



Can you imagine the American public tolerating a health care regime in which recent medical school graduates perform the most difficult medical procedures under the supervision of politically appointed senior doctors, many of whom have not themselves operated in years? Surely not.

And yet, the American judiciary has adopted just such a system to fulfill its law-stating function. It is no secret that judicial law clerks, who are often novice lawyers fresh from law school, commonly write the crucial working drafts of the opinions that seek to justify coercive legal judgments and set important precedents. Critics of the system abound, but significant change is unlikely, given crushing caseload pressures and shrinking judiciary budgets. Whether or not it is a good thing, American judges will almost certainly continue to rely heavily on law clerks to meet their opinion-writing obligations in the years ahead.

Teaching Judicial Opinion Writing

I am a career law clerk to a federal appeals court judge.

A decade ago, I was hired by Pierce Law and Vermont Law School in South Royalton, VT, to design and offer a judicial opinion-drafting seminar to second- and third-year law students. Initially, I pitched the seminar as a boutique offering that would appeal primarily to those students who had secured post-graduate clerkships. Over time, however, I have attempted to broaden the seminar's scope and appeal, as I have become convinced of the benefits of having all students—even those who are not interested in clerking or for whom clerking is not a realistic prospect—practice adjudicative writing.

Why should all students, and not just those on the clerkship path, be asked to draft opinions while in law school? The answer starts with the commonly accepted fact that the best attorneys are not those who advance the merits of the client's cause most forcefully, but those who are able to frame their arguments in terms that demonstrate an honest appreciation of the adjudicator's predicament. In a difficult case, effective lawyering requires one to range beyond the facts and legal doctrine, and to anticipate and speak to the myriad institutional and policy concerns that may inform the adjudicator's decision, such as: Am I confident that I have sufficient information, in terms of both record facts and social background facts, to decide this issue reasonably? Is the issue better resolved by

means of a broad or narrow, fact-based ruling? Is the issue receiving attention from the legislative or executive branch? Will my ruling jump-start or short circuit the democratic process?

In my experience, surprisingly few lawyers make effective arguments of this sort. Why this is so is a complicated question, but part of the answer might lie in the fact that few advocates have had occasion to reason through difficult legal problems from the judge's or law clerk's perspective. Realistic and well-designed opinion-drafting exercises can help to fill this experiential gap and provide some of the schema necessary for an empathetic grasp of the choices and dilemmas that adjudicators face.

Opinion-drafting exercises may, of course, be made part of the standard legal writing curriculum. One of my colleagues at Vermont Law School requires his legal writing students to draft an opinion. But the topic of opinion writing is so large that it merits its own course. In my seminar, students are asked to critically examine models of case resolution articulated and applied by a number of prominent commentators (especially judges) from across the ideological spectrum; to begin to develop their own case-resolution models as they tackle actual cases presenting close constitutional and statutory issues of significant social importance; to step outside themselves and

observe the evolution of their jurisprudential thinking as they read the course materials and draft their opinions; and, ultimately, to draft well written and principled opinions which fairly construe the record and reasonably respond to the issues presented.

Although I have assigned a number of different cases from a number of different courts over the years, most recently I have had the students prepare draft opinions in two cases that were litigated in a federal appeals court. The first case calls on students to decide whether government agents violated the Fourth Amendment's prohibition on unreasonable searches and seizures by reassembling, without a warrant, shredded personal documents fished from the trash of a suspected tax cheat. The second requires them to assess an immigration judge's ruling that an alien should be deported because she married fraudulently in order to secure an immigration benefit. The constitutional case challenges students to explore, among other things, the always topical questions of whether, and to what extent, a judge's personal views on the proper balance between liberty and governmental authority can, should, or must inform her substantive decision-making. The immigration case presents a number of tricky issues of statutory interpretation, raises important separation-of-powers questions, and requires thought about the extent to which our legal system can and should accommodate, and is capable of accommodating diverse cultural and religious norms.

With these cases focusing their attention, I assign the students readings which highlight the connections among the types of legal problems that make their way into a court of general jurisdiction. Students first read texts designed to highlight the difference between a natural law and positivist orientation—e.g., Sophocles' *Antigone*, Martin Luther King Jr.'s *Letter from a Birmingham Jail*, Oliver Wendell Holmes Jr.'s *The Path of the Law*, and the famous Hart-Fuller dialogue about whether the Nazi system of "justice" should be regarded as a legal order—and to put them in touch with their own philosophical predispositions.



Next, students study how great but ideologically diverse judges tend to approach common law, statutory, and constitutional problems, reading opinions and influential jurisprudential works by, among others, Justices Holmes, Cardozo, Scalia, and Breyer, and Judges Hand, Posner, Bork, and Coffin. Near the end of the course, as the students are refining their opinion drafts, they examine modern anti-theoretical trends and explore matters such as the capacity of judges to assess and apply empirical social science, whether writing style informs substance, and judicial candor. Throughout, students conduct "opinion studies," which require them to read and critique provocative judicial opinions. Students also participate in collaborative group writing exercises in which they are asked to agree to and outline an adjudicative approach to a fact pattern and then to compare the outline to the approach taken in the actual published opinion.

We may not like the fact that law clerks are opinion writers. As Judge Posner puts it, "Law professors resist acknowledging to themselves that they are teaching the work of last year's graduates, and lawyers resist acknowledging that they are writing for kids." But it is important that law schools prepare their students to be opinion writers and, more generally, to litigate within a system in which law clerks are opinion writers. Opinion-writing exercises, and courses which place students in the adjudicator's chair, should constitute an essential part of that preparation.

John Greabe is an assistant professor of law at Vermont Law School where he teaches Constitutional Law and Judicial Opinion Writing. An adjunct professor of law at Pierce Law, he teaches Judicial Opinion Writing. He is proud to report that approximately one out of every ten members of the graduating class at each school goes on to clerk, and that many of these clerks are his former students.

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