

# Using Actual Legal Work to Teach Legal Research and Writing

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Legal research and writing (LRW) teachers should use actual legal work to teach their courses, including (indeed, especially) first-year courses.<sup>1</sup> The legal work might come from a planned or ongoing lawsuit, transaction, or other matter. What is important is that it is real, although in my model, the teacher can add hypothetical features to customize the legal work to the particular LRW course. For example, in an appellate advocacy course, the teacher could present the legal issues arising out of a pretrial matter by summarily “deciding” them in a hypothetical trial court opinion, thus allowing the students to fully explore them in their appellate briefs and oral arguments.

It also is important that the students’ work be useful or potentially useful to people or organizations that need legal assistance. This gives students a sense of personal responsibility for the legal problems of another, substantially enhancing and diversifying the educational experience by strongly motivating students to do their best work.

The LRW teacher need not personally represent the client. In one model, a LRW teacher who does not represent the client might co-teach with a clinical teacher who does. Below, I describe two courses that fit this model, and I offer several arguments in support of it.

When the LRW instructor teaches by herself, she can cull the assignments from actual legal work provided by a “referring” lawyer. The offered assistance of the LRW teacher and students might be the inducement the lawyer needs to take on the matter, or it might allow the lawyer to expand the representation to include other clients or a class of people.

The best models, I believe, can be created jointly by LRW and clinical teachers. Sixty years ago, Jerome Frank criticized legal education for its obsession with the appellate case method: “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

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<sup>1</sup> The major source of this essay is an article that my colleague Steven Schwinn and I co-authored, Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year*, 12 Clin. L. Rev. 441 (2006). Much of what I say in this essay is the product of our teaching and writing collaboration.

about litigation in books?”<sup>2</sup> Today, the laboratories are inside law schools in the form of clinics. Partnerships between LRW and clinical teachers offer many reciprocal benefits. In what follows, I describe these benefits. I begin, however, by describing the two experimental LRW courses that Professor Steven Schwinn and I developed and taught with actual legal work.

## I. Experimental LRW Courses Taught with Actual Legal Work

### A. *A third-semester appellate advocacy course, LRW III*

The first course we co-taught was the third and final course in our LRW sequence: a two-credit, third-semester appellate advocacy course, which I will call “LRW III.”<sup>3</sup> We developed the issues for the LRW students’ appellate briefs and oral arguments from a post-conviction matter, which had not yet been filed and which a newly created post-conviction clinic was handling. I was the supervisor in that clinic as well. When we began work on the case, our client, whom I shall call “Mr. Anthony,” had been incarcerated for thirty-five years for a murder he did not commit. We used the students’ work to persuade the governor to commute Mr. Anthony’s sentence, in effect, to time served, resulting in his release from prison.

We developed this experimental LRW III course and the post-conviction clinic together. The LRW students were the research and writing arm of the enterprise, but they did not represent Mr. Anthony. The clinical students were responsible for interviewing, counseling, and otherwise representing their client under the State’s student practice rule. They did this with the help of the LRW students’ work product.

The record in Mr. Anthony’s case included the trial transcript, appellate briefs, and previously filed post-conviction papers. We added new information as the clinical students developed it. In the middle of the semester, we froze the record for the LRW students to give them a fixed record for their appellate briefs and arguments. We identified the facts that were “in play” and added some “stipulated facts.”

Professor Schwinn and I identified seven legal issues for the LRW students and divided the twenty-seven students into seven work groups, assigning one issue to each group. Within each group, we assigned a team of two students to represent the client, and two (in one case, one) to represent the State. Although “co-counsel” worked together, each was responsible for his or her own final brief

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<sup>2</sup> Jerome Frank, *A Plea for Lawyer-Schools*, 56 Yale L.J. 1303, 1311 (1947).

<sup>3</sup> At the time, Maryland Law School called its three courses “Legal Analysis, Writing, and Research,” or “LAWR,” courses. I will refer to them more generically as “Legal Research and Writing,” or “LRW,” courses.

and oral argument.

Using a clinical case “rounds” method, which engages faculty and students jointly as problem solvers (the analogy is to doctors in teaching hospitals), we met weekly with each of the seven groups, each of which also included one student from the post-conviction clinic. Many of the most interesting and important discussions occurred in these sessions. “Opposing” counsel, augmented by the clinical student in each work group, explored the strengths and weaknesses of the arguments, and in this give and take refined their final arguments. This process considerably enhanced the quality of the actual representation that the clinical students and I were able to provide to Mr. Anthony.

### ***B. A second-semester pretrial litigation course, LRW II***

The second course Professor Schwinn and I co-taught was a hybrid. We began with the two-credit, second-semester LRW II course, which focused on pleadings in civil pretrial litigation. To teach this course, LRW II teachers normally used a well-developed hypothetical civil case. Instead, we drew the assignments from five actual police brutality cases (involving alleged constitutional torts) and from litigation planned by a public interest organization in which plaintiffs would seek to create a constitutional right to counsel in some civil cases.<sup>4</sup>

We added a three-credit “Legal Theory and Practice” component to the LRW II course.<sup>5</sup> Through these clinical components, teachers use actual legal work to enhance theoretical analysis, while the teachers and students provide legal services to poor and underrepresented persons and communities. The teachers use the practice experiences to critically analyze access-to-justice, professional responsibility, and other systemic issues.<sup>6</sup>

We had fifteen students in the course, all of whom selected it as their

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<sup>4</sup> This litigation, which has its counterparts around the country, has been nicknamed “Civil Gideon.” The public interest organization planning this litigation was the Public Justice Center, Inc. (“PJC”). This was to be next-step litigation in the aftermath of *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003), a PJC case in which three judges of Maryland’s highest court concluded that Ms. Frase had a right to counsel in a contested custody case involving her child. The majority, however, comprising the other four judges, found the claim to be moot.

<sup>5</sup> The students received a sixth credit for a segment on research that other faculty members taught.

<sup>6</sup> Since the law school created the Legal Theory and Practice curriculum in 1988, faculty have added Legal Theory and Practice components to first-year Torts, Contracts, Criminal Law, Property, Legal Profession, and Civil Procedure courses as well as to a variety of upper-level courses and seminars. Day division students must take an experiential course — that is, they must choose from among a number of Legal Theory and Practice courses and clinical courses — as a condition of graduation.

second-semester elective. A small, private law firm was counsel in the police brutality cases, and the Public Justice Center, Inc., a public interest organization, was counsel in the right-to-counsel cases.

The private lawyers obtained client approval for the students' work, helped us to develop the assignments, gave us duplicate case files, taught a class on police brutality cases, and helped answer student questions during the semester. In these cases, the students, working under my supervision and that of Professor Schwinn, interviewed the clients and witnesses and drafted complaints and discovery requests. After several drafts, which we supervised, the students provided their final pleadings to the law firm.

The right-to-counsel case generated the major research and writing assignments for the semester. These were devoted to procedural issues that Maryland's appellate courts had not resolved, as well as one of the major substantive arguments. The volunteer lawyer for the Public Justice Center, a former Maryland Attorney General, taught a class on the issues in the case, and he and the organization's lawyers helped us to develop the assignments.

Students worked on the police cases in groups of two to three, and we met with each group weekly. For the right-to-counsel case, we worked with the students, and they with one another, to develop possible legal theories, and then each student wrote a memorandum. These assignments were relatively open-ended; i.e., we gave the students real legal issues that had no clear answers and for which there was no direct precedent.<sup>7</sup> We provided these memoranda to the Public Justice Center lawyers.

## II. Benefits of Teaching LRW Courses with Actual Legal Work

### A. *Motivating students to learn and apply core LRW skills*

The students in both courses were strongly motivated by the real nature of the work, even though neither set of students actually represented the clients. The pretrial litigation students in LRW II did interview the potential plaintiffs in the police cases, but the appellate advocacy students did not meet Mr. Anthony until after they had finished their work and he had been released from prison. What was remarkable was that *even this indirect responsibility for the legal problems of others and this limited personal contact proved to be powerfully motivating*. Many of the students considered the potential plaintiffs and Mr. Anthony to be their clients, and the students worked on the assignments as if they were. The student responses to performing actual legal work were very positive.

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<sup>7</sup> Because we were working under the direction of and with counsel in the cases, our work, and that of our students, was protected by the attorneys' and clients' work-product and client-attorney privileges.

One appellate advocacy (LRW III) student said: “I think it’s much more rewarding having a real client,” referring to Mr. Anthony. “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.” In comparison, this student said that the canned problems in his prior LRW courses were “exercises quite frankly in tedium and boredom,” and in those courses, it was “just a matter of doing it by rote” and getting it “done [so] you can move on.”<sup>8</sup>

A second student in the course said: “I felt personally challenged to do the very best that I could here and I like that.” The student explained: “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 to the hypothetical parties in a canned problem used in a prior LRW course, the student said: “Mary Jo and Wally are fictional, and I really couldn’t care less about their issue . . . I mean, it’s an interesting argument . . . [b]ut, this is for real.”<sup>9</sup>

A third student said that the opportunity to work on a real case was “part of the incentive to do more work whatever the nature of the research was.”<sup>10</sup>

The pretrial litigation students (LRW II) had similarly positive reactions. One 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 . . . [T]hat’s something that is going to stay forever with me. It’s really special.”<sup>11</sup>

A second student in the course said: “[I was] living, and breathing and sleeping” the case work.<sup>12</sup> A third said: “[T]his is hard and this is a lot of work and I just want to go to sleep at night, but you know, it [referring to the actual legal work] keeps you focused, at least for me, on a different level.”<sup>13</sup>

The motivational force of the cases was evident in several ways. The degree and quality of student participation, both in the classes and work group sessions, were substantially better than in standard LRW classes.

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<sup>8</sup> Course Evaluation Discussion with LRW III students (Jan. 22, 2004) (Transcr. on file with J. ALWD). These comments, and those that follow, were made during one class session in each course that was devoted to student evaluation. The discussion was recorded and transcribed. The quantitative and qualitative assessments in the written student evaluations in these two courses were more positive than those Professor Schwinn and I had received in LRW courses that we taught with hypothetical problems.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Course Evaluation Discussion with LRW II students (Apr. 28, 2004) (Transcr. on file with J. ALWD).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

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.<sup>14</sup>

The students' research was more thorough and creative, and, as I will describe below, their written analysis also was better than that of students in LRW courses taught with canned problems. I believe this was due to the motivational force of the actual legal work and the inherent limits of canned problems. One appellate advocacy (LRW III) student expressed a common student view of canned problems: "[T]he canned cases . . . 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." That is, "[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."<sup>15</sup>

The students' written analysis was better in two ways. First,

[T]he theories of the case and resulting arguments were better developed, more persuasive and more nuanced. The students also found and developed new arguments (ones that we had not previously identified), and added new components to and refined the predicted arguments, in ways that students in our traditional courses generally had not done.

We attribute the enhanced student creativity to the fact that we had not retrospectively created the argument pathways in the assignments as we would have with a canned problem, and thereby predetermined the students' "answers." 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.<sup>16</sup>

Second, and not surprisingly, given the dynamic nature of the facts in the actual cases, our students' understanding and use of the facts also were substantially better in the two courses than in standard LRW courses.

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<sup>14</sup> Millemann & Schwinn, *supra* n. 1, at 479.

<sup>15</sup> Course Evaluation Discussion with LRW II students (Apr. 28, 2004) (Transcr. on file with J. ALWD).

<sup>16</sup> Millemann & Schwinn, *supra* n. 1, at 480-81.

For all of these reasons, the quality of the briefs and oral arguments was better than usual in these two courses. On the other hand, the grammar, syntax, and style of the students' writing were not improved. We did not teach these skills particularly well, and actual legal work did not enhance the teaching we did.

### ***B. Teaching students to deal with factual and legal indeterminacy***

In the analysis above, I describe a paradox that challenged my theory of LRW teaching. The "best" LRW teaching problems — the ones that are most carefully planned, controlled, and tested — often undermine development of some of the most critically important lawyering skills, including creativity and dealing with factual and legal indeterminacy. Professor Schwinn and I put it this way:

The creator [of a canned problem] 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." And when the students' 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."

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[This] 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, 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. . . . 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.<sup>17</sup>

Let me add two important caveats. First, to teach successfully with actual legal work in LRW courses, LRW instructors must exercise substantial control over that real material. Establishing the boundaries of factual records and limiting research and writing to generally identified sets of issues leaves ample room for student creativity, especially when the students understand, as Professor Schwinn and I made clear in both courses, that the professor has not invented the problem or developed the “best” answer to it.

Second, I do not mean to suggest that canned problems have no educational value. To the contrary, I think they can be very useful, especially the more sophisticated ones with, for example, rich depictions of clients, pleadings from an actual case, multi-media materials, and interactive dimensions. I have developed and taught with such materials, and they can be necessary tools in large enrollment courses. I have not found, however, that they produce the same levels of student engagement that I saw in our two experimental courses. Nor do I think they can be used to achieve some additional educational goals, to which I now turn.

### *C. Additional educational goals supported by actual legal work*

First, teaching LRW courses with actual legal work introduces students to a client-centered, problem-solving method of work. In many classroom courses, especially those in the first year, clients are either invisible or caricatured. In our two courses, rather than invisible or made-up characters tacked onto a “problem,” the clients and their stories posed actual problems, and the students evaluated legal arguments by asking whether they would achieve the clients’

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<sup>17</sup> Millemann & Schwinn, *supra* n. 1, at 458-59 (emphasis added).

goals. This added an important dimension to predominantly classroom instruction.

Second, the cases also provided us with a real basis to critique legal rules, procedures, and systems. In the appellate advocacy course (LRW III), Mr. Anthony's case was a window into criminal law and Maryland's criminal justice system. It revealed the limited protections provided by the constitutional guarantee of effective assistance of counsel, the potential unfairness of procedural default rules, and the extraordinary elasticity of complicity rules.<sup>18</sup> The police brutality cases provided students with a basis to assess the legal rules governing detentions, arrest, the use of force, and sovereign immunity; and the right-to-counsel case invited analysis of our civil legal services delivery system.

Third, as important as any other benefit, teaching first-year students with real clients and cases reinforces the idealism that many students bring with them to law school and fight to maintain in the face of the traditional first-year curriculum. Students, like the rest of us, need to legitimately feel useful to appreciate the value of being a lawyer. Many of our LRW II and III students expressed this thought in their evaluations. One said the course helped in "remembering why we all came to law school. It's really hard to remember . . . after one semester of just sitting in a classroom. . . . I know it was a help to me to remember why I was here."<sup>19</sup> A second student, speaking for others whose sense of self-worth is undermined by the first-year curriculum, said: "[W]hen we first looked at the [right-to-counsel 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 [the professors] had faith in us. [They 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.<sup>20</sup> Engaging first-year students in actual legal work on behalf of the poor is the best way, in my view, to prevent student disengagement from law school.

Finally, involving LRW students in actual legal work can help real people obtain access to justice. The failure of LRW courses to do this has important service and educational consequences.

Every year, hundreds of law professors make research and

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<sup>18</sup> Mr. Anthony was convicted on a "look-out" theory without factual basis, and he spent over three decades in prison because his trial and appellate lawyer (the same person) provided ineffective assistance of counsel to him, because he could not adequately represent himself in the post-conviction process, and because when he tried to do so, he was held to have procedurally defaulted key arguments.

<sup>19</sup> Course Evaluation Discussion with LRW II students (Apr. 28, 2004) (Transcr. on file with J. ALWD).

<sup>20</sup> *Id.*

writing assignments to thousands of first- and second-year students, who spend tens of thousands of hours on them. At 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.

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.”<sup>21</sup>

Of course, there are challenges in using actual legal work to teach LRW courses. Spending too much time on access to justice, professional responsibility, and goals other than core research, analysis, and writing skills can overload a two-credit course. Teachers can develop hybrid LRW–clinic courses or seek to add an additional credit to the LRW course to pursue some of these goals, or accept the traditional two-credit limitation and focus on the core LRW goals, harnessing the motivational power of actual legal work to teach these basic skills.<sup>22</sup> Some students in the two-credit LRW III course felt that there simply was not enough time (and credit) to handle all that the course required.

The LRW teacher also must be clear about the relationships among referring lawyers, teacher, and students, and develop policies and agreements that protect client confidences, or simply decide not to teach with sensitive information, using hypothetical facts to fill these gaps.<sup>23</sup>

In addition, one or two students in the LRW III course complained about being assigned to represent the state against Anthony in a course dedicated to Anthony’s representation. We could have done a better job explaining why this role assignment was a critical step *in representing Anthony* effectively.

Several students in both courses also complained about course “disorganization.” These students reacted, in part, to changes in issues, theories of the case, arguments, and facts that were produced by the relatively dynamic aspects of the courses, and, in part, to our perceived failures, as teachers, to better anticipate and control the issues in the legal work.

Most important, the LRW teacher must be willing to deal with some uncertainty and loss of control.

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<sup>21</sup> Millemann & Schwinn, *supra* n. 1, at 459-60 (quoting 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)).

<sup>22</sup> See generally Millemann & Schwinn, *supra* n. 1, at 491-94.

<sup>23</sup> See generally Millemann & Schwinn, *supra* n. 1, at 494-96.

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.<sup>24</sup>

Learning how to bring as much order as possible to real-world events is one of the primary skills of a good lawyer, and it is, after all, the most valuable thing good lawyers do for their clients in every form of practice. In LRW courses, here are some useful tips: First, “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.”<sup>25</sup> Second, “[a]ccept 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.”<sup>26</sup> Third, “[d]evelop contingency plans, e.g., ‘reserve’ assignments and ‘replacement legal work.’ ” Fourth, “[i]dentify 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.”<sup>27</sup> Finally, “keep your sense of humor.”<sup>28</sup>

In her essay in this issue, Professor Kate O’Neill questions whether adding actual legal work to LRW courses will undermine the goal of introducing students to “neoclassical reasoning skills.”<sup>29</sup> I understand, and accept, the goal of teaching such skills, which she accurately notes are, or once were, taught in “legal method” courses. I also agree that “issues in real cases *do not necessarily* lend themselves to teaching the components of neoclassical reasoning in any systematic way” (emphasis added). I have two responses, however.

First, some actual legal work, carefully selected, can lend itself to teaching such skills. The civil Gideon problem that we used to teach LRW II, for example, required us — faculty and students — to understand, synthesize, and build on diverse bodies of right-to-counsel law. Some originated in common law England. Much is constructed on constitutional, equal protection, and procedural due process principles that are common to both criminal and civil right-to-counsel arguments in this country and have developed for almost one hundred years. There is much here, and in other carefully selected legal work, that supports the teaching of neoclassical reasoning.

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<sup>24</sup> Millemann & Schwinn, *supra* n. 1, at 496.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 497.

<sup>29</sup> See Kate O’Neill, *But Who Will Teach Legal Reasoning and Synthesis?* 4 J. ALWD 21 (2007).

Second, as Professor O'Neill recognizes, teaching neoclassical reasoning is one of the primary justifications for the pervasive use of some form of the case method in not only virtually all first year-courses, but in most, or at least many, second- and third-year courses. I think her criticism of these courses for substituting doctrinal instruction for reasoning is more persuasive than her conclusion that using actual legal work to teach LRW courses is inconsistent with teaching neoclassical reasoning.

I enjoyed the two experimental LRW courses as much as I have any course that I have taught in thirty-three years of teaching.<sup>30</sup> The substantial majority of students felt the same way. The courses were hard work, fun, challenging, interesting, and, I think, successful. I urge LRW and clinical teachers to develop and test their own models for integrating actual legal work into LRW instruction. I think you will be glad you did.

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<sup>30</sup> I have taught over fifteen different classroom courses and a similar number of different clinical courses.