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CULTIVATING OUR EMERGING VOICES: THE ROAD TO SCHOLARSHIP

KEVIN HOPKINS*

The written word is the only record we will have of this our present, or our past, to leave behind for future generations

Langston Hughes¹

INTRODUCTION

I am a professor of color at a predominately white law school where one of my teaching responsibilities involves writing. I have taught both objective and persuasive legal writing for nearly a decade. As part of my role, I teach students how to construct and deconstruct legal premises and theses and to present legal arguments in specific writing conventions. In short, I teach process—how to nurture thoughts and ideas into concrete arguments. For the most part, I feel comfortable in this role; I have learned the “King’s English” and have developed many of the essential skills to move effectively within the “King’s Court.”²

As a neophyte scholar of color, however, I often experience varying degrees of ambivalence in constructing and cultivating my own ideas from theory to scholarship. Similar to other pre-tenured professors, I am bombarded with several primary concerns that ultimately affect how I write and what I write about. First, I am mindful of the significance of producing scholarly writings that, in some manner, contribute to the broad array of currently existing scholarship in a specific legal area. Second, I am reminded by colleagues of the significance of producing “good legal scholarship”—scholarship that is well researched, documented, and respected by peers. Third, I am conscious of many of the criticisms and the under-valuation of both

* Assistant Professor, The John Marshall Law School. I am grateful to members of the Steering Committee of the First National Meeting of the Regional People of Color Legal Scholarship Conferences for the opportunity to share my thoughts on scholarship.

¹ LANGSTON HUGHES, *The Need for Heroes*, 48 THE CRISIS 184, 184 (1941).

² I use the terms “King’s English” and “King’s Court” as metaphors for the Legal Academy (The Academy) and traditional modes of communicating within The Academy (e.g., the Socratic and lecture methods of instruction).

minority perspectives on racial and gender issues and the use of non-traditional modes of discourse when analyzing these issues.³ Finally, I am aware of the need to pursue and select a topic that will appeal to the law review editors and the inherent presumptions that too often accompany the placement of one's article or essay with a respected law review or journal.

In preparation for the First National Meeting of the Regional People of Color Legal Scholarship Conferences' panel discussion on "Nurturing Our Emerging Voices," I share a few of my thoughts and experiences on the beginning stages of the writing process. Specifically, I will briefly discuss a few of the hurdles that I faced in developing my scholarship and my strategies for overcoming them. This essay will focus on the following themes: selecting a topic and choosing a title, cultivating ideas through research, and developing a writing style. It will not, however, delve into the specific mechanics of drafting the law review article.

Although I realize that my comments may be old hat for many of the established scholars in the audience, my hope is that my discussion will, in some way, contribute toward assisting new scholars of color in their own transition from practical to scholarly writing.

I. THE CREATIVE PROCESS: SELECTING A TOPIC AND CHOOSING A TITLE

Law reviews provide a medium for academic discourse and resolution of legal issues. Traditionally, law review articles have served two basic functions: the resolution of jurisdictional conflicts of law in the context of existing factual situations and the application of existing law to new factual situations or new laws to currently existing factual situations.⁴ The publication of scholarly articles and other writings is critical for success in the legal academy.⁵ As I paraphrase the com-

³ See generally Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (evaluating the concern that contributions of scholars of color are often wrongfully ignored or undervalued); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (evaluating the merits of the use of narrative by critical race scholars).

⁴ See Heather Meeker, *Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers*, 1996 UTAH L. REV. 917, 921. Although law reviews publish essays and articles that fall outside the scope of the traditional functions (e.g., book reviews, narratives, letters, and symposia presentations), my comments in this paper are centered around the more traditional law review article.

⁵ "Professors who publish, even those whose publications are trivial and mediocre, will earn more, get promoted faster, and migrate to the more 'prestigious' universities." Roger

ments of many of my mentors and colleagues at law schools throughout the country, one will never be denied tenure solely on the basis of teaching evaluations. One will, however, be denied tenure for failure to produce scholarship.⁶

Clearly, professors of color are in the minority at most law schools.⁷ As fate would have it, many are thrown into the midst of academia without a formal introduction to teaching or scholarship and without mentors to nurture them. Because many professors of color spend the first year or so just prepping for their teaching responsibilities, their scholarship is often either tabled for the moment or avoided because of fear or uncertainty. Unfortunately, one of the biggest roadblocks in developing scholarship can be as simple as the choice of a topic. I offer the following considerations for selecting a topic and choosing a title.

A. Topics

A prerequisite to addressing the issue of topic selection is identifying where to find topics. How does one find a topic? My advice on this point is by no means exhaustive. One might consider the following legal and non-legal sources for generating ideas for topics: advance sheets for case decisions, legal and non-legal newspapers, and casebooks (e.g., the questions and comments following the discussion of the principle case). Other helpful sources for selecting topics include research on issues during practice or clerkships, computerized legal research,⁸ Internet bulletin boards or listserves, legal seminars and conferences in an area of specialty, classroom discussions, and conversations with colleagues. Any one of these avenues could provide an interesting lead on an ultimate topic.

C. Cranton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 14 (1986). See also Donald J. Weidner, *A Dean's Letter to New Law Faculty About Scholarship*, 44 J. LEGAL EDUC. 440, 441 (1994) (noting that "[b]eing a scholar is part of the job" and becoming a complete academic involves "produc[ing], on a regular basis, scholarship that is read and relied on by people who work in your area").

⁶ This advice was given to me collectively by colleagues and friends upon my entry into law teaching. It is not intended to suggest that a lack of scholarship will be the only basis for a denial of tenure. For example, the submission of scholarship deemed to be weak by members of the tenure committee at an institution may also be detrimental to one's longevity as a professor.

⁷ This statement does not apply, however, to those scholars of color who are teaching at historically black institutions.

⁸ Computerized legal research tools will include the "Hot Topic" file of LEXIS and the Westlaw counterpart, InfoTrac or LawTrac.

Selecting a topic can be difficult, however, especially when drafting the first article or essay. First, many new scholars often struggle with choosing a topic that will lend itself to a sophisticated legal analysis while remaining somewhat interesting for the reader. Nonetheless, assuming that the scholarship will be submitted to the law reviews or law journals for publication, it is important to remember that the initial audience will consist of students who are the editors and staff members of the law journals.⁹ Because most of these students are relatively new to the study of law, their interests and knowledge on many legal topics is limited. Therefore, choosing a topic that is intellectually manageable¹⁰ for the student editor may be critical for passing the initial screenings of the massive numbers of articles these journals receive annually.¹¹

Second, any selection of a research topic should include an evaluation of one's potential audience, the topicality and originality of the topic, and one's own interest in the subject matter.¹² I struggle with attempting fully to define topicality. In my own writing, it has meant that the general topic area is one that other law professors have

⁹ Although law review editors and their staffs will comprise the initial audience for legal scholarship, the final audience will consist of legal academics, practitioners, and judges. Members of this final audience, like the members of the initial audience, want to be informed of something "new and illuminating." See ELIZABETH FAJANS & MARY R. FALK, SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES AND LAW REVIEW COMPETITION PAPERS 16 (1995).

¹⁰ See Richard Delgado, *How to Write a Law Review Article*, 20 U.S.F. L. REV. 445, 448 (1986). Professor Delgado offers the following advice given by a leading law review to its members on choosing comment topics:

[F]ind one new point, one new insight, one new way of looking at a piece of law, and organize your entire article around that. One insight from another discipline, one application of simple logic to a problem where it has never been made before is all you need. The article states in the introduction what that new thing is, and the rest of the article argues, illustrates, defends it in the face of possible objections, showing how it would work in practice.

Id.

¹¹ For example, *New York University Review of Law & Social Change's* process for screening book reviews involves an initial review by either of the two book review editors who perform a "crayon test"—a brief skim of the review. See e-mail from Jeremy Telman, Book Review Editor, N.Y.U. REV. L. & SOC. CHANGE (Oct. 23, 1998) (on file with the author). Should the review capture the interest of these editors and pass the initial screening, it is then passed on to two staff editors who perform a more careful reading. See *id.*

¹² See C. Steven Bradford, *As I Lay Writing: How to Write Law Review Articles for Fun and Profit*, 44 J. LEGAL EDUC. 13, 15 (1994) (noting that topicality and originality are important considerations to law review editors). See also FAJANS & FALK, *supra* note 9, at 16.

recently written about.¹³ On the other hand, topicality can be construed to include timeliness. For example, one might consider how recent technological advancements in the practice of law could necessitate a change in the American Bar Association's Model Rules of Professional Responsibility.¹⁴ It is important to keep in mind, however, that selecting a current or hot topic will often require one's immediate attention and swift submission of an article for publication in order to avoid preemption on the subject by other scholars.¹⁵

The topic should also demonstrate originality.¹⁶ Good law review articles are ones that take "challenging positions on controversial issues, applying progressive, intelligent analysis to existing cases and commentary."¹⁷ Originality, however, often seems to be at odds with topicality because many law review editors tend to recognize an issue as topical only if several other scholars have already written about the topic.¹⁸ Also, because of the abundant legal scholarship already in existence, coupled with an estimated 20,000 new articles that practitioners and law professors produce each year, establishing originality might seem impossible.¹⁹

I offer two solutions for insuring that a topic will be viewed as original. First, even when dealing with a more traditional subject area or one that has been discussed and analyzed by others, one can and

¹³ See generally Kevin Hopkins, *Back To Afrolantica: A Legacy of (Black) Perseverance?*, 24 N.Y.U. REV. L. & SOC. CHANGE 447 (1998) [hereinafter Hopkins, *Back To Afrolantica*] (reviewing DERRICK BELL, *AFROLANTICA LEGACIES* (1998) and critiquing the author's arguments on such topics as black emigration, a property interest in whiteness, affirmative action, and black-Jewish conflicts); Kevin L. Hopkins, *A Gospel of Law*, 30 J. MARSHALL L. REV. 1039 (1997) [hereinafter Hopkins, *A Gospel of Law*] (reviewing DERRICK BELL, *GOSPEL CHOIRS: PSALMS OF SURVIVAL IN AN ALIEN LAND CALLED HOME* (1996)). See also Bradford, *supra* note 12, at 15 (suggesting that law review editors are likely to recognize a topic as topical if several law professors have recently written about it).

¹⁴ See generally Kevin Hopkins, *Law Firms, Technology and the Double-Billing Dilemma*, 12 GEO. J. LEGAL ETHICS 95 (1998) [hereinafter Hopkins, *Law Firms*]. That essay won first place in the Georgetown University Law Center's Third Annual W.M. Keck Essay Contest in Legal Ethics. It discusses the technological changes in the practice of law and their effect on hourly billing and advocates a change in the ethics rules to expressly allow for the billing of recycled work product to compensate for losses due to technology. See generally *id.*

¹⁵ Preemption is the refusal of a law review to publish an article because its topic has already been addressed and published by another scholar or because the issue has been resolved by judicial opinion. See Meeker, *supra* note 4, at 933-34; see also Michael D. Stokes, *How to Get Your Article Published by a Law Review*, A.B.A. J., Oct. 1985, at 144, 144; Delgado, *supra* note 10, at 449.

¹⁶ See Bradford, *supra* note 12, at 15 (discussing originality of topics).

¹⁷ Stokes, *supra* note 15, at 144.

¹⁸ See Bradford, *supra* note 12, at 15.

¹⁹ See *id.*

should always strive to achieve an original conclusion. On the other hand, a more challenging approach might be to select a topic that is the result of some recent technology or shift in public policy.²⁰ The latter approach, however, requires that the author keep abreast both of current technology and its impact on law and of public policy issues stemming from recent legal controversies.

Finally, the creation of a research folder can be helpful for future topic selections. This folder can store notes with topic ideas, newspaper clips, e-mails, Internet printouts, LEXIS or Westlaw downloads, and any other information that may have caught the author's attention during the academic year. A periodic review of this folder may be helpful when considering one's next article.

B. *Choosing a Title*

The title can be one of the most creative aspects of a piece. It can be analogized to the label of a product for public sale. Just as one would attempt to create a label and marketing scheme that would attract the interest of a consumer, the title should likewise attract the interest of the audience.

Good titles reflect the author's thesis. In developing a title, it is helpful if the thesis can be easily detected in the specific wording.²¹ Also, many scholars often use catchy words, phrases, case names, and metaphors in the title to paint a visual picture in the mind of the reader.²² Finally, many scholars use the colon as punctuation in the title to separate the general from the more specific language.²³ In any case, all of these approaches are acceptable and may help to attract the attention of the law review editors, colleagues, and other legal academics.

One easy way to focus and avoid some of the initial roadblocks that typically occur in topic selection and in attempting to draft the massive law review article is to consider participating in a law-related

²⁰ See generally, e.g., Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251 (1999) (considering whether to extend social security benefits to posthumously conceived children).

²¹ Examples of such titles include Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996) and Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

²² E.g., Regina Austin, *Nest Eggs and Stormy Weather: Law, Culture, and Black Women's Lack of Wealth*, 65 U. CIN. L. REV. 767 (1997).

²³ See Bradford, *supra* note 12, at 17.

essay writing contest or drafting a review of a leading scholar's book.²⁴ For the most part, these are shorter than typical law review articles and may provide the psychological comfort zone necessary to get scholarship moving. I have found that each tends to provide a manageable context for writing and the opportunity to finish a reputable piece of scholarship in a reasonable period of time. With a writing contest, the contest administrators will have selected a narrow topic to be addressed and a specific page limit. On the other hand, with a book review, the author's book will be the basis for evaluation and critique.

In drafting a review, it is helpful to be aware that law review editors are much more attracted to scholarly reviews of books and articles written by leading scholars in a field of study. They are more interested in publishing critical reviews of the book or article than rubber stamps of the author's theories and conclusions. It is also important to avoid the tendency to comment on or criticize every aspect of the author's work. Focusing on a few central themes and providing a well-researched and documented analysis and critique of those issues will offer greater leverage and more room to develop the analysis fully.²⁵

C. *Keeping it Interesting*

Finally, it is critical that one select a topic one finds genuinely interesting. Moreover, because of the amount of time, energy, and intellectual thought expended when writing a law review article or essay, it is imperative that the author select a topic that is not only interesting but also intellectually challenging. This lesson is probably one of the most valuable I have learned in developing my own scholarship and to be gleaned from this essay. Because most law review articles take the writer an estimated 150 hours to complete, it is essential that one select a topic that will stimulate and capture one's own interest.²⁶ Otherwise, the writer may find that "[w]riting about something

²⁴ E.g., Hopkins, *Back to Afrolantica*, *supra* note 13; Hopkins, *A Gospel of Law*, *supra* note 13; Hopkins, *Law Firms*, *supra* note 14. Although I have limited my discussion to contests and reviews, one might also consider selecting and expanding upon a legal topic researched and explored while in practice or during a judicial clerkship.

²⁵ For example, in my review of Professor Derrick Bell's *Afrolantica Legacies*, I specifically focused on and critiqued just a few of the many themes raised. See generally Hopkins, *Back to Afrolantica*, *supra* note 13.

²⁶ See Delgado, *supra* note 10, at 448 (noting that producing the typical law review article will take "at least 150 hours from start to finish").

that simply does not interest [him or her] is an invitation to procrastination and mediocrity."²⁷

II. CULTIVATING IDEAS THROUGH RESEARCH

Upon selecting a topic, the author must become immersed in the research process. In short, this means that the author should read everything that is pertinent to the subject.²⁸ I offer this advice for three reasons. First, through research, the author will discover the issues that have been covered by other scholars and the intricacies and depth of the current analyses for the topic area. Second, it acts as a check against preemption.²⁹ Despite how appealing the topic may look, any work will be in vain if the work of other scholars has preempted it. Finally, an exhaustive search of all of the articles written about the topic will help the author to focus on a specific issue or point that remains unsettled or to see problems with the prevailing views of the existing analyses.

In performing my own research, I begin by perusing the law review files on LEXIS or Westlaw to determine the magnitude of what has already been written on my topic. I then pull the articles that seem relevant and review them. I may also consult secondary authorities such as legal encyclopedias and treatises on the topic for a more general review of the subject area.³⁰ Once I am satisfied that I have found the major articles written on the topic, I perform a more critical review of the articles and pull the major cases, statutes, and other primary authorities that have been cited by the authors.³¹ I feel comfortable in stopping my research only after I begin to see the same sources being referred to and cited to repeatedly.

²⁷ See FAJANS & FALK, *supra* note 9, at 16.

²⁸ Unfortunately, there is no other way to avoid the problem of preemption than to read everything that may be pertinent or related to the issue.

²⁹ See *supra* note 15 (discussing preemption). Even if others have already written on the topic, it is still possible to develop an original conclusion.

³⁰ In teaching research and writing, I inform my students that consulting a legal encyclopedia or treatise is a good way to acquire a basic working knowledge in a specific area of law. Also, these authorities may provide references to primary authorities and other legal periodicals that may have some bearing on the topic.

³¹ It should be noted, however, that the cases and sources cited in a law review article are only as current as the date of the article's publication. Therefore, it is important to Shepardize the cases and statutes and to consult the pocket-parts of all secondary sources to insure that all of the cited materials are still valid.

III. DEVELOPING A WRITING STYLE: TRADITIONAL VS. NON-TRADITIONAL

Upon the completion of research, the drafting process begins. Although I will not discuss the specific mechanics of the writing process, I will share a few thoughts regarding the use of non-traditional writing styles to convey an analysis. Specifically, this section will briefly touch upon the use of narrative and storytelling to convey arguments and the politics surrounding that usage.³²

The legal academy is conservative. For centuries, it has been dominated and monopolized by white males. Only recently have females and scholars of color been afforded opportunities to join law faculties nationwide. Even now, minority representation on law faculties is minuscule. Law professors have used the same pedagogy and methodology in teaching students for many decades. As a professor who teaches writing, I am required to teach my students how to present and process information using those legal writing conventions that are recognized and followed by practitioners, law professors, and judges.

Although I find the use of storytelling and narrative refreshing and enlightening (as I believe most scholars of color do), its weight and credibility in the scholarship arena have been challenged and questioned by scholars who are not of color, prompting scholars of color to defend it.³³ Many scholars of color assert that storytelling and narrative are critical in conveying a "voice of color"³⁴ in the legal academy, one that has for decades been "institutionally silenced, so-

³² The narrative or storytelling approach has achieved prominence in the writings of critical race scholars and feminists. In the past decade, many law professors have utilized storytelling as a medium to discuss racial issues and concepts that might not be as effectively discussed through the use of traditional legal scholarship. See generally DERRICK BELL, *AFROLANTICA LEGACIES* (1998); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

³³ See generally Farber & Sherry, *supra* note 3 (evaluating the merits of the use of narrative by critical race scholars); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 *IOWA L. REV.* 803 (1994); Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 *HOWARD L. J.* 1 (1996) (evaluating the Farber-Sherry critique).

³⁴ See Robinson, *supra* note 33, at 23. Professor Robinson has used the term "voice of color" as a metaphor to refer to the "manifold experiences of civil disability, political inequality, and social injustice" of blacks in America. See *id.*

cially marginalized, and legally oppressed."³⁵ I do not begin to delve into the heart of this debate. I will, however, raise a few considerations regarding the decision whether to incorporate storytelling and narrative into a piece of writing.

Professor Derrick Bell is probably most noted for his use of storytelling in discussing issues pertaining to racism and sexism. I have drafted critiques of his most recent books, *Gospel Choirs*³⁶ and *Afrolantica Legacies*,³⁷ in both of which Professor Bell extensively uses storytelling to convey his arguments. By default, I immediately confronted the issue of how to critique non-traditional legal scholarship. In drafting my reviews, I grappled with two major criticisms that have been posited by scholars who are not of color against the use of storytelling and narrative. First, some challenge the legitimacy of the use of fiction when the facts alone are sufficient to convey the intended message.³⁸ Second, some argue that many readers who are not of color may miss the relevance of the author's selection and use of a specific story.³⁹

Whether or not these criticisms are valid, many believe that storytelling allows scholars of color to reach an audience outside the traditional audience of readers. Storytelling may, therefore, be a useful and liberating mode of discourse for scholars of color, whose voices have been and continue to be silenced. On the other hand, authors should keep in mind that many institutions do not hold articles written in the storytelling style in high regard and that such articles, therefore, may not help the author during tenure considerations. Because the decision whether or not to use the storytelling style involves such conflicting considerations, the decision should be a personal, case-by-case one.

Most importantly, however, one must follow his or her heart. The writing will progress with greater ease if the author is passionate about the topic. For example, if race is of importance to the author, then he or she should write about it.⁴⁰ Storytelling and narrative provide great

³⁵ See *id.* at 20; see generally Peter C. Alexander, *Silent Screams from Within the Academy: Let My People Grow*, 59 OHIO ST. L.J. 1311 (1998) (discussing institutionalized silencing of minority law professors in American law schools).

³⁶ See Hopkins, *A Gospel of Law*, *supra* note 13.

³⁷ See Hopkins, *Back to Afrolantica*, *supra* note 13.

³⁸ See Hopkins, *A Gospel of Law*, *supra* note 13, at 1057-58 (discussing some of the criticisms against the use of storytelling and narrative).

³⁹ See *id.* at 1058-59.

⁴⁰ I am aware that some scholars of color might disagree with this advice and caution the pre-tenure professor to save racial issues for post-tenure scholarship. This decision

segues into deconstructing race and gender issues. My solution in critiquing Professor Bell's work was simply to turn my review into a scholarly piece by documenting sources when analyzing and critiquing Bell's arguments and by critically analyzing the arguments proffered.⁴¹

In addition, it should be noted that storytelling and narrative are becoming popular with scholars who are not of color. For example, a speech during a symposium is often no more than a brief narrative of the speaker's experiences, and many law reviews sponsor symposia and publish these speeches in order to ensure that voices of color are heard.⁴² Finally, many law journals at prestigious institutions are also aware of the important contributions that scholars of color have made through the use of these tools in their writings and would welcome submissions of articles written in this style.⁴³

CONCLUSION

The "voice of color" has too often been just another cry in the wilderness—here today and gone tomorrow. As law professors of color, we have the unique opportunity to speak out on many different issues and to have our thoughts and ideas immortalized through our scholarship. Although the initial stages of scholarly writing may seem difficult and tedious, the effort is worthwhile: our writings will have a lasting legacy and an immeasurable value for future scholars. Let us continue to lift our voices. Even more importantly, however, let us ensure that our voices will be heard for years to come through our scholarship.

requires gauging the specific faculty's response to non-traditional methods of scholarship or willingness to accept such scholarship. On the other hand, I have concluded that one must write about those things that provide intellectual stimulation and excitement.

⁴¹ The biggest challenge in critiquing Professor Bell's books was to identify within the fiction a legal issue or theme that would provide a significant basis for a traditional analysis.

⁴² Probably the most obvious is the First National Meeting of the Regional People of Color Legal Scholarship Conferences where the speeches and comments of the speakers will be printed by the *Boston College Third World Law Journal*, the *California Western Law Review*, and the *John Marshall Law Review*.

⁴³ See Butler, *supra* note 21, at 678–79 (including a narrative of the author's experiences as a federal prosecutor at the Justice Department); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710–12 (1993) (including a narrative of the author's grandmother's experiences in "passing" as white as a result of the fairness of her skin). As alluded to earlier in this piece, in most cases, the publication of non-traditional scholarship in a law review or journal at a prestigious institution will validate the piece as scholarly.

