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Race Belongs in Week One of LRW

Beth H. Wilensky
University of Michigan Law School, wilensky@umich.edu

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I talk to my 1Ls about race and the law in their first week of law school. In doing so, I have discovered that discussing race helps me introduce foundational concepts about legal writing and law school that we will return to throughout the year. That is partly because race is relevant to nearly every topic law school touches on. But it is also because race is present in—and often conspicuous in its absence from—court opinions in ways that provide rich fodder for discussing how to approach law school. That topic interests all students—even those who might be skeptical about addressing race as a core part of law school pedagogy. And for students of color, discussing race early helps build an environment that—I hope—enables them to feel that they can bring their whole selves to the classroom. This essay describes how I overcame my initial resistance to discussing race, how I go about starting a conversation about race in the very first week of class, and why doing so has made my class better.

Yes, Your Class Touches on Race Even if You Think It Doesn't

I didn't want to talk about race in my LRW class. I was worried I'd do it poorly. And I assumed I didn't have to. After all, I write all of my own assignments. That means I pick the area of law I want students to analyze. My approach has been to select "non-controversial" topics for students to write about: unfair competition, attorney-client privilege, compelled disclosure of a journalist's source, a high school student's free speech rights. I also write the case file for my problems, drafting the facts to avoid any suggestion that race plays a role in the analysis. As a result, I thought I could avoid discussion of the role that race, ethnicity, national origin, and other identities play in our legal system. I thought that doing so was a favor to my students. I told myself that I was making my classroom a more comfortable place for all of my students by not forcing them to confront those topics when they were trying to learn legal writing. I told myself that I was helping them stay focused on learning the fundamental skills of legal analysis, writing, and research. I was wrong.

It took a new assignment—along with my evolving understanding of how many of our students of color experience law school

* Clinical Professor, University of Michigan Law School. Thank you to Renée Allen and Courtney Liss for their thoughtful comments.

pedagogy—for me to see how wrong I was. A few years ago, I developed a closed memorandum assignment[1] that asked students to determine whether, under Iowa law, their client was in custody when law enforcement officers questioned him about an arson he was eventually charged with. Since the officers didn't read him his *Miranda* rights, if he was in custody then his statements to the officers would be inadmissible.[2] I selected this topic because it fit multiple pedagogical goals for the closed memorandum assignment. The topic was accessible to first-year law students and one I thought they would find interesting; the relevant body of law uses a factor test, which gives my students multiple opportunities to practice writing a CREAC analysis; the Iowa Supreme Court established the test in an opinion that highlights the relationship between the decisions of the U.S. Supreme Court and state courts; the interplay between federal and state law provided fodder for discussion of important federalism concepts I want my students to grapple with early in their law school experience; and multiple lower court decisions used the test in a way that enabled me to build a good problem around them.

I wasn't thinking about race when I selected this topic and created the materials. Nothing in the materials indicated to students what their fictional client's race or ethnicity was. But of course, race was there, present by its *absence* in the case law.

Whether an individual is in custody when interrogated (and therefore entitled to *Miranda* rights) turns on this question: Would a reasonable person in the individual's position have thought they were in custody?[3] The U.S. Supreme Court has left it to lower courts to sort out how to implement that standard. In Iowa, where my assignment is set, courts use a four-factor test that considers: (1) how the individual was summoned to the interrogation; (2) "the purpose, place, and manner of the interrogation"; (3) whether the individual was confronted with incriminating evidence; and (4) the extent to which the individual was "free to leave."[4] The defendant's race is not part of the test. But of course, whether a reasonable person in the individual's position would have felt like they could safely just walk away from a police encounter might—and likely does—often depend on the individual's race.

Many of my students recognized that omission when they read these cases, and as a result faced what was (for many) their first

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[1] A closed memorandum assignment gives students a defined set of materials to use in analyzing a legal issue.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[3] *State v. Deases*, 518 N.W.2d 784, 789 (Iowa 1994).

[4] *Id.*

experience of reading a court opinion for class and seeing a disconnect between law and reality. But I know that they will have that experience frequently throughout law school, including in LRW classes, even where the assignment is designed to avoid making race one of the issues students analyze. As just one example: If you assign any sort of employment law question, your students are bound to read lots of cases in which race, ethnicity, and gender discrimination are front-and-center, regardless of whether the problem you assign is centered on any of those things. The same is true of intentional infliction of emotional distress cases, prisoner's rights cases, anything involving criminal procedure, and many other topics that LRW faculty frequently build assignments around. And in more subtle ways, in cases in which the race of the parties is apparent or easily discerned, those details may influence students' experience of reading the opinion and their sense of how the court handled the facts. In just about any area of the law, your students are likely to be reading cases in which race, ethnicity, etc. is a salient feature—on the surface of the decision, lurking underneath, or conspicuous in its absence from the court's discussion. We do all of our students a disservice if we don't recognize that, and we are doing our students of color a particular disservice if we ignore something that might be fundamental to how they understand the material.

I am embarrassed to admit that I had already taught the custody problem twice before I realized that I couldn't simply rely on the fact that my assignment didn't raise any racial issues as a basis for not discussing race—and its absence from the legal doctrine—with my students. Many of them were already thinking about it. They told me they were struggling with whether and how to set aside their frustration with the doctrine to simply apply the doctrine in their memo assignment. So I decided to talk about it in class. Here's what I do.

Class #1: Setting up the Conversation

I tell my students, at the end of their very first LRW class—which is when we discuss the Iowa Supreme Court's decision establishing the four factors—this: "When you read this decision, it may have occurred to you that a significant thing that affects the extent to which a reasonable person would feel they could safely walk away from a police encounter is that person's race, ethnicity, gender, or their community's experience with policing. In our next class, I am going to set aside time to talk about that. I will not call on anyone to speak, although I welcome your views if you want to share them."

This preview achieves several objectives. It alerts students ahead of time, so they don't feel caught by surprise when I raise this issue during the next class.[5] For students who read the case and realized that race plays a role that goes unmentioned in the opinion, it validates their frustration and confirms that this discussion is an important one. For students who read the case and *didn't* recognize the absence of race from the court's analysis, it prompts them to think about the ways that race matters to this conversation. It assures students that they will not have to speak on the topic, especially during the first week of law school when many students are already nervous about speaking in class.

Class #2: Race, Legal Writing, and Law School

I have several goals for the portion of the next class when I discuss race. I want to:

- Signal to students that our classroom is a place where we can talk about the intersection of identity and the law.
- Model how to talk about those things in a respectful and open way.
- Convince students of the importance of learning the doctrine as an essential foundation to criticizing it and working to change it.
- Show students how what we do in LRW will give them the tools they need to criticize and work to change doctrine they disagree with.
- Introduce key concepts we will cover in LRW by analyzing the writing choices about race that the authors of the opinions made.

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[5] I am grateful to Dorothy Brown, Emory University School of Law, for this insight. As Professor Brown explained during a webinar, "[Y]ou need to prepare your students. Things tend to go off the rails when students have no idea we are about to have a systemic racism discussion." Society of American Law Teachers, *Incorporating Anti-Racism Frameworks into Core Law School Classes* (July 30, 2020), https://mediaspace.msu.edu/media/SALT+Webinar+1_July+30%2C+2020/1_thxi281t [https://perma.cc/6Z9E-LJ6Y] (starting at minute 14).

- Bring skeptical and resistant students into the conversation by showing them that our discussion about race can train them to read cases closely, make connections between cases, and learn other skills essential to law school success.

To do all of this, I start by reminding my students of what I'd said in the previous class: The doctrine contemplates a reasonable person whose sense of whether he can safely walk away from a police encounter is uninformed by race. I tell my students that if that bothers them, if that makes them eager to challenge the doctrine instead of merely analyzing how it would apply in our client's situation, then I have this advice: To be an outstanding advocate, you need to develop the ability to press a client's case from multiple angles. For example, you need to develop the ability to:

(1) Argue from the law as it is. If you represent the client in the closed memorandum assignment, you need to be able to argue that the factors the Iowa courts use support a finding that your client was in custody (and that his statement therefore is inadmissible because he wasn't Mirandized).

(2) Argue that there is a gap in the law that should be filled in your client's favor. If the courts haven't explicitly said, "Don't consider race," there's an opening to argue that it should be a consideration. And you need to be able to think strategically about when and how to raise that argument.

(3) Argue for a change in the law. If binding precedent explicitly says, "Race is not a consideration," you want to know when and how to argue for overturning that precedent.

There are, of course, many other tools in the lawyer's advocacy toolbox. But I start here because students tend to be eager to jump to (2) and (3) above out of frustration with the doctrine. I identify two problems with that thinking. First, an attorney must be able to do (1) effectively in the vast majority of cases; a criminal defense attorney does her client no favors if her frustration with the doctrine undermines her ability to nonetheless convince the court that the doctrine requires suppression of her client's statement. Second, an attorney needs to thoroughly understand—and be able to explain—how the existing doctrine operates in order to convince a court to change it. I tell my students to approach the closed memorandum assignment as an opportunity to work on (1), even if they don't like

the doctrine they must apply. And I assure them that the skills we cover as the year progresses will help them start building the toolbox they'll need for (2) and (3).[6]

In fact, I suggest they consider this when they read a case: When a court says that it considers X when deciding Y, it might inherently be saying that it does not consider things that are *not* X when deciding Y. When the Iowa Supreme Court says that it considers four factors when analyzing custody questions, it is also suggesting that it does *not* consider things outside of those four factors. That is useful to pay attention to when reading cases, in LRW and doctrinal classes both. Identifying those "not X" things in doctrinal classes can help students identify patterns in the case law, make connections between cases, recognize outliers, and analyze hypotheticals. Noticing those "not X" things can also spur ideas for ways to expand or shift the law, i.e., to turn "not X" into something the courts *do* consider.

Next, I point out writing choices in one opinion that I find particularly troublesome with respect to race. Three of the cases I give my students involve white defendants.[7] The fourth, the Iowa Supreme Court case *State v. Bogan*,[8] involves a black defendant—a 14-year-old boy who was pulled out of class by his principal and several police officers, and interrogated in his school's office. I walk my students through that case and point out some things that jumped out at me about the writing choices the Justice made.

First, I suggest that it's notable that we know the race of the defendant; the court describes him as an African-American male.[9] But in the other three cases I assign, you'd only learn the defendant's race if you Googled them and found their mugshots.[10] I use that difference to introduce my students to the principle that good legal writing omits irrelevant information. If the *Bogan* court didn't discuss the

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[6] For a terrific discussion of the pedagogical importance of connecting class material to students' hunger for using the law to enact social change, *see* Sha-Shana Crichton, *Incorporating Social Justice into the 1L Legal Writing Course: A Tool for Empowering Students of Color and Historically Marginalized Groups and Improving Learning*, 24 MICH. J. RACE & L. 251 (2019).

[7] *State v. Countryman*, 572 N.W.2d 553 (Iowa 1997); *State v. Hill*, 766 N.W.2d 648 (table), No. 08-0657, 2009 WL 606051 (Iowa Ct. App. 2009); *State v. Chiavetta*, 737 N.W.2d 325 (table), No. 05-1911, 2007 WL 1828323 (Iowa Ct. App. 2007).

[8] 774 N.W.2d 676 (Iowa 2009).

[9] *Id.* at 677-78.

[10] In fact, this is how I learned that these defendants appear to be white—though I recognize that ascertaining someone's race from their physical appearance in a photo raises its own problems.

defendant's race in analyzing whether a reasonable person in his position would have felt free to leave, why did the court include his race at all? I point out that the same court, in another case students read,[11] had analyzed the same legal question and not mentioned the race of the defendant, a white woman. That discrepancy is a reminder that oftentimes, white is treated as the default race, and doesn't get mentioned, whereas other races do.

Second, in one place, the judge refers to the defendant and his co-defendant as "the two men."[12] The defendant was 14 years old—a fact the opinion doesn't even reveal until later,[13] after a reader might already have formed an image of the defendant based on the earlier, incorrect description. And of course, the description is a reminder that our criminal justice system frequently treats Black children as older than they are, especially relative to how it treats white children.[14]

These troublesome parts of *Bogan* provide the opportunity for me to introduce this core idea about legal writing to my students: Writing is about choices.[15] Every decision—to include or not to include something, to use this specific word instead of that one, etc.—is a choice. Even when you aren't aware that you are making a choice, you are—and those choices have consequences for your credibility, persuasiveness, and reputation.[16]

Finally, I tell my students that *Bogan* is a good reminder that they should not assume judicial opinions exemplify good legal writing, or that students should necessarily try to model the techniques they see judges deploy. In fact, a valuable method of developing your own skill

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[11] *Countryman*, 572 N.W.2d. 553.
[12] *Bogan*, 774 N.W.2d at 678.
[13] *Id.*
[14] *See* Kim Taylor-Thompson, *Treating All Kids as Kids*, BRENNAN CENTER FOR JUSTICE (May 24, 2001), https://www.brennancenter.org/our-work/analysis-opinion/treating-all-kids-kids [https://perma.cc/7LAD-NDME].
[15] *See* JOHN MCPHEE, DRAFT NO. 4 56, 98, 180 (2017) ("Writing is selection.").
[16] *See* Teri A. McMurtry-Chubb, *The Practical Implications of Unexamined Assumptions: Disrupting Flawed Legal Arguments to Advance the Cause of Justice*, 58 WASHBURN L. J. 531, 535 (2019). As Professor McMurtry-Chubb explains, "[T]he legal writing classroom" is often a space "where students formulate unexamined assumptions based on race, class, gender, and sexuality" and "it can engage critical pedagogies to disrupt the flawed arguments that students make as a result of their unexamined assumptions." *Id.*

as a writer is to critique and reflect on the writing in judicial opinions you read—just as you critique and reflect on the doctrine discussed.[17]

Conclusion

Students learn fundamental skills in LRW, and understanding how to grapple with race in legal analysis and writing is fundamental. If you still aren't convinced, consider this: I was concerned about introducing an "additional" topic in my already-crowded syllabus, especially early in the year when I have so much to cover. But I've discovered that talking about race in the first week ties in perfectly with many themes I wanted to convey from the start. It has *enhanced* my teaching of lawyering skills, not drawn attention away from it. I see my students nodding along during the discussion, and they have expressed relief to me that I acknowledge these issues from the beginning. I've also become more comfortable introducing this topic each year I've taught. It used to be that I couldn't imagine wanting to bring up race at all, much less at the very start of the year. Now, I can't imagine the first week of LRW unfolding without it.

[17] For a detailed discussed of why and how LRW faculty should teach students to identify biased language and cultural assumptions in judicial writing, *see generally* Lorraine Bannai & Anne Enquist, *(Un)examined Assumptions and (Un)intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE UNIV. L. REV. 1 (2003).