

Imagine

A Comment on “A Liberal Education in Law”

Melody Richardson Daily¹

While I was impressed with Professor Parker’s paper for many reasons, to me her single most striking assertion is this: “Practicing law—and learning law—is at heart an imaginative enterprise.”² It is a sentence that should be carved above the entrance to every law school. Few practicing attorneys would disagree with Professor Parker’s observation. After all, if imagination is the ability to deal creatively with reality, then imagination is essential for each of the ten fundamental lawyering skills listed in the MacCrate Report.³ For example, no lawyer can succeed in problem-solving without first engaging in the process of imagining multiple possible solutions, imagining the obstacles that each approach would encounter, imagining ways to overcome those obstacles, and imagining the client’s response to each possibility.

And yet the typical law school curriculum makes little effort to inform law students about the role of imagination in legal practice. Teaching students that creativity is essential would better prepare them for practice, and it might also reduce some of their anxieties about law school.

Many first-year law students find law school frustrating, and they complain that professors “hide the ball.” These complaints often stem from the students’ misconception that the professor knows *the* right answer and that the law student’s task is to discover (or guess) that right answer. Like *X-File* aficionados, law students want to believe that “the truth is out there.” But as Mr. Bryn Vaaler’s description of writing an advice letter illustrates, “the truth” (the specific advice that is appropriate for a specific client regarding a specific legal issue) is not out there waiting to be discovered.⁴ There is no book of form letters from which Mr. Vaaler or any other attorney can select the correct answer; the correct answer—appropriate legal advice—does not

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2. Carol M. Parker, *A Liberal Education in Law: Engaging the Legal Imagination Through Research and Writing Beyond the Curriculum*, 1 J. ALWD 130, 132 (2002).

3. ABA Sec. Leg. Educ. & Admis. to the Bar, *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 3 (ABA 1992).

4. Bryn Vaaler, *Compositional Practice*, 1 J. ALWD 148, 150-51 (2002).

exist until Mr. Vaaler or some other attorney creates it by engaging in the imaginative process of writing.

Law school writing assignments can teach our students to use their imaginations by demonstrating that attorneys have to construct meaning, not merely find it. The writing assignments in a legal writing course typically do just that. We give our students a set of facts and ask them to write a memorandum explaining the relevant law and predicting whether a client can succeed in a specified cause of action. When students begin to research and read the law, they discover that there is seldom a case or a statute that provides an absolutely clear answer. Each student has to create an answer.

But requiring students to research and write memos is not the only way to engage our students in imaginative writing. Every year when I teach my externship course, at least one class focuses on the attorney's professional obligation to maintain client confidentiality. I could conduct this class in many different ways: I could lecture; I could require my students to read a case dealing with the sanctions imposed on a lawyer who failed to live up to this obligation; or I could describe a series of hypothetical situations and ask students whether the conduct I describe violates the rule. Each of those teaching methods has its value, but none succeeds in engaging all of the students in an imaginative process.

Instead, I have my students read "The Tender Offer," a short story by Louis Auchincloss. The main character, Valerian Shaw, a sixty-four-year-old partner in a Manhattan corporate law firm, learns that his firm is assisting with the corporate takeover of a small publishing company headed by Shaw's longtime friend, Simeon Andrews.⁵ For a variety of personal reasons, Shaw decides to disclose this confidential information to Andrews, who uses that information to sell his own stock for \$10 million and become chair of the board of the new publishing company. As chair, Andrews reports Shaw's breach of confidentiality to a senior partner at Shaw's law firm, and Andrews demands that Shaw be forced to resign because the publishing company "cannot afford to be represented by a firm with such a leak."⁶

When my students come to class after reading the story, I begin class by giving them ten minutes to write a response to this question: "Knowing what you know now, would you hire Valerian Shaw as your attorney? Why or why not?" When their time is up, I collect their responses and ask all the students who decided they would not hire Shaw to hold up their hands. Students look around the room and are sometimes clearly shocked to realize that reasonable students disagree on this issue. I then call on someone to explain the reason for his or her answer, and students are soon engaged in a spirited discussion.

This short writing exercise accomplishes a number of goals. First, because there is no right answer, students have to create their own answers. And in the process, they have to deal with the moral complexities that arise

5. Louis Auchincloss, *The Tender Offer in Legal Fictions: Short Stories About Lawyers and the Law* 1, 3 (Jay Wishingrad ed., Overlook Press 1994).

6. *Id.* at 11.

when an attorney's loyalty to a friend conflicts with the clear rules of professional conduct. Second, by requiring students to write their answers, I get active participation from every student. If I asked this question orally, I would receive, at best, one or two responses. The other eighteen students would probably be content to accept the views articulated by their classmates and might never grapple with the issue themselves. When I require writing, not only do I receive a written response from everyone, but I also find that my students are far more likely to volunteer in class in order to explain positions they have already defended in writing.

If writing promotes imaginative thinking, we should be asking ourselves why so few doctrinal professors require their students to write. One reason may be that the word "writing" has myriad meanings. I have taught writing for a number of years in a variety of settings—in high school, in undergraduate college programs, and in law school. I have noticed that when people outside academia ask me what I do, and I reply that I teach writing, I often receive puzzled reactions ranging from "Oh, I'll have to watch my grammar" to "I hope lawyers have better handwriting than doctors." I received my favorite response several years ago when I stated that I directed the writing center, and my questioner said, "Really? I didn't know that the college still taught riding. Where are the stables?"

While our doctrinal colleagues do not think that legal writing professors teach penmanship or equestrian skills, I suspect that the phrase "legal writing" means something very different to them than to us. For legal writing professionals, "legal writing" is the biggest of tents. It encompasses a variety of formats (memoranda, briefs, pleadings, statutes, client letters, contracts, and judicial opinions), a range of purposes (recording, reflecting, informing, describing, synthesizing, analyzing, evaluating, and persuading), and a number of stages within the process (brainstorming, freewriting, prewriting, outlining, drafting, revising, and editing). In addition, most of us envision legal writing as a cognitive process that enables our students to learn the law. As Robert Frost stated, "All there is to writing is having ideas. To learn to write is to learn to have ideas."⁷

Many of our colleagues, however, seem to equate teaching legal writing with teaching grammar, punctuation, usage, and citation rules. No wonder doctrinal professors are often reluctant to include legal writing in their doctrinal courses. Who would choose to devote a Torts class to the proper use of the semicolon? And how many of our colleagues would consider themselves competent to teach students when to use "which" and when to use "that"?

If we want our colleagues to use writing to teach doctrinal law, we need to educate them about the difference between teaching writing and using writing to teach. We can start by describing what we do in our legal writing courses. We can then explain what we mean by "writing to learn," and, when we find

7. *Education by Poetry in The Dolphin Reader* 25 (Douglas Hunt ed., 2d ed. Houghton Mifflin 1990).

colleagues who are interested, we can volunteer to help them design effective writing assignments.⁸ Finally, we can applaud the efforts of those who are already using writing in doctrinal courses, and we can assure them that a writing assignment can be valuable even if it is short and ungraded. If we want to erase the lines between doctrine and skills courses, it is time to follow Professor Parker's advice and use *our* imaginations to create more effective ways to communicate with our doctrinal colleagues.

8. See generally Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561, 575-80 (1997) (providing examples of writing activities that are appropriate for doctrinal courses).