protects the confidentiality of information developed in anticipation of litigation by agents—the LRW teacher and students—of the referring attorney.²⁰⁹

²⁰⁴ We did not develop written agreements with appropriate disclaimers, but LRW teachers who have liability concerns might wish to do so.

²⁰⁵ Our clinic's policy insures not only the clinic, but also any person who provides professional services on behalf of the clinic or under the *direction of a clinical teacher*. This includes volunteers. Therefore, in our LAWR III course, Schwinn and the students were covered because they were working at the direction of Millemann, a covered clinical teacher. Moreover, our clinical policy expressly covers LTP faculty and students, and thus covered us and the students in the LAWR II/LTP course. However, there may be a rider in a clinic's policy that precludes coverage for cases in which an attorney is paid a fee. This might remove coverage for cases referred from private law firms.

²⁰⁶ See, e.g., *Commonwealth v. U.S. Mineral Prods. Co.*, 809 A.2d 1000 (Pa. Commw. Ct. 2002); *State ex rel. Med. Assurance W. Va., Inc. v. Recht*, 583 S.E.2d 80 (W. Va. 2003); *Zenith Radio Corp. v. Radio Corp. of Am.*, 121 F. Supp. 792 (D. Del. 1954).

²⁰⁷ See, e.g., *Dabney v. Inv. Corp. of Am.*, 82 F.R.D. 464 (E.D. Pa. 1979) (holding that subordinates protected by attorney-client privilege include any law student acting as agent of duly qualified attorney).

²⁰⁸ *E.I. Du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 718 A.2d 1129 (Md. 1998).

²⁰⁹ *United States v. Nobles*, 422 U.S. 225 (1975) (extending the work-product protection to include the work product of agents for the attorney).

There is a practical, last-resort way to protect the confidentiality of very sensitive client information in non-clinical courses taught with actual legal work. Do not disclose it. This is a big step to take in a course that depends in significant part on honesty and trust among students and faculty, especially if the information is relevant to an issue on which a student is working. But, when warranted, and with adequate notice to the students (“I may not be able to disclose every fact in this case”), it is an option.

3. Some Loss of Control

All of the good qualities of actual legal work—that it is client-centered, dynamic, and sometimes indeterminate—make it more unpredictable than a canned problem. Most issues that have been screened for merit prove to be meritorious as predicted; some do not. The facts in a pre-established record do not change; those in a more open-ended record do. Most clients and witnesses appear for scheduled client interviews; some do not.

With most actual legal work, the teacher cedes some control over the process. With this come some unpredictable, or at least unpredicted, developments, and some unevenness in assignments. Some students will report this in their evaluations as “disorganization.” And it is, compared to the orderly worlds they are used to: tried and true canned problems; syllabi that provide fifteen- to twenty-page assignments per hour; and familiar modes of case analysis (facts, issue, rule, principle, next case).

However, one of the purposes of teaching with actual legal work is to help students learn to *create structures* where there are none, to make mid-course corrections in response to new developments, and creatively to construct legal arguments when there are no legal templates; that is, to bring order to disorderly events.

Having said this, students and faculty will feel uneasy at times, as practicing lawyers do. There are good ways to prepare for this, however.

At the threshold, organize the actual legal work as much as possible. It can take as much or more time to convert actual legal work into good teaching material as it does to construct a good canned problem. Eliminate predictable problems.

Accept that there will be unexpected developments. Warn the students about this. Teach about the ways in which lawyers plan for different contingencies. Do this before the need arises. Develop contingency plans, e.g., “reserve” assignments and “replacement legal work.”

Identify problems as soon as they develop (semesters go quickly) and make the best mid-course corrections you and the affected students can. Factor unexpected developments into the grading criteria to compensate for unevenness in assignments, and tell students you will do this.

And, keep your sense of humor.²¹⁰

4. Student Discontent with Assigned Roles

Some of the students in the LAWR III course were unhappy in being assigned to represent the State, if only hypothetically. They pointed out that one goal of the course was to provide effective representation to Mr. Anthony, and they did not enjoy playing the “heavy.” This criticism produced some important discussions that we should have had earlier, when we made the initial role assignments. We discussed the importance of identifying and making the

²¹⁰ Some LRW teachers who structure their courses in ways that are similar to ours without using actual legal work face many of these same problems. For example, Kenneth Chestek advocates teaching LRW courses “by tying all or most of the assignments into a single problem, which the students then work on all year as if they were lawyers.” Chestek, *supra* note 51, at 59. In his courses, he selects “a fact pattern taken from a real case” and “reveal[s] the facts in stages, akin to the development of a real case.” *Id.* at 65. “As the semester progresses, more facts are revealed, but only as the students ask. . . . This allows them to have a stake in the development of the record upon which their persuasive writing will later be based.” *Id.* This requires the student “to sift through all this undifferentiated data to make decisions about which facts were legally relevant, which had persuasive value, and which could simply be discarded.” *Id.* Chestek’s benefit-cost analysis is similar to ours. Among the advantages: students can assume attorney roles, learn the importance of context, become responsible for the problem, learn to work together and “realistically” analyze ethical issues. *Id.* at 70-75. Among the disadvantages, there is less time for traditional LRW skills, the professor loses some control over the teaching material, it is hard work for teacher and students, the approach is “litigation centric,” and students may have uneven experiences. *Id.* at 76-81.

opposing arguments as part of constructing and refining one's theory of the case, and the ways in which the students who had been "state lawyers" had been an essential part of helping Anthony. We should have anticipated this issue and assigned materials that would have presented the competing "neutral" and "partisan" conceptions of a lawyer's role.²¹¹

5. Be Careful What You Wish for

One of the consequences of asking twenty-seven students in a course (our LAWR III course) work on a single matter is that it produces twenty-seven papers to use on behalf of the client. As a clinical teacher, it sometimes is difficult to integrate the written work of two or three students into a single pleading. It is impossible to do so with twenty-seven students. This means that the lawyer who represents the client, or the LRW teacher if that is the prior agreement, will have to work to convert the collective student work product into a coherent and unified document. The referring lawyer and LRW teacher should resolve this issue in the referral agreement. It should be possible to enlist the aid of a teaching assistant in doing this if the teacher plans for it from the beginning.

V. CONCLUSION

In this article, we encourage LRW teachers to use actual legal work to generate research and writing assignments. We make a number of arguments in support of our proposal.

Actual legal work motivates students to learn the basic skills of research, analysis and writing, and thus helps to accomplish the primary goals of LRW courses. It helps students to explore new dimensions of basic skills, including those related to the development and use of facts and the construction of legal arguments in response to indeterminate legal issues.

²¹¹ See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36-38. See also Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73-74 (1980).

Through actual legal work, LRW teachers can achieve important secondary educational goals, including introducing students to a client-centered, problem-solving form of representation, professional responsibility issues (especially access-to-justice and pro bono issues), and critical analysis of law and justice systems.

Engaging first-year students in actual legal work can bring real clients into the classroom, demonstrate to students that they can help others (and that they like doing so), and thereby reinforce their idealism. We believe these are good refinements in the culture of traditional first-year legal education.

Our proposal, directly and indirectly, also would help individuals and community organizations obtain legal assistance they need to prevent and resolve legal problems. We believe this is socially beneficial and educationally valuable. There are several ways in which this may occur. A LRW professor and students can provide representation that otherwise would not be provided. Or, with the promise of help from a LRW class, another lawyer—in a clinic or from outside the school—might agree to provide representation to a person who otherwise would not be represented. Or, a LRW teacher and students might enhance the quality of representation in a case for which another lawyer is primarily responsible.²¹²

In the longer term, we believe that engaging students in law school in legal work on behalf of poor and underrepresented people and groups will encourage a number of them to provide legal services to similar clients in the future.

We describe two experimental courses that we developed together and co-taught.

Understanding the limitations of first-person accounts, we attempt to analyze the benefits of

²¹² The student work can be valuable in different ways. When a case has complex factual and legal issues, as did the Anthony case in the LAWR III course, *see supra* Part III(A), the work of students, combined with the classroom and workgroup analysis of it, can substantially strengthen the theory-of-the case analysis. *See supra* Part III(A)(5). On the other hand, in more straightforward cases, the students can perform supplemental tasks that busy lawyers with lots of clients, e.g., legal services lawyers or assistant public defenders, may not have time for.

these courses and courses like them and the challenges they pose to teachers, students, and law schools. We believe the courses were successful.²¹³ There are many other possible ways to engage LRW students in actual legal work. What is essential, in our view, is that LRW and clinical teachers work together to create and test a variety of course models.

Although we point out the limits of one type of canned problem, our argument assumes, and we believe, that many forms of teaching problems are pedagogically valuable. Indeed, they comprise points on a single continuum that includes actual legal work and reaches into clinics. For example, well-constructed problems can introduce students to basic LRW skills, factual complexity, indeterminate legal issues, client-centered problem solving, and professional responsibility issues. So can actual legal work, but in a different way; one that is dynamic in a real, rather than artificial sense, and that gives students some responsibility for another person, produces work that is useful to that person, and thereby motivates—often, highly motivates— the student to learn. In the process, many students will begin to discover important things about themselves, e.g., that they enjoy helping others and are, or are becoming, competent to do so, and some people who need legal assistance will receive it.

In law schools, which value autonomy, it largely will be left to individual faculty members whether and how to create and teach courses like these. For us, it was very much worth the effort, and we encourage others to try it.

²¹³ Our student evaluations for the LAWR II and III courses were better than those we have received for prior LRW courses taught without actual legal work, and were as strong as the best evaluations we have received in non-LRW courses. In our experience, evaluations in LRW courses generally tend to be somewhat lower than in other courses. We enjoyed teaching these two courses as much as we have any courses in our careers. *See supra* note 115.