Breaking the Rules

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Abstract

"Breaking the Rules" is a legal research and writing (LRW) assignment that I crafted for students completing their first year of law school. LRW classes usher students into the legal "discourse community," where the communication conventions of our field become internalized. This assignment challenges students to question those conventions, particularly as regards reliance on settled legal rules that may perpetuate discrimination. The first part of this article is an essay that contextualizes and explains the assignment; the second part provides the assignment itself.

Introduction

The required full-year legal research and writing (LRW) class introduces new law students to communication skills involved in client representation—how to analyze and express the law on a client's behalf.[1] Consequently, LRW professors, myself included, feel a particular responsibility to usher students into the legal "discourse community," where the communication conventions of our field become internalized (Williams, 1995).

A growing body of scholarship challenges us to think more deeply about this discourse community because some of our conventions may perpetuate discrimination in the law (e.g., Berenguer et al., 2020; Culver, 2021). Our students arrive wanting to meaningfully impact the inequities they see reflected in the media and in their own lives (Atkins, 2020; Crichton, 2021). Taught to stay within traditional communication models, students may become frustrated and unmotivated to learn (Crichton, 2019; Wilensky, 2022)—the antithesis of the mindset necessary to flourish in the transition to law school.

This essay focuses on one particularly problematic LRW convention: uncritical acceptance of settled legal rules. The first part addresses the central place of settled rules in LRW instruction and describes a brief-writing problem that nudges students to begin considering the discriminatory impact of the "*Terry* stop" rule. The second part describes my "Breaking the Rules" assignment, which is the primary focus of this piece. This assignment takes students a step beyond the brief-writing problem and introduces skills aimed at fundamentally challenging and breaking the grip of settled rules that are long overdue for an overhaul.

Working Within the Rules: *Terry* Stops

My first LRW homework assignment always highlights a basic principle: "[T]he practice of law is, at its core, understanding and using rules" (Bonneau & McMahon, 2017, p. 35). This focus on rules continues throughout the year. Through scaffolded research and writing assignments, my students learn to discern a rule from authority, explain the rule by reference to past opinions, and apply the rule to a hypothetical client's circumstances to objectively predict the likely outcome (Fall semester) or persuasively argue for a favorable outcome (Spring semester).[2]

Historically, LRW professors have taught these skills through hypotheticals that accept the primacy of settled legal rules (Berenguer et al., 2020; Tully, 2022). For example, I sometimes assigned students in the Spring to draft briefs for a hypothetical *Terry* stop appeal. The *Terry*

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stop rule allows an officer with "reasonable suspicion" of ongoing criminal conduct to briefly stop the suspect for further investigation (*Terry v. Ohio*, 1968). Although the rule sounds neutral, its application has resulted in persons of color being stopped in vastly disproportionate numbers (e.g., Lee, 2016). Notwithstanding this context, my past hypotheticals involved only white defendants and officers because I was concerned about my ability to handle potentially unplanned classroom discussions about racism and also concerned about revealing my own unconscious biases in the process (Bishop, 2017; Dalton & Nejdl, 2019; Samuel-Siegel, 2022).

My students, however, deserved the opportunity to grapple with the *Terry* rule's real-world impacts (Keene & McMahon, 2022; Tully, 2022). While I was not an expert on the racism endemic to *Terry* stops, I was certainly capable of educating myself and being open to student insights and concerns that might arise. Accordingly, in Spring 2022, I created a new *Terry* stop hypothetical in which a Black officer stopped a Black defendant based on an anonymous tip from a person who was likely white.

I started the Spring 2022 semester with statistics bearing out many students' gut impressions regarding *Terry* stop discrimination. Throughout the semester, the hypothetical provided moments for reflection on this theme and opportunities for students to incorporate related context into their arguments. For example, students representing the defendant could highlight how the white anonymous tipster seemed unable to tell one Black person from another; student attorneys for the government could make the point that the Black officer acknowledged this fact and included it in his assessment of the tipster's information.

This hypothetical did not, however, provide an effective opportunity for students to fundamentally argue against the *Terry* rule itself (Keene, 2021; Wilensky, 2022). Principles of *stare decisis* dictate that prior decisions govern pending controversies, and both sides had potentially winning arguments under the current rule. Some students representing the defendant tried arguing disproportionate impact, but that argument was ineffective as the appellate record contained no specific evidence that racism had anything to do with the stop of this Black defendant. I made this design choice intentionally as my primary goal for the Spring was for students to research and write a persuasive argument under the established legal rule. But it wasn't where my students or I wanted to end the semester.

Breaking the Rules: The "High Crime Area" Factor

Law professors across the first-year curriculum increasingly incorporate materials illuminating the context in which problematic rules arise and how they are applied in ways that disparately impact historically disadvantaged groups (e.g., McMurtry-Chubb, 2022). LRW, usually the only first-year skills-based class, provides a unique opportunity to go beyond the academic discussion and introduce students to skills for challenging the discriminatory status quo (Han et al., 2023; Stanchi, 2021; Wilensky, 2022).

My "Breaking the Rules" assignment took on this challenge, focusing on the particularly problematic "high crime area" (HCA) factor that is part of the *Terry* stop calculus. The assignment came after the students had submitted their final briefs in the *Terry* stop problem described above. The steps of the assignment included: (1) understanding the HCA rule; (2) considering real-world context informing the rule's fundamentally unjust application; (3) learning from the work of past advocates who successfully challenged settled rules; and (4) drafting a report that stated a new HCA rule and supported that rule with carefully chosen authorities.

Parts (1), (2), and (3) involved several hours of assigned homework and a single two-hour class session. Part (4) was started in class and continued in small groups outside of class, with a group report due several days later. The Supplementary Material section provides a link to my teaching slides.

The HCA Rule

The HCA rule derives from *Illinois v. Wardlow* (2000). Reading the majority *Wardlow* opinion, students discerned a seemingly neutral rule: an officer's determination that an individual was in an HCA supports the officer's decision to make a *Terry* stop.

Students also read Justice Stevens's dissent from the majority's HCA rule. In LRW classes, dissents generally take a distant back seat to majority opinions because students are learning to formulate winning arguments supported by binding law (Keene & McMahon, 2022). However, by reading Justice Stevens's opinion, students discovered two fundamental flaws in the majority's HCA rule. First, the rule takes at face value an officer's opinion that the stop occurred in an HCA. Second, many reasons besides criminal activity explain why an individual in an HCA might act "suspiciously" in the presence of law enforcement, including a person of color's negative experiences with law enforcement in the HCA in the past.

Real-World Context

To highlight the HCA rule's disparate impact on communities of color, the assignment included real-world context from several sources (Keene, 2021; Kline, 2021). One such source was the much-publicized *Terry* stop of Elijah McClain (Smith et al., 2021). Mr. McClain was stopped because the police thought he "looked sketchy" and was in what they described as an HCA. The officers' violence against Mr. McClain resulted in his death. Because of the resulting publicity, an independent panel was appointed to examine the circumstances; the panel's report demonstrated Mr. McClain's stop did not occur in an HCA (Smith et al., 2021).

Of course, most *Terry* stops do not receive the scrutiny that Mr. McClain's did. With that in mind, we considered additional context—a study examining two million stops in New York City. The study found that the "HCA" designation was almost entirely uncorrelated with actual crime data and that race was at least as likely a predictor of the HCA designation as crime statistics (Grunwald & Fagan, 2019).

Incorporating this context from outside the confines of established HCA doctrine laid the groundwork for students to share their own real-world experiences in an in-class conversation (Culver, 2021; Keene, 2021; Rankin, 2022). Given the sensitive subject matter, this part of the exercise was definitely not a moment for mandated participation. In particular, I was careful to welcome voluntary contributions by students of color without imparting any expectation, even implicitly, that they do so (Bishop, 2017).

The conversation that followed was extraordinary. Students related both the general tenor of police interactions in their communities and specific interactions they had experienced or witnessed. The stories included students of color stopped for no reason other than that they were hanging out with a large group of friends. The stories also included white students describing similar scenarios but with very different endings—police looking the other way or helping an inebriated student get home. These stories, and many others, were offered and received respectfully by the entire class.

Learning from Advocates on Both Sides of the Abortion Debate

By this point, most students were fired up to fundamentally challenge the HCA rule, and we turned to legal skills they might employ in this work. This was a good moment to remind students that they wouldn't be writing on a blank slate, that they could situate themselves as part of a long tradition of lawyers who have used LRW skills to successfully challenge seemingly fixed rules of law (Berenguer et al., 2020).

To learn from this tradition, students reviewed the winning Supreme Court briefs in *Roe v. Wade* (1973) and *Dobbs v. Jackson Women's Health Org.* (2022), each of which fundamentally changed

the rule of law on abortion rights. Assigning briefs from both sides of the debate underscored students' change-making abilities regardless of their views.

I asked students to focus on the types of authority relied upon in each brief. In our class session, students reported finding many sources beyond the usual majority appellate decisions. These included dissents, legal scholarship, scholarship from other disciplines, advocacy pieces, and government reports. As we dug deeper into these sources, students observed how the authoring lawyers had chosen authorities that would catch the reader's attention and some that imparted a bipartisan legitimacy to the argument, such as *Dobbs*'s citation to writings by Ruth Bader Ginsburg and Dahlia Lithwick, both prominent but seemingly unlikely (i.e., liberal, pro-choice) sources.

Crafting and Supporting a New HCA Rule: Student Reports

For the final product of the assignment, students were presented with a new hypothetical where they represented a Black woman subjected to a *Terry* stop in a parked car. The circumstances supporting reasonable suspicion would not on their own have justified the stop without the added boost of the officer's determination that the suspect's car was parked in an HCA.

Situating the assignment as a client representation accommodated students who might not personally agree that the HCA rule should be changed. After spending the whole semester honing advocacy skills in a fictional *Terry* stop case, they could appreciate that attacking the HCA rule head-on was the best strategy for this client.

I divided the class into groups of five people, with each group assigned to produce a report that expressed the group's consensus on a new, fairer HCA rule and that succinctly described the relevance of three authorities that supported their new rule. The students had worked in small groups of varying sizes and compositions throughout the year; they were comfortable working with each other, and by this point they well understood the benefits of learning from colleagues in a structured way. Groups reflected the racial makeup of the class as best I could discern it, with no student being the only person of color in their group (Nowka, 1999).

Although I allowed for the possibility that groups might have a difficult time building consensus for a new rule, that proved not to be the case. Half the groups took an incremental approach (Bonneau & McMahon, 2021), maintaining the basics of the *Wardlow* HCA rule but adding a new requirement: courts must disregard officers' claims that the stop occurred in an HCA unless crime statistics legitimized the HCA designation. The other half took a more radical approach: HCA designations should never be part of a *Terry* stop determination because the HCA standard has proven discriminatory time and again.

Picking up on the types of authority we observed in the *Roe* and *Dobbs* briefs, we discussed effective research strategies for this project. We brainstormed search terms and databases beyond Westlaw and Lexis, such as Google Scholar and the Bureau of Justice Statistics. We also talked about choosing wisely among the many available authorities, as the *Roe* and *Dobbs* lawyers did, including considerations of recency, authorship, and specific relevance.

Finally, I used the assignment as one more opportunity for students to consider the needs and expectations of the target audience. The assignment was set up as a report for senior attorneys who had not yet done any research and needed a report that would help them quickly understand the proposed new HCA rule and assess the strength of authorities supporting that rule. Considering students' need to continue working on conciseness in their writing, the instructions specified that each of their three sources should be described in no more than seven sentences.

The reports blew me away. The proposed rules included useful context, and the descriptions made clear how the well-chosen authorities supported the rule.

Reflections

I taught this assignment in a single week, including just two hours of classroom time. Although the one-week setup worked well, I am contemplating increasing the timeframe, either by freeing up an extra hour of class time at the end of the semester or by working some of these skills into lessons throughout the semester. With more time, I would add depth to both the research and writing aspects.

For research, the lesson could take a more creative approach to search strategies. For example, Dalton and Nejdl (2019) propose brainstorming synonyms for historically disadvantaged groups as an opportunity to discuss how those terms develop and change over time and also to address the possibility of using terms that students would not use themselves, especially if they are looking for historical materials.

For writing, the assignment could provide further focused practice on persuasive rhetorical choices. For example, we could explore how the wording of the proposed new rules in the *Roe* and *Dobbs* briefs rhetorically lead the reader to very different conclusions.

Finally, I would like to work with professors outside the LRW arena to expand the assignment's potential.[3] Certainly, the assignment as is could easily be incorporated into the *Terry* stop unit of a 1L criminal law class. But the bones of the assignment would also work well with any substantive area where the legal rule is inequitable by design or in its impact. Thus, the assignment should be adaptable for other 1L courses, such as contracts or property, or even as a capstone project for college seniors headed to law school. The key for me would be to find professor partners committed to giving students a practice-oriented start on challenging the discriminatory norms they will encounter throughout their law school careers.

ASSIGNMENT
Breaking the Rules

Overview

In our final unit before the exam, we will discuss how lawyers sometimes seek not merely to apply a legal rule to their client's circumstances but to change the rule altogether.

Assignment Part A—Critical Consideration of the High-Crime Area Rule

Read *Illinois v. Wardlow*, 528 U.S. 119 (2000), both the majority opinion and Stevens's partial concurrence. Then read this news article in *The Guardian* about the death of Elijah McClain following a *Terry* stop in Aurora, Colorado.

- OPTIONAL: You are *not* required to watch the video embedded in the news article, which depicts the events of that night. The video is very disturbing.
- ALSO OPTIONAL: If you are interested in reading the full independent report about Mr. McClain's death, it is available here.

Come to class prepared to discuss your answers to the following questions:

- Based on *Wardlow*, what is the rule for the extent to which an officer may rely on "high-crime area" as a justification for a *Terry* stop? What facts established reasonable suspicion in *Wardlow*?
- The officers who stopped Mr. McClain said that they had reasonable suspicion for the stop. Based just on the article in *The Guardian*, what facts did the officers rely

on for this claim and what was the independent report's conclusion about those justifications?

- Do you feel that the *Wardlow* rule regarding officer reliance on a "high-crime area" justification strikes the right balance between the competing interests wrestled with in *Terry* (legitimate law enforcement vs. riding roughshod over individual rights)? Why or why not?

Assignment Part B—Authorities to Challenge the Rule

Lawyers have a long tradition of advocating for change. For example, consider the fight over abortion. Jane Roe, the plaintiff in *Roe v. Wade*, could not obtain a legal abortion because of the Texas statute prohibiting abortions except to save the life of the mother. For Roe to prevail, her lawyers had to attack the existing rule—the Texas prohibition—and propose a new rule. Fifty years later, Thomas Dobbs, the Mississippi State Health Officer who was the lead plaintiff in *Dobbs v. Jackson Women's Health Organization*, successfully argued to uphold a Mississippi statute that prohibited abortion after fifteen weeks' gestation, with limited exceptions. Dobbs could not prevail under the *Roe* rule tying abortion rights to fetal viability; accordingly, Dobbs's lawyers argued that the rule crafted by *Roe* and its progeny was wrong and proposed a new rule to take its place.

Skim the Supreme Court brief for Roe, available on Westlaw at 1971 WL 128054, and the Supreme Court brief for Dobbs, available at 2021 WL 3145936,[4] focusing on the breadth of authority—legal and otherwise—relied upon by the parties. Come to class prepared to discuss your observations in this regard. Specifically:

- What types of authority did Roe's lawyers rely on to argue that abortions for reasons other than saving the mother's life are permissible?
- What types of authority did Dobbs's lawyers rely on to argue that pre-viability restrictions are permissible where a rational basis supports the prohibition?

Assignment Part C—High-Crime Area Rule and Research Project

1. New Client: Shakima Greggs

You represent a new client, Shakima Greggs, who was arrested as a result of evidence found during a *Terry* stop. The officer who stopped Ms. Greggs said he reasonably suspected that she was involved in an illegal drug deal based on a combination of the following:

- Ms. Greggs and another person were observed sitting together in a parked car for ten to fifteen seconds at the far end of a dimly lit parking lot late at night. Ms. Greggs and the other person seemed to be looking at something that Ms. Greggs was holding in her hand.
- The parking lot was located in a neighborhood that, according to the officer, was "well known" in his precinct as a "high-crime area," and the officer himself had made three drug-related arrests during the past year within a six-block radius of the parking lot. The officer did not have any empirical data to support the "high-crime" designation ascribed to the area.

Ms. Greggs and her companion were both Black women, and the parking lot was in a majority-Black residential neighborhood.

Although neither aspect would be sufficient on its own, precedent cases in your jurisdiction have found reasonable suspicion in similar combined circumstances. Accordingly, Ms. Gregg's best argument is that the basic high-crime area rule from *Wardlow* should be refined or, perhaps, rejected entirely.

2. Research Project

Counsel for Ms. Greggs (i.e., everyone) will argue for a new "high-crime area" rule. The rule should be well-supported by authority, even if not by precedential majority opinions.

Collectively, the members of your team should (1) craft a new HCA rule and (2) locate three sources that would be particularly effective authority to support this rule. At least one source should be a court opinion (which may be in the form of a dissenting opinion) and at least one source should be something other than a court opinion. Keep recency, authorship, and relevance considerations in mind.

Procedure: Decide as a group how to divide up the work and get started. We may have time to start the project during class time. No one should spend more than two post-class hours on this project.

Product: The team should produce a report identifying (1) the proposed new rule and (2) the three authorities that you have selected.

- No particular format is required.
- The report should be polished and easy to follow, geared toward allowing a senior lawyer who has not yet done any research herself to quickly understand the proposed rule and assess the strength of each authority listed.
- I posted two research reports from last year's class in the Samples module. Read the NOTE before looking at the samples.

For each of the three sources of authority:

1. Provide sufficient information for the reader to be able to locate the source. Include a link for online sources. Don't worry about *Bluebook*[5] format for this exercise.
2. In no more than six or seven sentences, describe why the source seems to be particularly good authority for the argument that your proposed rule rather than the *Wardlow* test should apply in Ms. Greggs's case. Point to specific parts of the source that contain helpful analysis.

Notes

[1]Thank you to Amy Griffin for her thoughtful comments on a draft of the essay; to Nick Grande for his excellent research assistance; to Georgetown University Law Center for supporting the project; and to my students, whose responses to the assignment inspired me to write this article.

[2]Many legal writing programs follow a similar format of covering predictive writing in the Fall semester and persuasive writing in the Spring semester, but not all do.

[3]The introduction to this special issue includes some suggestions for adapting assignments in this issue to contexts outside the contributors' own areas of focus.

[4]Both briefs are available as supplements to this article on the *Prompt* website.

[5]The *Bluebook* (Columbia Law Review Association et al., 2021) is the citation manual predominantly used by law students and lawyers for their writing.

Supplementary Material

For supplementary material accompanying this paper, including a PDF facsimile of the assignment description formatted as the author(s) presented it to students, please visit https://doi.org/10.31719/pjaw.v8i2.187.

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