THE NEXT GREAT CHALLENGE: MAKING LEGAL WRITING SCHOLARSHIP COUNT AS LEGAL SCHOLARSHIP

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The *Legal Writing Journal* published my first article. For that reason alone, it is special to me. As I am sure is true for many legal writing scholars, the *Journal* helped me find my voice, provided welcome validation, and conferred value on my scholarly effort. I have a copy of each print volume in my office, and like old friends, they are always there when I need them. I miss receiving each new cream and green issue in the mail, devouring it, and adding it to my collection, but the online version is equally pleasing in a different way and admittedly more convenient.

As we celebrate the thirtieth anniversary of the *Journal's* founding, I thank those with the requisite foresight, talent, and spirit who founded the Legal Writing Institute and shortly thereafter the *Journal*. I just missed being a part of this magical time but consider myself a fortunate beneficiary. Since 1991, the *Journal* has been a consistent witness to and agent of the growth of our discipline. Together with *Legal Communication & Rhetoric: JALWD*, our second peer-review journal, it has given legal writing scholars a comfortable home and, to build on a phrase from Linda Berger, "a [legitimate] place to stand."[1]

As teachers, scholars, and publishers of legal writing, we can be proud of our progress over the last thirty years. We acknowledge the efforts of law faculty nationwide, doctrinal and skills-related alike, who have believed in our work, supported our cause, and made mutual respect possible for the benefit of all our students. Yet many of us continue to face significant challenges in terms of title, security of position, salary, governance rights, other academic privileges, and heavy course loads. As a member of LWI's Professional Status

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[1] Linda L. Berger, *Studying and Teaching "Law as Rhetoric": A Place to Stand*, 16 LEG. WRITING 3, 4 (2010).

Committee, I am keenly aware of the amount of work yet to be done.

The next great challenge for legal writing scholarship will be to convince the legal academy writ large that legal writing scholarship counts as legal scholarship. By "legal writing scholarship" I mean articles grounded in theory that explore the creation and meaning of legal texts and communication in all its forms, legal writing pedagogy and curricula, and the importance of legal writing and other skills training in legal education. By "counts," I mean that the subject of legal writing forms the basis of a respectable scholarly agenda as valuable and worthwhile as any other that is "tenurable." If we can win that battle for respect, I think we win the war for equal status and security of position.

Some of our colleagues at UNLV have conceptualized the evolution of legal writing scholarship as a series of leaps.[2] The first big leap was to take an interdisciplinary approach to writing about teaching writing.[3] The second leap was to build community by creating spaces of our own, such as LWI, the *Journal*, and then later, *JAWLD*.[4] The third leap was to develop a rich, often interdisciplinary approach to studying and writing about legal writing.[5] In their article, Linda Berger, Linda Edwards, and Terry Pollman suggested—hoped, perhaps, and I along with them—that scholarship relating to legal analysis, skills and practice is no longer considered inferior to traditional legal scholarship.[6] The growing number of schools where legal writing faculty have achieved equal status due at least in part to their legal writing scholarship suggests we have made significant progress as a result of these leaps.[7]

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[2] *See* Linda L. Berger, Linda H. Edwards & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 LEG. WRITING 537 (2010).

[3] *Id.* at 542.

[4] *See id.* at 544.

[5] *Id.* at 545.

[6] *Id.* at 539.

[7] According to a recent list compiled by Mel Weresh at Drake Law School, forty-four law schools (roughly twenty-two percent of all law schools) now have some form of tenure (what she terms unitary, programmatic, or special), for one or more of their legal writing faculty. According to the most recent survey, however, the picture is less rosy due, in part perhaps, to the difference in the nature of the information collected. The survey indicates that twelve schools have tenured or tenure track faculty hired to teach legal writing, twelve schools have tenured or tenure track faculty hired to teach legal writing and other courses, and one school has tenured or tenure track faculty who teach legal writing as part of their first-year

Despite undeniable progress at many schools, the most respected professors in my world are still those who teach and write about traditional, doctrinal subjects and publish in elite yet student-edited journals. At Georgetown, our Dean and a large contingent of supportive faculty recently voted to allow legal writing faculty to apply to for tenure eligibility between their third and sixth years.. If accepted, all existing tenure procedures will apply, If not, the faculty member remains on the contract track. The decision came after nearly twenty years of struggle and the work of three ad hoc committees. Although this change represents a major inroad to heavily defended territory, the faculty at large has yet to address the larger question of whether legal writing scholarship alone will qualify an applicant for tenure. In a world where T14 schools can and still set "the standard," I believe we have cause for concern. At Georgetown and elsewhere, entry level, tenure-track faculty are increasingly hired with J.D.s, Ph.D.s, and substantial scholarship. Not surprisingly, we have heard it suggested that we might need Ph.D.s as well. The problem is that there is no Ph.D. in legal writing. Although rhetorical theory informs what we do as teachers of legal analysis and writing, graduate programs in rhetoric or communication do not directly address its application to law and lawyering.

My experience at Georgetown is not unique. The notion that legal writing scholarship is no less scholarly than the subject we teach remains a significant barrier to equality. As long as the value of legal writing scholarship remains open to question, we will have trouble finding a wide range of potential publishers, being taken seriously by some of our tenured colleagues, motivating legal writing colleagues to write about legal writing, and motivating those of us not required to write to do so anyway. Establishing our own journals has helped solve the publisher problem. The downside has been to segregate us from the larger community of legal scholars. Unless our journals landed on their desks, traditional legal scholars have had little incentive or occasion to read our work. Some likely believe legal writing scholarship is stuck in that first "how to teach" phase or consists of articles on teaching tips and the mechanics of writing. Others view our journals as a form of self-publishing, accepting articles that would not otherwise be taken by a "real journal."

The smart move, as I have heard colleagues say, is to publish in student-edited, law school journals to reach a larger

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doctrinal courses. *See* Ass'n of Leg. Writing Dirs. and Leg. Writing Inst., *2015 Survey Report* 5, http://www.alwd.org/wp-content/uploads/2017/03/2015-survey.pdf.

audience and increase the chances for promotion or tenure. Unfortunately, most journals of the "best law schools," according to *U.S. News & World Report*, do not publish legal writing scholarship, nor do they have any great incentive to do so.[8] This is not surprising since often these schools invest little in their legal writing programs,[9] still operating perhaps on the theory that writing cannot be taught, or if one is smart, one can write.[10] At a recent AALS Annual Meeting, I suggested at a discussion group on diversity in scholarship that "diversity" includes subject matter as well as authors and varying points of view. Afterwards, several attendees confided in me that they had never noticed the absence of skills-related scholarship in traditional journals or considered the question.

The effect of traditional attitudes on new legal writing faculty is equally concerning. At schools where legal writing faculty are not required to produce scholarship, they have no incentive to write if they are not eligible for writing grants and perhaps little incentive if they do. And where legal writing faculty are required to produce scholarship, either for a promotion in rank or security of position, it may seem wiser to write in a traditional subject area likely to be considered by their tenured colleagues as more intellectual or worthwhile. Discouraged about the value of writing about legal writing, new legal writing faculty can feel forced to become expert in yet another field of law.[11] Given the work load and additional responsibilities that legal writing faculty often face, this choice seems unfair. Nor am I confident that traditional faculty are uniformly generous when evaluating scholarship on legal doctrine authored by a legal writing colleague. The net result is often to deny legal writing faculty the joy of discovery inherent in scholarship and the synergy between scholarship and teaching.

Making legal writing scholarship count as much as traditional scholarship will not be easy, but we are not likely to achieve greater status and security of position for the majority of our colleagues until we do. As teachers and innovators of legal writing, we should embrace the benefits of scholarship and the rigor it demands. We must begin or enter existing conversations with adequate research and

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[8] *See* Jessica Lynn Wherry, *Dear Student Editors, We Need Your Help,* 24 AM. U. J. GENDER SOC. POL'Y & L. 433, 433-443 (2016).
[9] *See, e.g.*, Berger, et al. *supra* n. 2 at 558-59.
[10] *See, e.g.*, Chris Rideout and Jill J. Ramsfield, *Legal Writing: A Revised View,* 69 WASH. L. REV. 35, 40-44 (1994).
[11] For a fuller discussion of the dilemma legal writing faculty face in choosing a scholarly agenda, see Berger, et al. *supra* n. 2 at 557-60.

attribution.[12] For the most part, our scholarship has focused on the creation of texts: teaching the modes and process of legal analysis, examining the creative process of writing, and exploring the theories that inform effective and ethical analysis and persuasion.[13] As we initiate new legal writing faculty at our own schools, particularly those direct from practice, we should introduce them to this body of work, hope to inspire, and then help them build a scholarly agenda. Weekly or monthly workshops on topics or works in progress can build community and motivate even the most exhausted writers.

It may also be time to broaden our focus to include the meaning or interpretation of texts as well, to address both the law as written as well as the writing of practitioners. I envision a foundational phase, with articles that teach and illustrate the theory and process of rhetorical analysis, followed by a rich foray into the rhetorical analysis of legislation, judicial decisions, pleadings, contracts, and oral argument, to name a few. Rhetorical analysis of current and controversial legal issues or cases would likely be of greater interest to traditional scholars as well.[14]

As publishers of legal writing, we can likely do better to widen and integrate our scholarly audience. If we can reach traditional and legal writing scholars alike, we may help achieve the kind of positive contact that leads to positive status change. For example, the *Journal* might devote specific volumes to a particular issue in law or legal education and then invite authors with traditional and skills-related perspectives to submit articles on that issue. Or the *Journal* could host symposia on specific federal or state judicial

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[12] *See, e.g.*, *id.* at 549-52.

[13] *See, e.g.*, LWI's *Monograph Series* (with issues devoted to teaching legal analysis and writing to first-year and upper-class students, the rhetorical theory that informs the teaching and creation of legal writing, and moot court programs and oral advocacy), https://www.lwionline.org/publications/monograph-series.

[14] *See, e.g.*, Linda L. Berger, *Creating Kairos at the Supreme Court: Shelby County, Citizens United, Hobby Lobby, and the Judicial Construction of Right Moments*, 16 J. APP. PRAC. & PROCESS 147 (2015); Kirsten K. Davis, *The Rhetoric of Accommodation: Considering the Language of Work-Family Discourse,* 4 U. ST. THOMAS L.J. 530 (2007); LINDA H. EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD (2012); Carol McCrehan Parker*, The Perfect Storm, the Perfect Culprit: How a Metaphor of Fate Figures in Judicial Opinions,* 43 MCGEORGE L. REV. 323 (2012).

decisions or controversial developments in the law. Speakers could include traditional legal scholars, legal writing scholars, the advocates involved, and the media, each of whom would contribute their particular expertise or point of view. Speakers would be invited to turn their remarks into a scholarly article to be published in a symposium issue. This type of issue would likely draw interest from a much wider audience than the *Journal* typically enjoys and help bring our divided communities together.

The *Journal's* anniversary gives us an opportunity to reflect on the nature and quality of our scholarship. Determining the paths it can and should take is our collective responsibility as we work toward equality. Just as we strive to grow as teachers, we must encourage each other to grow as students and scholars of our own discipline. If we can do that, the rest will follow.