

HERE'S TAE US, WHA'S LIKE US: SOME THOUGHTS ON THE FUTURE OF LEGAL WRITING IN AMERICAN LAW SCHOOLS

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Ask any Scot to complete the phrase "Here's tae us, wha's like us," and the universal answer will be "gey few and they're a' deed." It's an old toast, translated as "Here's to us, who's like us, very¹ few and they're all dead." It's a recognition that Scotland is a small country with a small and, at least in our² own minds, disrespected and oppressed population, but that we're proud of our accomplishments. And that much like a Jet in *West Side Story*, when you're a Scot, you're a Scot all the way.³

Much the same is true for legal writing⁴ teachers in the United States. There aren't that many of us, and we're not accorded the respect in the legal academy to which we believe we're entitled, but we accomplish a lot as teachers, scholars, and—increasingly—as administrators. From a standing start just a few decades ago, we, and our field, are deeply woven into the fabric of law school life. We have

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¹ "Gey" is sometimes translated as "damned" or "damn" in order, I suppose, to provide some degree of emphasis. Take it from a native Scot though: "Gey" means "very," and nothing more. We Scots have a powerful way with invective—there can be few more profanely lyrical experiences than hearing a cursing Scot in full flow on a Glasgow Saturday night—but "gey" is a family word, one that you can use to children. We (mostly) save our cursing for grown-ups.

² I've been a citizen of the United States for many years now, but I was born, raised, and educated—through high school—in Scotland, mostly in Edinburgh, with the last three years in Glasgow.

³ "When you're a Jet you're a Jet all the way, from your first cigarette to your last dying day." Stephen Sondheim, *Jet Song*, from *West Side Story*, found in STEPHEN SONDHEIM, *FINISHING THE HAT* 31 (2010). Far be it from me to question anything written by the great Stephen Sondheim, but I'd always thought that our first dying day would be our last one as well, given the nature of the process. So maybe just "dying day" would have been enough? Or maybe I'm just jaded after all these years of looking for logical inconsistencies in student writing.

⁴ I use "legal writing" here as a shorthand way of describing those of us who do what we do, regardless of the labels we use to describe our work. As will be seen, though, I'm not sure that it's a label we should continue to use.

two professional associations devoted to our interests,⁵ three journals devoted to publishing work on our subject,⁶ and we have more regional, one-day, and national conferences than you can shake a stick at.⁷ A few people, working harder than it's possible to imagine, have fundamentally changed the way legal citation is taught in this country,⁸ and legal writing teachers have made significant contributions in all the areas that touch ours, no matter how tangentially.⁹ The conversation about legal rhetoric is now impossible without including the voices of many in our community. A new area of scholarly inquiry—Legal Storytelling—has brought narrative theory into the mainstream of legal academic conversation, and new areas of inquiry are being mined every day. Viewed from almost any perspective, the story of legal writing in the legal academy in this country is a triumphant one.

Almost any. We have our struggles as well, most notably the old fight about status. Indeed, the Call for Essays to which this essay is a response throws the continued concerns of the legal writing community into sharp relief. It speaks of the goal of seeking "improved status"¹⁰ and asks what that phrase means. The Call asks for essays

⁵ I'll cite to them because of the demands of academic writing, but does anyone reading this not know that I'm speaking of the Legal Writing Institute and the Association of Legal Writing Directors?

⁶ This Journal of the Legal Writing Institute, Legal Communication & Rhetoric: The Journal of the Association of Legal Writing Directors, and Scribes.

⁷ In addition to the conferences exclusively devoted to our interests (and I include the Legal Storytelling Conference in that list, even though it reaches beyond our boundaries as well), we also have a significant presence in the American Association of Law Schools (AALS) and Southeastern Association of Law Schools (SEALS) conferences as well.

⁸ Not only is the ALWD Manual still around, it has forced The Bluebook into making changes in the way it presents its opaque instructions on legal citation. The Bluebook might still be close to impenetrable, but the ALWD Manual is responsible for that "close to" and that's more than any other competitor in the legal citation field has ever accomplished.

⁹ The scholarly convention would be to list some of these areas and to cite to some of the scholarship that supports my claim here. But that scholarly superstructure would dominate a short essay like this and, in any case, selecting some scholars for mention and not mentioning others strikes me as both odious and unnecessary. We all know our field, so let's supply the people and articles we know that support those claims.

¹⁰ Posting from Elizabeth Frost, Essay Co-Editor, JLWI, (efrost@uoregon.edu) to LRWPROF-L@iupui.com, *JLWI Vol. 24 -- Call for Essays* (July 8, 2019) (copy on file with author).

that go beyond the topic of tenure status to address other aspects of professional status, such as long-term contracts, pay, voting rights, benefits, sabbaticals, teaching of other courses, class size, relationships with other faculty, opportunities for professional writing, opportunities to attend conferences, opportunities to present research at faculty meetings or seminars, relationships with students, relationships with law school administration, opportunities to serve in law school administration, etc.¹¹

The Call also identifies other concerns: How can the legal writing community "help each other to improve our professional status and experience?"¹²; "[h]ow do our interests as faculty in improving our status align with students' interests?"¹³; and "[w]hat happens when an individual's interests do not align with programmatic interests?"¹⁴

This is a thoughtful list of concerns, and it displays a level of worry about the future of our field that might not be apparent from a superficial review of the apparent success story that is legal writing. My response to the editors' concerns, in this essay, might not be an especially satisfying one to many still in the trenches of the status wars, but it comes from a long-held concern that the status issue has taken time and energy away from places where our attention could more helpfully be focused.

In the interests of full disclosure, I should admit that I am a tenured, full, professor of law, and that I am starting what has been gently referred to as a three-year glidepath to retirement. So I am no longer a combatant in the status wars, and arguably have not been for several years now. Accordingly, anything I say here can readily be dismissed in light of my own status. In defense of my opinions, I can only say that they are genuinely held, and that in my time teaching in our business I have experienced every variant of status imaginable:

¹¹ *Id.* It's quite a list, and that "etc." at the end is an intimidating open end. At the risk of being provocative, though, I'll say that I don't think this list of concerns goes "beyond the topic of tenure status," I think it defines it. The grant of tenure to a faculty member, in theory if not in practice, resolves all of these concerns.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

adjunct,¹⁵ one semester contract teacher,¹⁶ one year contract teacher,¹⁷ long-term contract teacher,¹⁸ tenure-track,¹⁹ and finally tenured professor of law.²⁰ From personal experience, I can say that the scars of insecurity don't magically disappear upon the conferment of tenure, much as I had hoped they would.

Winning the Status Wars

After a lot of thought, I've come to this conclusion about the status wars: We should declare victory and stop fighting them. Almost.

We've reached a stalemate in our war to secure better status in the legal academy because the entire concept of status in the legal community is changing. Tenure itself is under assault and is not likely to survive long²¹—perhaps the current tenured faculty members in law schools across the country are the last ones who will get this cherished status conferred upon them, and if not, there surely can't be many more years left for the tenure track: It's too expensive, it limits an institution's flexibility, and while it heightens the incentive to produce pre-tenure scholarship, it provides little or no incentive to produce scholarship post-tenure. There seems little point in continuing a struggle to obtain that which will soon be unobtainable for everyone in the legal academy.

¹⁵ I was an adjunct for five years at the University of Baltimore while still in practice, working for the great Eric Easton.

¹⁶ The Spring 2002 semester at the Washington College of Law, The American University. Working for the great Penny Pether.

¹⁷ The 2002-03 academic year at American.

¹⁸ I only worked one year under the contract, though: the 2003-04 academic year at American.

¹⁹ At Syracuse, from 2004 until 2010.

²⁰ From 2010 to the present.

²¹ Milton Greenberg, *Tenure's Dirty Little Secret*, THE CHRONICLE OF HIGHER EDUCATION, <https://www.chronicle.com/article/Tenures-Dirty-Little-Secret/130185> (January 1, 2012); Samantha Bernstein and Adrianna Kezar, *Is it Time to Eliminate Tenure for Professors?*, THE CONVERSATION, <http://theconversation.com/is-it-time-to-eliminate-tenure-for-professors-59959> (June 28, 2016); Pete Musto, *Tenured Positions at US Public Universities are Under Attack*, LEARNING ENGLISH, <https://learningenglish.voanews.com/a/tenure-at-us-universities-under-attack/3738435.html> (February 25, 2017).

It's also true, as the Call for Essays seems to recognize, that not all legal writing teachers are interested in pursuing tenure.²² That reluctance is an understandable one: The tenure track is an arduous path and not everyone will enjoy the process of generating however many pieces of tightly-argued scholarship the tenure standards of individual law schools might require, especially where the institution requires the scholarship to be published in a restricted number of law reviews. The silent prejudice of law reviews—especially those thought of as prestigious ones—against scholarship to do with the way lawyers or judges write makes the imposition of unitary tenure standards within an institution unfair and often impractical, unless a legal writing teacher is willing to forgo writing scholarship in our area and is instead interested in, and able to, write scholarship that third-year law students will deem worthy of their law reviews.

Maybe I'm foolishly optimistic, but I see a future where few, if any, faculty members in law schools have tenure. When that happens, it will be difficult for law schools to withhold the badges of status from legal writing faculty or, indeed, from any of the various skills-based teaching areas that are currently discriminated against. If a law school only has one or two tenured faculty members, or none at all, then faculty governance has to be spread among all faculty members—tenured, tenure-track, and contract—in order to have any meaning, and non-tenured faculty will have to serve, and vote on, faculty committees if those committees are to get anything done. When that happens, surely the other indicia of status—scholarship support, sabbaticals, and so on—will follow.

In short, the status structure against which we've been fighting all these years is about to tumble on its own. We don't need to do any more pushing for it to fall. And when it does, law school administrations who haven't already recognized this will discover what we've been telling them all along: They have groups of faculty members in their midst who are talented, motivated, and hard-working, and who have the best interests of their students and the institutions at heart. Moreover, they're the faculty who teach the subjects that employers value the most. Even the most conservative and closed-minded administrators will be forced to see that it's in their best interests to make their legal writing faculties happy.

So, if all this is inevitable, we can just sit back with folded arms and wait to reap the benefits of the collapse of tenure, right? Well . . . no, not quite. This is, of course, a much too provocative and optimistic

²² At least, that's how I read the question about "[w]hat happens when an individual's interests do not align with programmatic interests?" *Infra*, text accompanying n. 14.

view of where things are and where they will be. We can get to the pastoral uplands of equal status in law schools but there's still some hard climbing to be done to get there. Here are four things I suggest we start working on now that will position us well as the future of status for all faculty members in the legal academy resolves itself. It's a personal list, so no one will agree with all of it and my guess is that hardly any will agree with any of it. That's fine! Make your own lists and let's have a debate.

A. Change the Name of What We Do

We all understand why our discipline is generally called "legal writing,"²³ but the name causes us problems when being asked to be taken seriously by our doctrinal²⁴ colleagues, some, at least, of whom still think that all we do is teach grammar, punctuation, and composition.²⁵

On the other hand, saying that we teach "legal analysis" probably doesn't score us too many points either. We do, of course, but so does everyone else in the legal academy or, more importantly, that's what everyone in the legal academy thinks they do. So even if we're correct in saying that our approach is the most effective way of teaching our students legal analysis, we won't score any points with our doctrinal colleagues if that's what they think they do as well. They'll think we don't understand who they are or what they do, that we're making inflated claims about our own importance, and that we're unrealistic about our place in the institution and our importance to the students. They might be wrong, and we might be right, but that doesn't matter much when we're trying to more deeply embed ourselves in the academic life of our schools.

So the idea of changing the name of our discipline might be relatively easy to accept, but finding a name to change it to is

²³ While not all programs have the words "legal writing" in them, they appear in the names of our two professional organizations and they are, I suspect, how we and most others refer to us when speaking generically of what we do.

²⁴ Another generic word that doesn't really capture the reality of the distinction between who we are and who the tenured faculty are in most law schools. But there's no elegant and shorthand way of encapsulating the nuances of who "they" are in this "us and them" conversation, so I'm going to use "doctrinal" as my way of saying "them" and trust that we can all read past its limitations.

²⁵ Which is not to say that we don't teach those things. In fact, anecdotal experience and water cooler conversations at various conferences throughout the past few years suggests we probably need to spend more time teaching them.

considerably more challenging. "Legal Rhetoric" is probably the most accurate, but will others outside our orbit understand that or understand what it means? In Syracuse, I asked that the name of our program be changed from "Law Firm"²⁶ to "Legal Communication and Research," which describes what the students learn in our course but doesn't, I think, set the heart racing as a name for an entire discipline.

So what should our discipline call itself? I don't know. But I do know that the debate about what to rename ourselves would be a fascinating one, with many ideas being put forth and argued for and against. The process might lead us to a deeper appreciation of who we are and what we do, and that would surely be a good thing.

B. Improve Our Outreach to Practitioners and Their Clients

Our attempts to improve our status have, understandably, been focused on the legal academy. And those attempts have had a fair amount of success. But moving forward, I suggest that we consider changing that focus to show our value to legal practitioners and their clients, many of whom are themselves lawyers. But since what we do is all about language and revealing analysis through the choice of words, let's put that another way: I suggest that we consider changing our focus to show our value to the alumni and donors who are the principal source of the legal academy's revenue.

We bring something to the table when we speak to practicing lawyers. We, and clinicians who should be our natural allies in all of this, teach law students what they need to know to practice law. We don't teach them the intricacies of future interests in antiquated English property law, nor do we teach them the common law definitions of crimes that were superseded by statute decades ago. Rather, we teach them how to find out what the law is now and write about facts and contemporary law in such a way as to benefit their clients in current disputes. I'm not saying that the theoretical foundation of the law I learned in my doctrinal classes wasn't useful, but I also remember being sat down during a couple of lunchtime

²⁶ If I close one eye and squint heavily with the other one I can just about see what the faculty were trying to convey with "law firm," but I don't think the ideas of professional behavior and practice skills were adequately summed up in that name, especially for jaded attorneys looking at transcripts and course names and trying to figure out if our students are worthy of interviews or job offers.

sessions to learn from a partner at my firm how to use that foundation to research and write about real legal disputes.²⁷

We should start to engage those who don't have academic prejudices about what is and isn't valuable in a legal education, but who rather are fighting the day-to-day trench warfare of legal practice, and those clients who bring them work, and we should show those people who we are and what value we bring to them. We can show them that much of our scholarship is directed at solving real-world issues²⁸ and that even the scholarship that isn't directly applicable to their practice is often still interesting, engaging, and relevant to what they do, as opposed to the dense and impenetrable analysis of obscure points of law that often forms the subject of doctrinal professors' scholarship.²⁹

But we can do more than just show practitioners these things. We should offer practical help for them as well, in the form of CLE classes and other outreach projects that extend our teaching activities into working with our alumni and the attorneys with whom they work. In short, I argue that our responsibility to our students doesn't end when they leave our classes or walk across the stage at Commencement, but that they are our students for life and that they still have much to learn from us once they're out in practice.

One can take this too far, of course, and we have to recognize that law firm partners, although often still weak writers,³⁰ are likely not going to be interested in having us show up and critique their work. But any partner who is critical of junior associate writing should be overjoyed at the thought of trained law school teachers coming to them to offer help for those young attorneys, and solo practitioners should be overjoyed at the prospect of having the same support offered to them.

This would all take time, of course, and it would likely be overload time that is not compensated. But it would be time well spent in

²⁷ Her name was Nancy Gregor, and I have her to thank for any success I've had in the law. She didn't have to help me, but she realized that I was foundering and she knew exactly how to teach me to swim at the deep end.

²⁸ Perhaps one of our service organizations could sponsor a series of bibliographies that focus on articles of interest to practitioners and judges that could be emailed to attorneys across the country.

²⁹ No, I'm not going to cite to examples of impenetrable doctrinal scholarship. Even tenure has its protective limits.

³⁰ I don't say this from personal experience, of course. All the partners at the firms where I worked were and still are artists with the pen and the word processor. And the unicorns that worked at the firms were all excellent editors and proofreaders. Really.

making allies of the people who have the most influence with our academic institutions. And once they see the good work we do, it's not unreasonable to hope that they might bring some of that influence to bear on those institutions on our behalf, especially if some of our scholarship about status and the unfairness of our treatment made its way into their hands.

And, of course, we can use the ever-improving technology at our disposal to minimize the amount of time this outreach might take. Prerecorded videos addressing common writing concerns could be available to attorneys at any time, and distance learning techniques—for both live presentations and writing critiques—could cut down on the travel time necessary to do this sort of work.³¹ And becoming skillful as distance educators could be helpful for professional development as our schools turn more and more to technology to increase their student base.

C. Improving Our Outreach to Pre-Law Students

If we consider extending our work to include those students who have graduated from our schools, we should also consider working with those students who haven't come to law school yet. Just as working with alumni and other practicing lawyers can show our administrations that we understand the importance of maintaining good relations with potential donors to our institutions, so working with prospective students will show them that we understand the importance of improving both enrollment and the quality of enrolled students at our schools.

Doing this would help us to meet our principal reason for doing what we do—improving the quality of lawyer writing—and it would help us increase the bonds with our students that we all value. Some doctrinal faculty might be willing to take some small steps in helping encourage students to attend their law schools, but were we to take the time to engage the pre-law students in a concerted attempt to help improve their writing skills, that would make a lasting and positive impression on those students.

As with the outreach to alumni, technology would help minimize the strain of this additional work. In fact, many of the support videos created to support improved alumni writing could also be used to improve pre-law students writing: The same grammar, punctuation,

³¹ That said, of course, nothing replaces the immediacy of meeting and working with a person, and distance learning makes it more difficult to make the personal connections that can be established by in-person contact.

and structural principles apply to all legal writing, and there's no reason to reinvent the comma for a different audience.

How long before the students come to law school should we reach out to them? I would suggest several years—as early as freshman year in college and perhaps even before, reaching into high schools, but at least in the students' last year of college, when they are beginning to become serious about applying to law school. And yes, this approach runs the risk of helping students improve their writing only to have those students take those improved skills to another law school. But the principal goal in doing this is to help law students and, eventually, lawyers, write better. Of course I would prefer that those students turn into my students later, but if they turn into your students, I'm still happy: enough of the students I help will come to my school that the effort is surely worth it. And administrators would have to recognize that our efforts were helping them to improve their bottom lines of student attendance and increased student ability. That helps to lay the groundwork for improved status down the road.

D. We Need to Keep Doing Everything We're Doing As Well

The Call for Essays also asked "[h]ow can legal writing faculty help each other improve our professional status and experience?"³² It proposes topics such as "mentoring each other, collaborating on research and writing articles, co-presenting at conferences, giving each other feedback on article drafts, writing recommendation letters for each other, supporting each other for tenure or long-term contract processes, etc."³³

The only response to this list, I think, is "yes." One of the special things about our community is our willingness—our eagerness, really—to help, to share, to find out what others are doing and, where possible, to collaborate with them. I've spoken with several colleagues at other law schools who have spouses who teach in other areas of the law or other disciplines within the academy, all of whom are astounded at the level of help and support we offer to each other. Anyone who has published in one of the journals devoted to legal writing, or who has had an outside colleague review their work as part of a tenure or promotion decision, knows that we are a community that takes the idea of support very seriously.

Surely no one thinks we should do less of this, even if we start to fill up our dance cards with some of the outreach projects I've

³² *Supra* text accompanying note 12.

³³ *Id.*

described here. There's always time to read a colleague's article and offer some suggestions, there's always time to agree to help out an institution with a tenure or promotion review,³⁴ and there's always—always—time to write a letter of support for someone who's written an article or given a presentation that made a positive impression on you. And aside from being helpful to the individual whose work you're praising in particular, and to the discipline in general, it's also, as our parents taught us, the right and polite thing to do.

One thing I would add to the Call's "etc." though, is to argue that we should find ways to disengage from our schools' participation in the mad scramble for US News votes that happens every fall. It's unrealistic, I suppose, to hope that US News would voluntarily stop trying to rank the "top" legal writing programs, whatever the concept of "top" might even mean, but it's not unrealistic to propose that we take no part in what is, after all, just an attempt to sell something that exists to carry advertising. We are all dismissive of the US News rankings for law schools, and argue that they don't—can't possibly—capture the nuances and subtleties that make our law schools good places for students to come and study law, so how can it be that the "legal writing program" rankings are different?

Disengaging from US News would save the money spent in producing promotional materials of questionable value³⁵ and would save us from the unedifying experience of finding ways to promote our programs at the expense of other programs in the country. It won't help to cut down on my mailbox clutter, but I should tell you that I've never participated in the US News poll that shows up in my letterbox ever year (or the reminder ballot that shows up a little while later to tell me that I haven't sent the first one in yet) and I never will. I don't know enough about your programs to say that one is better than the other, and nothing you tell me will be enough to convince me of that. What I do know is that everyone in our community is doing good work

³⁴ And as one who's done a few such reviews, I can assure you that there's no greater honor as a teacher to being asked to do one of them and no greater enjoyment to be gained as a teacher than reviewing the work of someone who's being considered for promotion. It forces you to step back for a second and consider the astounding depth, breadth, and quality of the work being done in this community and to realize how privileged we are to be part of it.

³⁵ One postcard from a few years, though, is still on my noticeboard in my office. It reminds me that a legal writing professor from the sending school "probably knows more about legal writing" than me. Probably?! It's a certainty that this person has forgotten more about legal writing than I ever knew, and no one will ever persuade me otherwise. But did I really need a postcard to remind me of that?

and is trying hard to help their students improve their writing, research, and analytical skills. Isn't that enough?

Conclusion

There's lots more to say about the issues raised by the Call for Essays but the Call also suggested an upper length limit and I'm well over it, so I have some editing, not more writing, in my future. I would suggest, though, that much like in the movie *City Slickers*, the secret of a happy professional life as a legal writing teacher is one thing.³⁶ We all just have to find out what that one thing is, and it won't be the same for any of us. And whether you agree with anything I've written here or disagree violently with all of it, or fall somewhere between those two poles, the important thing is to find the thing that will improve the way you feel about the way you're treated in your law school: objective marks of status are all well and good but they can't make you feel respected if you're not, and you can lack the marks of status, but feel well-treated and respected by those you work with.

One thing's for sure though. There aren't that many of us who do what we do, so it's important that we stick together, respect each other, and celebrate our successes as we regret our frustrations. So raise your glasses: Here's tae us. Wha's like us? Gey few, and they're a' deed.

³⁶ CITY SLICKERS (Castle Rock Entertainment 1991). The power of this suggestion would be enhanced by thinking of me delivering it on a horse, looking and sounding like Jack Palance. Or maybe it wouldn't.