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# The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community

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## THE PAST, PRESENCE, AND FUTURE OF LEGAL WRITING SCHOLARSHIP: RHETORIC, VOICE, AND COMMUNITY

Linda L. Berger, Linda H. Edwards, and Terrill Pollman\*

This Article welcomes a new generation of legal writing scholars.

In the first generation, legal writing professors debated whether they should be engaged in legal scholarship at all.<sup>1</sup> In the second generation, assuming that they should be engaged in scholarship, legal writing professors discerned and defined different genres of and topics for the scholarship in which some or all of us were or should be engaged.<sup>2</sup> In this Article, we map the contours of a third generation of legal writing scholarship—one that integrates the elements of our professional lives and engages more effectively with our professional communities.

The core of such study and practice is rhetoric,<sup>3</sup> and in particular, the rhetorical concept that meaning is constructed out of

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1. Vestiges of this debate still flavor discussions among legal writing professors; objections to emphasizing traditional forms of scholarship center on the heavy commenting and teaching workload of skills professors as well as the perceived divide between theory and practice. For discussions of the conditions of this debate, see for example, Christian C. Day, *In Search of the Read Footnote: Techniques for Writing Legal Scholarship and Having It Published*, 6 *Leg. Writing* 229 (2000); Toni M. Fine, *Legal Writers Writing: Scholarship and the Demarginalization of Legal Writing Instructors*, 5 *Leg. Writing* 225 (1999); Susan P. Liemer, *The Quest for Scholarship, The Legal Writing Professor's Paradox*, 80 *Or. L. Rev.* 1007 (2001).

2. Mitchell Nathanson, *Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor*, 11 *Leg. Writing* 329 (2005); Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 *Leg. Writing* 3, 15 (2005); Michael R. Smith, *The Next Frontier: Exploring the Substance of Legal Writing*, 2 *J. ALWD* 1 (2004).

3. For the authors of the classical rhetoric text, "rhetoric is the art or the discipline

the interaction of reader and writer, text and context.<sup>4</sup> As a result, our work as readers and writers matters. The study and practice of “law as rhetoric” is a thread that can run through the fabric of a professional life, weaving together the legal writing professor’s work in scholarship,<sup>5</sup> teaching, and professional service.

Part I of the Article takes a look back at our developing discipline.<sup>6</sup> Part II addresses the rhetorical communities we are constructing through our scholarship, as well as some ways we might think about re-imagining them.<sup>7</sup> Part III sketches a possible map for our future, discussing the reasons why legal writing professors should be writing and suggesting that rhetoric provides topics, theories, and practices for teaching and scholarship that can guide academics, lawyers, and law students as they interpret, imagine, and compose legal arguments.

By arguing that rhetoric provides resources for the third generation of legal writing scholarship, we set out on a natural path for those who teach students how to construct rhetorically effective texts. But we recognize that there are risks to suggesting

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that deals with the use of discourse, either spoken or written, to inform or persuade or motivate an audience.” Edward P.J. Corbett & Robert J. Connors, *Classical Rhetoric for the Modern Student* 1 (4th ed., Oxford U. Press 1999). For Steven Mailloux, “Rhetoric deals with effects of texts, persuasive and tropological. By ‘texts,’ I mean objects of interpretive attention, whether speech, writing, nonlinguistic practices, or human artifacts of any kind.” Steven Mailloux, *Disciplinary Identities: Rhetorical Paths of English, Speech, and Composition* 40 (Modern Lang. Assn. of Am. 2006). Aristotle’s often-quoted definition of the practical art of rhetoric was “the faculty wherein one discovers the available means of persuasion in any case whatsoever.” Aristotle, *The Rhetoric of Aristotle* 224, bk. I, ch. I 1355b, line 26 (Lane Cooper trans., D. Appleton & Co. 1932).

4. See e.g. Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. Leg. Educ. 155, 155–157 (1999).

5. Maksymilian Del Mar has noted that the five responsibilities of scholarship (reading, writing, teaching, collegiality, and engagement) can “provide a framework for imagining the institutional life of a legal scholar.” Maksymilian Del Mar, *Living Legal Scholarship*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1051001](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1051001) (Aug. 1, 2007).

6. This section attempts to emulate Steven Mailloux’s advice that we should be “using rhetoric to practice theory by doing history.” Mailloux, *supra* n. 3, at 40.

For a more extensive early history of legal writing scholarship and predictions about the future, see Jill J. Ramsfield & J. Christopher Rideout, *Scholarship in Legal Writing*, in *The Politics of Legal Writing: Proceedings of a Conference for Legal Research and Writing Program Directors* 74 (July 28–29, 1995) (available at [http://www.alwd.org/publications/pdf/LRW\\_PoliticsofLegalWriting.pdf](http://www.alwd.org/publications/pdf/LRW_PoliticsofLegalWriting.pdf)), and James F. Stratman, *The Emergence of Legal Composition as a Field of Inquiry: Evaluating the Prospects*, 60 Rev. Educ. Research 153, 210 (1990).

7. The concept of the rhetorical community emerges from the work of James Boyd White, especially James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. Chi. L. Rev. 684, 695 (1985).

that we should apply rhetorical theories and approaches to our scholarship, and especially to our study of the “effects of texts.” Focusing on legal rhetoric may nurture scholarship so diverse and fragmented that we cannot claim that it constitutes part of a discrete discipline. Turning to other disciplines may subject our scholarship to criticism that it is both too theoretical and not thoroughly enough grounded in the theory we apply. Engaging in provocative conversations about our ideas will require us to be critical at times of one another’s work, something that may seem damaging to our discipline’s need for community-building and community support. Meeting the expectations of “inside” and “outside” communities will test our political astuteness as well as the strength of our emerging field. All these risks accompany the maturing of a discipline, and so we hope that the conversation about them will continue.

### I. A RHETORICAL HISTORY OF LEGAL WRITING SCHOLARSHIP

The path of legal writing scholarship has been marked by twists and turns, the occasional rockslide or dead end, and what we can now see as a series of steps in a purposeful direction. As Pierre Schlag points out, legal scholarship is an “institutionalized social practice.”<sup>8</sup> Enforcing the canons of this, like any other social practice, “is invariably a sort of policing action, no matter how benign its motivations, and police often step up their vigilance when they fear that social order is breaking down.”<sup>9</sup>

When legal writing professors took a turn towards scholarship, the prevailing view in the legal academy was that scholarship examining theory and doctrine was to be preferred over pedagogical scholarship or scholarship examining skills and practice.<sup>10</sup> At the same time, within academia more generally, the

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8. Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (a Report on the State of the Art)*, 97 *Geo. L.J.* 803, 805 (2009).

9. Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 *Harv. L. Rev.* 963, 980–981 (1998).

10. What we think of as typical or traditional legal scholarship has changed a great deal during its short history. In the 1950s, law schools began to move from relying on part-time teachers who were also practicing lawyers or judges to hiring full-time professors who created a “community of scholars.” Richard Buckingham et al., *Law School Rankings, Faculty Scholarship, and Associate Deans for Faculty Research* 5 (Suffolk U. L. Sch. Research Paper, Working Paper No. 07-23, 2007), available at <http://>

interpretation of “texts” was favored over the composition of texts.<sup>11</sup> In both cases, the more respected professors were those whose scholarship focused not on how to write or how to teach, but instead on how to interpret, analyze, and critique the written artifacts of legal processes. The status, expectations, and workloads of legal writing teachers constituted what could have been an insurmountable roadblock to scholarship; legal writing teachers were not expected to publish, and the numbers of students they were assigned, as well as the teaching and commenting practices they engaged in, made it difficult to find the time to study and write.

The twists and turns toward interdisciplinary legal scholarship opened up a new direction for legal writing scholars.<sup>12</sup> Since the late 1960s, articles featuring interdisciplinary applications to the law have proliferated, from law and economics to law and lit-

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ssrn.com/abstract=965032. Some have traced the intense focus on faculty scholarship in law schools “back to 1959 when the AALS adopted an official research standard. The standard noted that faculty members had an important responsibility to advance and share ‘ordered knowledge’ [and that] AALS member law schools had an obligation to assist their faculty and encourage research and scholarship.” *Id.* at 5–6.

Much of the subsequent legal scholarship was doctrinal and descriptive, or theoretical and prescriptive; the purpose of most scholarship was to prescribe a better outcome to a judge. As Judge Posner put it, the task of “doctrinal” legal scholarship was simply to “extract a doctrine from the line of cases or from statutory text and history, restate it, perhaps criticize it or seek to extend it, all the while striving for ‘sensible’ results in light of legal principles and common sense.” See Richard Posner, *Legal Scholarship Today*, 115 *Harv. L. Rev.* 1314, 1316 (2002). The prescriptions were predominantly based on policy arguments derived from beliefs about the way society should be organized or operated.

Typical of the criticisms of this kind of legal scholarship were Judge Edwards’s comments that law faculties had abandoned scholarship directed to judges, practicing lawyers, and legislators in favor of producing scholarship that primarily engages in theoretical dialogues with academics in other fields. Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 *Mich. L. Rev.* 34, 34–36 (1992).

11. In the early twentieth century, the study of oral rhetoric split off from the study of written rhetoric in American universities.

At the same time, literary scholarship came to dominate English departments at the expense of pedagogy and composition study, which were often conceived as more rhetorically oriented than either historical research or critical interpretations of literature. By the middle of the twentieth century, rhetoric as the study of the language arts found itself radically fragmented into separate disciplinary domains with faculties that did not and, for the most part, still do not talk with each other. With minimum modification, this unfortunate sorting continues: speech criticism into communication departments, literary reading into English departments, and writing research into composition programs.

Mailloux, *supra* n. 3, at 32.

12. Although doctrinal scholarship has declined in number and placement, it probably still constitutes the bulk of legal scholarship. Douglas M. Coulson, *Legal Writing and Disciplinary Knowledge-Building: A Comparative Study*, 6 *J. ALWD* 160, 166–167 (2009).

erature to law and cognitive science.<sup>13</sup> Some of these disciplines lend themselves to arguments that come naturally to legal writing professors, arguments about what language means or what decision-makers intended or how a decision was reached and how it should be interpreted. Still, as legal writing scholars draw on other disciplines, another obstacle may appear. As has been noted elsewhere, the scholarly traditions of other disciplines sometimes differ from the traditions of scholarly writing in law reviews.<sup>14</sup> Those differences may be perceived in ways that are damaging when legal writing scholars are evaluated.<sup>15</sup>

#### A. Putting the First Foot on the Path: Descriptions of Programs and Curricula

Early in the twentieth century, critics discovered that lawyers did not write clearly, and legal writing programs were established in law schools. The ensuing legal writing scholarship described the programs and curricula that had been developed by individual law schools. Most of that scholarship was published in a single journal, the *Journal of Legal Education*.<sup>16</sup>

These trends can be seen in an early chronological bibliography of “teaching lawyers to write”;<sup>17</sup> the bibliography began with a 1921 article published in the *ABA Journal* that focused on *Defects in the Written Style of Lawyers*.<sup>18</sup> Next, Harry Kalven de-

13. *Id.* at 166–168.

14. Douglas Coulson compared law review articles with writing in the humanities: In both the text-level patterns of variation and the sentence subjects, the [law review] articles in the sample reflect a sustained discourse among jurists who seek to build on, refine, and dispute each others’ conclusions regarding the application of well-developed concepts to a newly emerging legal question. The writers’ concern with rigorous definition and classification of legal phenomena appears to reflect the influence of legal formalism, which views law as a science seeking to develop an ordered “system of norms conceived as a grammar of legal validity” to inform prescriptive analysis. The articles exhibit virtually none of the forms of literary argument identified in studies of literary criticism, but instead reflect a concerted effort to “master complexity,” “simplify intelligently,” and “provoke closure,” rather than to explore the complexity of phenomena, data, or texts for their own sake.

*Id.* at 194.

15. *See* pt. II.

16. This conclusion is supported by the bibliography compiled in James R. Elkins, *Teaching Lawyers to Write: A Chronological Bibliography*, 22 Leg. Stud. Forum 778 (1998).

17. *Id.*

18. Urban A. Lavery, *The Language of the Law: Defects in the Written Style of Lawyers, Some Illustrations, the Reasons Therefor, and Certain Suggestions as to Improvement*, 7 ABA J. 277 (1921).

scribed the University of Chicago Law School's "training" program in Research and Exposition in the *Journal of Legal Education*.<sup>19</sup> This article was followed by a series of descriptions of legal writing programs, including several that addressed what appeared to be the most significant issue for law school administrators, the cost of such programs. So it was only to be expected that *A Low-Cost Legal Writing Program: The Wisconsin Experience*,<sup>20</sup> published in 1959, was followed in 1973 by *Legal Writing and Moot Court at Almost No Cost: The Kentucky Experience*.<sup>21</sup>

In the midst of this flow of descriptive and instrumental scholarship, there were some early signs of more evaluative and theoretical scholarship about the teaching of writing. Marjorie Rombauer published a comparison of *First-Year Legal Research and Writing Programs: Then and Now* in 1973,<sup>22</sup> and Reed Dickerson suggested that writing might even be viewed as helpful to thinking.<sup>23</sup> And legal writing scholarship would soon find the voice to express what they had learned about teaching from their research and their experiences.

#### B. Leap One: Finding a Voice

Descriptions of legal writing curricula and programs were necessary for the field to discover itself and begin to define its boundaries. But legal writing teachers took a status-changing leap when they began to write interdisciplinary articles about how to teach writing. Recognizing that people who taught undergraduates to write might know something useful about teaching lawyers to write, a few law schools had hired professors with degrees in English composition or literature. The subsequent interdisciplinary richness of the early legal writing scholarship owes much to those teachers who entered the field with advanced degrees in English composition and literature and became devoted to legal

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19. Harry Kalven, Jr., *Law School Training in Research and Exposition: The University of Chicago Program*, 1 J. Leg. Educ. 107 (1948).

20. Stewart Macaulay & Henry G. Manne, *A Low-Cost Legal Writing Program: The Wisconsin Experience*, 11 J. Leg. Educ. 387 (1959).

21. Kenneth B. Germain, *Legal Writing and Moot Court at Almost No Cost: The Kentucky Experience 1971-72*, 25 J. Leg. Educ. 595 (1973).

22. Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. Leg. Educ. 538 (1973).

23. Reed Dickerson, *Legal Drafting: Writing as Thinking, or, Talk-Back from Your Draft and How to Exploit It*, 29 J. Leg. Educ. 373 (1978).

writing, working as writing advisors and legal writing teachers, designing programs and curricula, writing articles and legal writing textbooks, and helping to found the Legal Writing Institute.<sup>24</sup>

Out of the disciplines of English composition and literature, legal writing scholars first found the voice and the vocabulary—as well as the theories and practices—that were necessary to study their topic and to write about their teaching. In time, articles about the teaching of legal writing would draw not only on composition and literary theory but also on linguistics, classical and contemporary rhetoric, and critical theory, including feminist theory.

The view of legal writing as fertile ground awaiting substantive insights from other disciplines was realized in Terry Phelps's 1986 article, *The New Legal Rhetoric*.<sup>25</sup> This article suggested that applying composition theory to the teaching of legal writing would provide the beginnings of “a substantive pedagogy that can teach law students to write well.”<sup>26</sup> As the article predicted, composition theory heavily influenced the teaching of legal writing, and the article became an essential introduction to the idea that legal writing was itself a field worthy of serious study.

An early alternative route, pointing toward interpretation as well as composition, was discovered when literary theory was applied in Betsy Fajans and Mollie Falk's article, *Against the Tyranny of Paraphrase: Talking Back to Texts*.<sup>27</sup> Through this article, the authors pushed legal writing scholarship beyond the composition of documents, and into the interpretation of texts, suggesting that the application of interpretive techniques—such as close reading—might help produce better legal writers. The article explicitly linked interpretation to composition by suggesting “classroom activities and writing assignments which encourage law students to read closely in order to write strongly.”<sup>28</sup>

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24. See Jessie Grearson & Anne Enquist, *A History of Writing Advisors at Law Schools: Looking at Our Past, Looking at Our Future*, 5 *Leg. Writing* 55 (1999).

25. Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 *Sw. L.J.* 1089 (1986).

26. *Id.* at 1089.

27. Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 *Cornell L. Rev.* 163 (1993).

28. *Id.* at 166, 193 (reading for jurisprudential and interpretive posture, reading for context, reading for style, reading for narrative, reading for omission).

## C. Leap Two: Building a Room of Our Own

Much of the early discipline building was designed to create a community of legal writing professors who were excellent teachers. Drawing on their experience in other disciplines, professors trained in those disciplines helped establish the formal organizations and publications that provided the essential institutional base and information-sharing mechanisms for legal writing teachers.<sup>29</sup>

First came the “Conference for People who Teach in or Administer Legal Writing Programs,”<sup>30</sup> organized by Chris Rideout and Laurel Oates at the University of Puget Sound School of Law in August 1984. Out of that conference, the Legal Writing Institute (LWI) was founded, followed closely by the first Idea Bank and *Second Draft* newsletter. In 1988, the LWI established *Legal Writing: The Journal of the Legal Writing Institute* to serve as a forum for encouraging and publishing scholarship within the developing discipline of legal writing.<sup>31</sup> Chris Rideout served as the Journal’s first Editor in Chief, and the first issue served its discipline-building purpose by bringing together the first survey of the field<sup>32</sup> with a bibliography of books and articles in the field,<sup>33</sup> as well as substantial articles by rhetoric and composition scholars about the effects of teaching and writing practices. These articles about teaching legal writing built not only on the experience of teachers in the field but also on research studies of the development of writing competencies and of the effects of briefs on professional audiences.<sup>34</sup>

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29. See Mary S. Lawrence, *The Legal Writing Institute, The Beginning: Extraordinary Vision, Extraordinary Accomplishment*, 11 *Leg. Writing* 213 (2005) (providing the history of the establishment of the Legal Writing Institute).

30. The speakers were interdisciplinary; they included law professors, judges, and professors of English from the University of British Columbia, Oregon State University, the University of Texas, and the University of Chicago. See Conference Brochure, *Teaching Legal Writing* (1984) (available at <http://www.lwionline.org/about/history/brochure1984.pdf>).

31. All issues of the *Journal of Legal Writing* are available at the Journal’s website, <http://journallegalwritinginstitute.org>.

32. The published report of the 1990 LWI survey is found at Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: The First Images—A Survey of Legal Research and Writing Programs*, 1 *Leg. Writing* 123, 125 (1991).

33. George D. Gopen & Kary D. Smout, *Legal Writing: A Bibliography*, 1 *Leg. Writing* 93 (1991).

34. James F. Stratman, *Teaching Lawyers to Revise for the Real World, A Role for Reader Protocols*, 1 *Leg. Writing* 35 (1991); Joseph M. Williams, *On the Maturing of Legal*

The LWI's biennial conferences, surveys, and collections of materials and ideas were essential to the establishment of the community of teachers, as they brought together diverse teachers, concepts, and experts for continuing extensive conversations about how we could improve the teaching of legal writing in law schools.

#### D. Leap Three: Other Voices, Other Rooms

The next great leap was powered by early sightings of distant and expansive vistas for legal writing scholarship: out there, some legal writing professors envisioned new purposes, new audiences, and new sources of theory and research.<sup>35</sup> When we changed direction from focusing exclusively on how to teach legal writing to the broader view of how to study and write about legal writing, we imagined a perspective for our professional lives as legal writing professors. Several projects helped legal writing professors at this crossroads, including the series of legal discourse colloquia organized by Terry Phelps and Linda Edwards; these introduced authors to scholarly habits, knowledge, and mentors that would guide their subsequent work.

New disciplines provided modes and methods for enriching our teaching and our understanding of our students. For example, linguistics theory was applied to the composition of legal documents in the Fajans and Falk article, *Linguistics and the Composition of Legal Documents*.<sup>36</sup> Feminist theory was the starting point for Kathryn M. Stanchi's analysis in *Feminist Legal Writing*.<sup>37</sup> There, she suggested that the exploration of feminist legal writing might enrich "the conventional wisdom that defines legal

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*Writers: Two Models of Growth and Development*, 1 *Leg. Writing* 1 (1991); see also George D. Gopen, *The Professor and the Professionals: Teaching Writing to Lawyers and Judges*, 1 *Leg. Writing* 79 (1991).

35. The Legal Studies Forum published a special legal writing scholarship issue in 1996, *The New Legal Writing Scholarship*, 20 *Leg. Stud. Forum* 1 (1996). It included such interdisciplinary pieces as Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 *Leg. Stud. Forum* 7 (1996); James R. Elkins, *What Kind of Story Is Legal Writing?* 20 *Leg. Stud. Forum* 95 (1996); Philip N. Meyer, "The Exploding Frog": A Legal Writing Teacher's Dream, 20 *Leg. Stud. Forum* 137 (1996); Kate O'Neill, *Formalism and Syllogisms: A Pragmatic Critique of Writing in Law School*, 20 *Leg. Stud. Forum* 51 (1996); and Teresa Godwin Phelps, *Tradition, Discipline & Creativity: Developing "Strong Poets" in Legal Writing*, 20 *Leg. Stud. Forum* 89 (1996).

36. Elizabeth Fajans & Mary R. Falk, *Linguistics and the Composition of Legal Documents: Border Crossings*, 22 *Leg. Stud. Forum* 697 (1998).

37. Kathryn M. Stanchi, *Feminist Legal Writing*, 39 *San Diego L. Rev.* 387 (2002).

writing, persuasion, and persuasive writing.”<sup>38</sup> Similarly, Jessica E. Price, in *Imagining the Law-Trained Reader: the Faulty Description of the Audience in Legal Writing Textbooks*, explored critical theory, in particular, the ideas of a “‘situated legal writer’ who must ‘instead learn to write in a new institutional setting, learn a whole new local practice, and react positively to new and changing circumstances.’”<sup>39</sup>

In addition to supporting scholarship about teaching legal writing, the new disciplines helped other legal writing professors shift their scholarship from composition to interpretation. By applying theories derived from linguistics, classical and contemporary rhetoric, social science, and cognitive science, this scholarship explained how and why particular texts were rhetorically effective.<sup>40</sup>

Connecting and engaging with other professional audiences was one part of Michael Smith’s argument that our scholarship should address the “substance” of legal writing and be written for the broader audience of professional legal writers, including lawyers, judges, students, and other academics.<sup>41</sup> The mission of encouraging and publishing scholarship based on the study and practice of professional legal writing was reflected in a new peer-edited journal established in 2002, the *Journal of the Association of Legal Writing Directors* (J. ALWD).<sup>42</sup>

38. *Id.*

39. Jessica E. Price, *Imagining the Law-Trained Reader: The Faulty Description of the Audience in Legal Writing Textbooks*, 16 *Widener L.J.* 983, 1022 (2007).

40. See for example, the articles cited in Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 *J. ALWD* 129 (2006).

41. Smith, *supra* n. 2, at 5–18, 20–22.

42. All issues of the *Journal of the Association of Legal Writing Directors* are available at the ALWD website, <http://www.alwd.org/jalwd.html>.

For a description of ALWD’s efforts to establish legal writing as a discipline and as a profession, see Smith, *supra* n. 2, at 2. The article describes five initiatives: (1) organizing legal writing directors and creating mechanisms to share information; (2) offering support to established and new legal writing professionals; (3) seeking to improve the status and working conditions of legal writing professionals; (4) revolutionizing legal citation with the publication of the *ALWD Citation Manual*; and (5) founding J. ALWD. *Id.* at 2–4. Noting that “[t]he purpose of the Journal of the Association of Legal Writing Directors (J. ALWD) is to develop scholarship focusing on the substance of professional legal writing and to make that scholarship accessible and helpful to practitioners as well as to legal writing teachers,” the article characterizes as a bold move the decision against “producing a journal on legal writing in general” and instead “to dedicate this Journal to one specific genre of legal writing scholarship: scholarship that explores the substance of legal writing.” *Id.* at 3–4; see also *Erasing Lines: Integrating the Law School Curriculum—Proceedings from the 2001 ALWD Conference*, 1 *J. ALWD* 1 (2002) [hereinafter *Erasing*

Finally, the expansion of our scholarship to “other voices” and “other rooms” prompted conferences and workshops whose point was to encourage scholarship and to discuss specific subjects associated with professional legal writing, such as rhetoric, persuasion, and storytelling.<sup>43</sup> Supporting the creation of this community of scholars are such efforts as the LWI Writers’ Workshops, held every summer, and the ALWD Scholars’ Workshops and Forums, conducted as part of regional legal writing conferences.

### E. Glimpsing the Presence of a Discipline

Establishing common ground is the basis of a discipline. In different ways, traditional scholarly publications—especially peer-reviewed journals—and the newer, essentially unedited, electronic forms of distribution<sup>44</sup> help build this foundation. They are the way that we establish a consensus among scholars about what we are studying as well as the sense that we have shared beliefs and methods, common ancestors, and some agreement on canonical components. In recent years, publication of many legal writing bibliographies, as well as LWI’s establishment of a monograph series,<sup>45</sup> reflect the beginnings of such agreements. Our journals foster a sense of common beliefs and methods. As we expand from legal writing texts to writing extensively about the subjects of our study and practice, for audiences including other academics and practicing lawyers as well as students, we more firmly establish the knowledge base of a discipline.

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*Lines*]; *The Politics of Legal Writing—Proceedings of a Conference for Legal Research and Writing Program Directors*, [http://www.alwd.org/publications/pdf/LRW\\_PoliticsofLegalWriting.pdf](http://www.alwd.org/publications/pdf/LRW_PoliticsofLegalWriting.pdf) (July 28–29, 1995). The 1995 conference was the first conference of legal writing directors, and it led directly to the creation of ALWD.

43. The “applied storytelling” movement has so far resulted in two conferences and a number of published articles; American University and Mercer University have sponsored workshops on the relationship of law and rhetoric; and Rutgers University has sponsored a conference on persuasion. See *Applied Legal Storytelling: Chapter Two*, [http://www.lclark.edu/law/programs/legal\\_analysis\\_and\\_writing/applied\\_legal\\_storytelling\\_conference/](http://www.lclark.edu/law/programs/legal_analysis_and_writing/applied_legal_storytelling_conference/) (accessed Apr. 27, 2010); Am. U., Wash. College of L., *How Legal Rhetoric Shapes the Law*, <http://www.wcl.american.edu/legalrhetoric/podcast.cfm> (last updated Jan. 7, 2010, at 12:38 p.m.); Mercer U. Sch. of L., *Legal Writing through a Rhetorical Lens*, <http://law.mercer.edu/lawandrhetoric/> (accessed Apr. 27, 2010).

44. SSRN distributes subject matter eJournals containing both draft and published articles, essays, and comments on Legal Writing and Law & Rhetoric.

45. See e.g. Leg. Writing Inst. Monograph Series, *The Art of Critiquing Written Work* vol. 1, [http://www.lwionline.org/monograph\\_volume\\_one.html](http://www.lwionline.org/monograph_volume_one.html) (accessed April 19, 2010).

Through their rapidly increasing size, shifting subject matter, and expanding scope, our bibliographies show how far we have come—from building a community of teachers to constructing an intellectual community of scholars. The purpose of the early bibliographies was to help teachers learn to teach; now, legal writing bibliographies focus also on providing a knowledge base for our scholarship.<sup>46</sup> In the first issue of *Legal Writing*, George Gopen and Kary Smout listed 409 articles and 103 books, more than half published between 1980 and 1991.<sup>47</sup> When Linda Edwards and Terry Pollman published their compilation of scholarship by legal writing professors in *Legal Writing* in 2005, their bibliography contained entries for more than 300 authors, including more than 350 books, book chapters, and supplements; more than 650 articles in student-edited law reviews; and at least that many articles in peer-reviewed journals, specialty journals, and other kinds of publications.<sup>48</sup> At that time, only about 25 percent of the law review articles legal writing professors had published were about legal writing topics.<sup>49</sup>

By some measurements, legal writing already has established itself as a discipline. Among the marks of a discipline, legal writing can claim the following: (1) dedicated and peer-reviewed journals (*Legal Writing* and *J. ALWD*, as well as related journals, newsletters, and other publications); (2) two flagship organizations (the LWI and ALWD, as well as a number of related organi-

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46. The teaching-related bibliographies included *Bibliography of Books, Articles, and Periodicals on Legal Writing Programs and Instruction*, to accompany Commun. Skills Comm., Sec. Leg. Educ. & Admis. to B., *Sourcebook on Legal Writing Programs* (Eric B. Easton ed., 2d ed., ABA 2006) (bibliography available at <http://www.abanet.org/legaled/publications/sourcebook/sourcebookbibliography.pdf>); the bibliography in Commun. Skills Comm., Sec. Leg. Educ. & Admis. to B., *Sourcebook on Legal Writing Programs* 149–174 (Ralph L. Brill et al. eds., ABA 1997); and bibliographies published in Terence Collins & Darryl Hattenburger, *Law and Language: A Selected Annotated Bibliography on Legal Writing*, 33 *J. Leg. Educ.* 141 (1983); Elkins, *supra* n. 16; Gopen & Smout, *supra* n. 33.

For bibliographies with a broader scope, see e.g., Pollman & Edwards, *supra* n. 2; Smith, *supra* n. 2; Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 *J. ALWD* 75 (2009); Carrie W. Teitcher, *Legal Writing Beyond Memos and Briefs: An Annotated Bibliography*, 5 *J. ALWD* 133 (2008).

47. Gopen & Smout, *supra* n. 33, at 93.

48. Pollman & Edwards, *supra* n. 2, at 15.

49. According to the most recent ALWD–LWI survey, legal writing professors at 146 schools are either required or encouraged to produce written scholarship. ALWD & Leg. Writing Inst., *2008 Survey Results* 62 (2008) (available at [http://www.alwd.org/surveys/survey\\_results/2008\\_Survey\\_Results.pdf](http://www.alwd.org/surveys/survey_results/2008_Survey_Results.pdf)) [hereinafter *2008 Survey Results*]. Legal writing teachers are eligible for summer research grants at 100 schools. *Id.* at 60.

zations); (3) a listserv supporting the community (again, we have two as well as a blog); (4) dedicated conferences (a major conference every year, sponsored by either LWI or ALWD, as well as many regional and specialty conferences); and (5) people who call themselves professional legal writing teachers and scholars. In the next section, we turn to building that community of scholars.

## II. OUR PRESENT AND OUR PRESENCE: MID-COURSE ASSESSMENT

Now that we are seriously engaged in building our discipline, we should consider the kind of scholarship that can help us with that project. What are its characteristics? What is the nature of the enterprise, and how we are doing with it? In the first part, we described the paths so far taken, the inherited language and context of our scholarship.<sup>50</sup> In this part, we suggest some ways in which legal writing professors are modifying and re-arranging what they have inherited, and we begin to explore the “rhetorical community” that is created by our scholarship. What kind of person is speaking here? To what kind of person? What kind of voice is used? What kind of response is invited or allowed? Where do I fit in this community?<sup>51</sup>

### A. Writing as Conversation

Because writing is usually done alone, it may seem that writing is an individual enterprise—a lone writer at a keyboard thinking and recording great thoughts. But in fact, everything we write is generated from a body of ongoing work by others and will be presented to others to become a part of a shared discourse.

Perhaps a helpful metaphor is to think of writing as conversation rather than as speech-making.<sup>52</sup> Imagine a room full of

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50. See White, *supra* n. 7, at 695.

51. *Id.* at 701–702.

52. Although not the source of the image in this article, it may be interesting to compare Kenneth Burke’s unending conversation metaphor:

Imagine that you enter a parlor. You come late. When you arrive, others have long preceded you, and they are engaged in a heated discussion, a discussion too heated for them to pause and tell you exactly what it is about. In fact, the discussion had already begun long before any of them got there, so that no one present is qualified to retrace for you all the steps that had gone before. You listen for a while, until you decide that you have caught the tenor of the argument; then you put in your oar. Someone answers; you answer him; another comes to your defense; another aligns

people engaged in a conversation. The door opens and a hypothetical professor (let's call her Professor Akin) walks into the room. The conversation continues as Professor Akin takes a seat. If we think of the ongoing conversation as our scholarship, what is the best way for Professor Akin to join that conversation? How can both she and the assembled group best help the shared conversation progress?

First, Professor Akin should take a seat and listen for a while. She should find out what the group is discussing and who is saying what. Perhaps she should ask the person sitting next to her what was said before she entered the room. Once she has a good idea of the content of the conversation so far, she can begin to participate. When she does, she should try to add something new. The conversation will not progress if she merely reports to the group what others have already said. Imagine Professor Akin taking the floor, saying "X said this; Y said that; Z made this other point" and then sitting down. That would be rather strange conversational behavior. In a conversation, the speaker is taking up talking time, during which no one else can speak. Part of her implicit promise to her listeners is that she will make good use of the time by moving the discussion forward somehow.

But Professor Akin *should* mention part of what has already been said because she should relate her new points to the points already made. She might agree with some points and offer new reasons in support. She might agree with part of a prior comment but disagree with another part. She would, of course, explain her reasons for agreeing and disagreeing. She might make a new point entirely, saying that the conversation so far has not considered a significant aspect of the topic. When she finishes her comment, she should listen again, waiting to see what others will say about her thoughts and what impact those thoughts will have on the direction of the conversation.

The other members of the group have conversational duties as well, duties that will help advance the shared conversation. Group members should listen to Professor Akin when she stands

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himself against you, to either the embarrassment or gratification of your opponent, depending upon the quality of your ally's assistance. However, the discussion is interminable. The hour grows late, you must depart. And you do depart, with the discussion still vigorously in progress.

Kenneth Burke, *The Philosophy of Literary Form* 110–111 (U. Cal. Press 1973).

to speak. They should not be busy working on what they will say next and therefore ignoring the conversation going on around them. They should listen with an open mind, willing to be convinced of something new. But they should also be willing to offer a different perspective, perhaps tweaking the new idea or perhaps disagreeing entirely. If a listener disagrees (let's call him Professor Brown), he should share his perspective and explain his reasons. The group is searching for the best answer, after all. Perhaps the best answer is somewhere between the ideas offered by Professors Akin and Brown. The group may never reach the best answer if Professor Brown is not willing to share his different perspective.

Disagreement in a conversation can be uncomfortable, of course, so Professor Brown will be sure to treat both Professor Akin and her ideas with respect. In fact, Professor Brown may affirm the importance of Professor Akin's ideas explicitly. He also affirms their importance implicitly by taking them seriously enough to warrant further exploration. After Professor Brown finishes speaking, Professor Akin may speak again, responding to Professor Brown's comments. She will treat Professor Brown and his ideas with respect as well. Being human, she may feel some discomfort, but she is also grateful for the chance to further explore her own perspective, a chance she may not have had if no one had disagreed. Other members of the group will offer their own thoughts on the disagreement between Professors Akin and Brown, and they will share their own new ideas as well. And on the conversation goes.

#### B. The Duties of Writers and Audiences: A Mid-Course Check

All of us have participated in oral group deliberations like this one. With this kind of full, thoughtful, broad, and respectful participation, all of the participants will know a great deal more and will understand the topic much more deeply than any one of them ever could alone. This model works well for our scholarship too. A number of characteristics at work in the model conversation apply equally to scholarly writing.

First, the writer has responsibilities to others. She does thorough research, finding out what has been said before she entered the conversation, but she does not simply repeat what already has been said. When she writes, she impliedly promises her future

readers that she will make good use of their reading time, so she makes new points rather than merely filing a transcript of the conversation to date. She does not ignore the points of others, however. Instead, she places her own new points in the context of what has already been said. She knows that others may disagree with part of all of her idea, and she is willing to hear disagreement. In fact, she welcomes disagreement as an opportunity to delve even more deeply into the subject.

Readers have responsibilities as well. They should read openly and from within the text, hoping to be persuaded of something new.<sup>53</sup> Even if they have written about the topic themselves, they welcome a new participant to the conversation. They know that no one owns a topic. The more the topic is explored, the deeper the group's ultimate understanding will be and the more important each writer's own contributions will be to that understanding. But readers should be willing to disagree too, in order to assist with the group's shared goal of finding the best answer to an interesting question. When the readers again write, they place their own new comments in the context of the new comments of recent writers too, treating those comments with respect as well. Readers have the responsibility of remaining current in the literature of the field, for productive response to a writer's new work must be grounded in a broad knowledge of the field's preexisting scholarly work. Keeping current in the literature is necessary not only to respond professionally to new *published* work but also to fulfill the crucially important responsibility of mentoring new scholarship *before* it is published. Mentoring requires the willingness to read drafts and to provide honest and thoughtful feedback based on literacy in the field itself.

How are we in the legal writing community doing with these criteria? *Are our articles well researched?* Many are. Certainly professors who teach research should produce well-researched articles, and often that is the case in our community. But we are still in the midst of a transition from an earlier era, when research was not always deemed so important. Perhaps in that earlier era, the literature was not as developed as it is today.

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53. Maksymilian Del Mar has written eloquently of this ethic of reading, suggesting that we should enter the world of the text, assuming the role of "companions around a dinner table, sharing wine amongst inquisitive friends, as in Plato's symposiums." Del Mar, *supra* n. 5, at 7.

Perhaps we were still taking the first steps toward becoming a discipline, so we had not yet established the necessary research ethic. But those early days are past, and today it is critically important to read and cite thoroughly. Today's work builds on the work of those who came before us. Our challenge is to extend the national conversation by citing to relevant work produced both inside and outside our own field.

*Are we making new points?* Largely, yes. The second generation of legal writing scholarship is vastly more sophisticated and creative than was the first generation as a whole. Part of what makes legal writing scholarship so exciting today is the amount of new territory to be explored, and as a community, we have begun that exciting work. No doubt the third generation will produce even more new ideas, relying upon the work that has gone before but deepening the level of analysis and understanding.

*Are we recognizing the shared nature of scholarship by seeking feedback from a variety of readers before publication?* Collectively, we may need some improvement on this score. We expect our students to use the feedback process to improve their work, but we do not always listen to our own teaching. In recent years, one of the authors has had the opportunity to observe well-mentored new faculty members in other fields. They have learned to use the writing process to perfect a work. These new scholars write a first draft that may be so rough that many legal writing teachers would be embarrassed to show it to a mentor. But these inexperienced authors choose carefully how to send the draft around: first to the two or three most trusted friends who will not judge them on the basis of bad beginnings; then to ever more sophisticated circles of friends, colleagues, and mentors. By the time the article gets to the author's most discerning and experienced mentor, it looks very good. The mentor is impressed and in a good position to praise the author to others. Even more important, the paper is developed enough to evoke a sophisticated response, and the author is intellectually and psychologically ready to understand and incorporate these more sophisticated responses. In each round of comment, authors take suggestions seriously. And those drafts—that started out as terribly written as any second-semester law student's zero draft—become wonderful articles published in prestigious journals.

We know from our teaching that this is how feedback works, but legal writing teachers often do not take full advantage of the

rhetorical community we are building. We hesitate to ask someone to read a draft because we know it is imperfect, thus foregoing the help of those we could trust. The unfinished draft invites comment; the “perfected draft” says to the responder, “I’ve put so much work into this already, I just want some trifling comments that will be easy to fix.” Seeking feedback earlier in the process gives both author and responder space to grow. The responder can (and definitely should) provide honest substantive feedback, not just a cosmetic edit and a note saying what the responder thinks the author wants to hear. As any first-year student knows, we in the legal writing community are a notoriously discerning audience, with plenty of suggestions for how to improve a document. Our scholarship will only get better if we remember to seek feedback from others in the field.

*Are we welcoming new scholars into the shared conversation, glad when they make points we had not considered?* Almost always, yes. Our community is clearly one of the most supportive academic communities in existence. It is, of course, an understandable human reaction to feel a little threatened when a new voice enters the discussion on a particular topic, making new points or taking a different approach, but as members of this warm and welcoming community, we put that momentary feeling aside. We know that there is far more knowledge to be uncovered and explored than anyone can manage alone. We are, after all, in this together.

But not surprisingly, we have trouble with the hardest part of the conversational model—being willing to disagree with each other and be disagreed with in return. The provocative voice is not always welcome within our community. We are reluctant to disagree with each other, particularly in print. Mature disciplines are not afraid of disagreement. In fact, the more scholars disagree, the more good scholarship is produced. As our discipline moves toward maturity, we need to become more accustomed to healthy professional disagreement.

Of course, every individual author, no matter the discipline, would prefer unequivocal praise of her ideas. No doubt the same is true within the legal writing community. But the problem is greater and far more complicated in marginalized academic communities struggling for full acceptance—communities like ours. In our example above, if Professor Akin is on a tenure-track or working toward a long-term contract, how should Professor

Brown feel about disagreeing with her contribution to the scholarly conversation? If he takes issue with some of her points, might his disagreement be used by others to advance an agenda in opposition to legal writing professionals at Professor Akin's personal expense?

We must be honest and say that this fear can be legitimate. The same kinds of scholarly disagreements that would be expected as a matter of course in mainstream disciplines can be made to appear much more serious in the hands of those hostile to equal status for legal writing. This fear should not prevent us from undertaking a vibrant scholarly conversation in which we speak our views honestly, but it should inform the way in which we frame our disagreements.

Like all marginalized communities, legal writing professors have two distinct audiences, one inside the discipline and one outside its membership. The rhetorical task of writing truthfully with these two audiences simultaneously in mind can be difficult. In that situation, Professor Brown should walk a carefully balanced line, stating his disagreement honestly but underlining the value of Professor Akin's own points so the outside audience does not misunderstand his point. The value of an article, after all, is not a question of agreement or disagreement with content. Some of the most important work in a discipline can be work that challenges commonly held beliefs. If the work is well-researched and filled with creative new insights, the work deserves high praise, no matter whether any particular reader is ultimately persuaded on each and every point. And for her part, as difficult as it may be, Professor Akin should not consider disagreement a breach of loyalty to the discipline but rather a sign that the discipline is growing up and taking its rightful place in the academy.

*Finally, are we encouraging a vibrant rhetorical community by staying current in the legal writing literature?* Reading and writing are connected. Both are negotiated processes as readers and authors engage in an inner dialogue to make meaning.<sup>54</sup> In fact, some in describing the writing process talk about assuming different roles—becoming different people—as the writing takes shape.<sup>55</sup> If this inner dialogue is to be useful to the intellectual

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54. See Berger, *supra* n. 4, at 155–157; Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 Marq. L. Rev. 887 (2002).

55. See e.g. Bryan Garner, *Legal Writing in Plain English* 5–7 (U. Chi. Press 2001).

life of the field, however, it must lead to the public dialogue, the conversation. The legal writing community has a strong ethic of sharing.<sup>56</sup> As we understand the value of collaboration in sharing teaching ideas, we should recognize that transforming the writer's inner dialogue to a public conversation is critical for the intellectual life of the field. And as noted earlier, unless one is familiar with the body of legal writing literature, it is difficult to make useful contributions.

Many of the barriers that make it difficult to write also impede reading. It is easy to put aside the responsibility to read scholarship when you are busy reading literally thousands of pages of student work each semester.<sup>57</sup> And perhaps it is because the legal writing community has had frequent and vibrant conferences, and an active listserv, that we have not always depended on reading articles for the national conversation.<sup>58</sup> Those who have been in the field a long time may decide there is little new for them in scholarship—they have “seen it all before.” This feeling is exacerbated in legal writing because for many years, caps on the number of years teachers could stay in a position led to turnover and a continual influx of new teachers.<sup>59</sup> New teachers rediscovered old ideas and often presented the already explored ideas as if they were new and fresh. Now that the second-generation legal scholars have begun to produce more sophisticated and original work, experienced legal writing professors may

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Garner describes four roles an author assumes in the writing process, as they have been delineated by Dr. Betty Sue Flowers: The Madman, The Architect, The Carpenter, and The Judge. *Id.* at 5–7. Garner writes about the roles almost as if the author were four, different people who serially assume responsibility for the piece of writing. *Id.* at 6. This metaphor supplies a vivid image of the internal dialogue that occurs as we write.

56. One example of this ethic is the “Idea Bank,” a site to share assignments and teaching ideas on the Legal Writing Institute’s website at [http://www.lwionline.org/idea\\_bank.html](http://www.lwionline.org/idea_bank.html).

57. *2008 Survey Results*, *supra* n. 49, at 63. The average pages of student work read by legal writing professors is 1,483, but some read more than 4,000.

58. The Legal Writing Institute has held biennial conferences since 1984. Leg. Writing Inst., *History*, <http://www.lwionline.org/history.html> (accessed Apr. 19, 2010). The Association of Legal Writing Directors has held conferences in the intervening years since 1999. In addition, both organizations maintain active listservs.

59. Capping the number of years that a legal writing professor could stay at one law school was a common practice that has begun to disappear in the last fifteen years. *See e.g.* Jo Anne Durako, *A Snapshot of Legal Writing Programs at the Millennium*, 6 *Leg. Writing* 95, 112 (2000); Mary Lawrence, *An Interview with Marjorie Rombauer*, 9 *Leg. Writing* 19, 29 (2001). Recently, economic pressures appear to have encouraged a few law schools to again establish short-term positions for legal writing professors as visitors or teaching fellows.

have failed to develop the habit of reading new work. Novice teachers stand to gain even more by reading regularly in their field. Developing a habit of reading the emerging third generation of legal writing scholars will offer rewards to both the individual reader and the greater rhetorical communities individual readers will create.

### C. Rhetorical Communities

#### 1. *Our Audiences*

Choosing an audience is a key question for any scholar. In the legal academy, the question of who makes up the primary audience for legal scholarship has been controversial. Many assume that authors intend the primary audience of scholarship to be judges, because scholars hope to influence the courts.<sup>60</sup> Others argue that scholars should write for other scholars in the legal academy, perhaps because they are eager to join the national conversation among scholars that shapes the education of generations of lawyers.<sup>61</sup> Erwin Chemerinsky and Catherine Fisk accept both of those audiences as important, but urge scholars to broaden their view of possible audiences for their work.<sup>62</sup>

In the legal writing community, when the question of audience arises, we most often identify only two audiences—an “inside” audience and an “outside” audience. The “inside” audience is the legal writing community, in which members have traditionally placed a high value on uncritical support. The “outside” audience, in contrast, is other law professors and members of tenure committees, who are more likely to be critical, adversarial, and even threatening to job security. The outside audience is often feared.<sup>63</sup>

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60. The often-cited article articulating this viewpoint, and lamenting the lack of interest in the academy about writing for judges is Harry T. Edwards, *supra* n. 10.

61. See e.g. Stephen M. Feldman, *The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)*, 54 J. Leg. Educ. 471 (2004); see also Richard A. Posner, *The Deprofessionalization of Legal Training and Scholarship*, 91 U. Mich. L. Rev. 1921 (1993) (agreeing in measure with Judge Edwards’s arguments for more doctrinal legal scholarship but defending the interdisciplinary scholarship, especially Law and Economics scholarship).

62. Erwin Chemerinsky & Catherine Fisk, *In Defense of the Big Tent: The Importance of Recognizing the Many Audiences of Legal Scholarship*, 34 Tulsa L.J. 667, 675 (1999).

63. Other “outsider” groups, such as critical race scholars, have written about two audiences referring to the “imperial scholar” who writes high theory compared to more

This fear of a critical audience is destructive on many levels. The fear of a critical or derisive response may be one of reasons some legal writing professors do not write.<sup>64</sup> It may also inspire the paradoxical position of some legal writing professors who deny the value of scholarly writing. Like the law professor who comes to teaching to escape the practice of law and cannot avoid showing students disdain for practicing lawyers, some legal writing teachers teach writing but do not write and cannot avoid showing their disdain for academic legal writing.

Those legal writing professors who do engage in scholarship may face frustrations regarding their choice of audience. If they choose to focus on either the “inside” or “outside” audience to the detriment of the other, they will limit the scope and reach of their project. Some will write only for the “safe” audience of the legal writing community of scholars. Others will write only what is acceptable to a tenure committee, ignoring the rapidly developing body of literature in the legal writing field. Each of these choices may make sense at various times because the rewards and dangers posed by “outside” audiences are real. Thus, despite how stultifying “we/they” thinking can be, sometimes it may be necessary for a group like legal writing professors who often still encounter barriers to full status within the legal academy.<sup>65</sup>

Further, differences in the “inside” and “outside” audiences go beyond the usual dichotomy faced by scholars in more established areas. One of the difficulties of writing for an “outside” audience is that many in the legal academy never had the experience afforded by a modern legal writing program. Law schools hire most of their faculty members from elite schools.<sup>66</sup> Elite schools are

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traditional doctrinal analysis. See e.g. Kevin Johnson, *Race Matters, Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. Ill. L. Rev. 525.

64. In addition to the fear of harsh criticism, legal writing teachers face other difficulties that also explain why they may not write. Teaching writing is extraordinarily labor intensive. Marking papers, conferencing with students, and creating new assignments year after year takes time. Finding time to write during the school year is difficult, if not impossible. Summers are often devoted to developing assignments or to summer teaching to supplement salaries that as a rule are lower than the rest of the permanent faculty's. See generally *2008 Survey Results*, supra n. 49, at 62.

65. See e.g. Kristen Konrad Robbins, *Philosophy v. Rhetoric in Legal Education: Understanding the Schism between Doctrinal and Legal Writing Faculty* 3 J. ALWD 106, 106–110 (2003).

66. A study of new faculty hired between 1996 and 2000 found that just over 86 percent of them came from the top 25 law schools. Richard E. Redding, *Where Did You Go to*

often least likely to offer a well-developed legal writing program.<sup>67</sup> Thus, many law faculty who received their law degree from elite schools are just not familiar with the kinds of rhetorical and communication theories now being applied in the legal writing classroom.

While the perils involved in writing for an “outside” audience are real, significant hazards also complicate writing for the “inside” legal writing audience. Although inroads into the mainstream of scholarship are evident,<sup>68</sup> one risk may be a smaller and less influential readership, a risk that will not have escaped the thinking of faculty in other fields. Anecdotal evidence supports the conclusion that tenure committees and faculties sometimes discount legal writing articles; even more troubling, it is possible that some faculties when considering tenure for legal writing professors discount evaluative letters from other legal writing scholars.

“We/they thinking” limits audiences, which limits choices. Legal writing scholars may miss the chance to influence judges and practitioners. And legal writing scholars do write articles that matter to judges and practitioners;<sup>69</sup> in fact, scholarship written for the professional legal writing audience of judges and lawyers is a target audience for several of our journals (*J. ALWD* and *Scribes*). Another important phenomenon is that judges themselves often choose to write about legal writing when they

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*Law School? Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 *J. Leg. Educ.* 594 (2003).

67. Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: A Sharper Image*, 2 *Leg. Writing* 1 (1996) (summarizing the results of Legal Writing Institute’s survey with a heading reading: “The Higher the Tier, the Less Professionalized the Legal Writing Program”). This may be changing as more top-tier schools have re-evaluated legal writing programs in the last ten years.

68. For example, the popular Legal Writing Prof Blog, part of the Law Professors Blogs Network has a growing readership. The blog posted the largest gains in both page views and visitors in 2008. Leg. Writing Prof Blog, *Legal Writing Prof Blog Wins Most Improved Player Award Redux*, <http://lawprofessors.typepad.com/legalwriting/2010/01/legal-writing-prof-blog-wins-most-improved-player-award-redux.html> (Jan. 22, 2010). Recently, the blog posted a notice that it had surpassed the half million mark on page views. Leg. Writing Profs. Blog, *Half Million Page Views*, <http://lawprofessors.typepad.com/legalwriting/2010/01/half-a-million-page-views.html> (Jan. 30, 2010).

69. There are too many to list. See e.g. Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 *J. ALWD* 108 (2004); Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 *Rutgers L. Rev.* 381 (2008).

publish articles and books.<sup>70</sup> It is logical to assume that when judges write these articles and books, they hope for a broader audience beyond other legal writing scholars.

Pleasing a tenure committee or traditional faculty may lead legal writing professors to choose topics outside the field, and this choice may stunt the growth of the national conversation on legal writing. A similar danger lies in legal writing scholars choosing only topics that the legal writing community will support and find non-threatening. Avoiding the “provocative voice” impoverishes the entire legal writing community.

Thus, a new generation of legal writing scholars may wish to reserve the notion of “insiders” and “outsiders” for those political times that make such thinking necessary, such as when a legal writing professor is in the middle of a troubled tenure process. But in other times, we can seek opportunities to expand our imagined rhetorical community with the choice of an audience beyond the “we/they” duality that has grown out of years of second-class citizenship in many law schools. Some speak of evaluating and defining scholarship through the “validation of our peers.”<sup>71</sup> If this is true for the legal academy, legal writing professors must begin to think of themselves as peers of non-legal writing faculty in the legal academy, and of our rhetorical community as larger than the legal writing world. Recent social science research into questions of motivation may suggest other important factors to consider about ourselves as writers.

## 2. *Ourselves*

Social science research on motivation suggests that in addition to the more conventional factors involved in beginning a work of scholarship, legal writing professors should consider choosing a topic and audience that personally satisfies them, and they should strive to maintain autonomy in their work. Choosing a personally satisfying topic will ignite their curiosity and internal

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70. See e.g. Ruggero J. Aldisert, *Opinion Writing* (2d ed., AuthorHouse 2009); Antonin Scalia & Brian Garner, *Making Your Case: The Art of Persuading Judges* (Thomson/West 2008).

71. Other disciplines often use this “peer validation” as defining scholarship. See e.g. Corly Brooke, *Defining Scholarly Teaching and the Scholarship of Teaching and Learning (SOTL)*, <http://www.ag.iastate.edu/agcoll/PDF/Brooke%20College%20of%20AG%20SOTL%2007.pdf> (Apr. 5, 2007).

desire to learn about the topic, to contribute to a particular community of scholars, and accordingly will make them more productive scholars, more likely to succeed.

A key branch of motivational theory examines whether motivation is internal or external and whether the difference affects the level of motivation.<sup>72</sup> Intrinsic motivation derives from the task itself and the actor's reaction to it.<sup>73</sup> It is "manifested both as enhanced performance, persistence, and creativity and as heightened vitality, self-esteem, and general well-being."<sup>74</sup> It may involve more interest, enjoyment, and confidence.<sup>75</sup> Conversely, when actors are externally motivated, they respond primarily to secure a reward, or to avoid a loss or harm.<sup>76</sup> Studies in this area suggest that those who engage in tasks based on internal motivation are likely to spend more time on the task and experience more success with it, while external rewards often hinder motivation.<sup>77</sup>

Applied to the context of legal writing scholarship, these studies suggest that scholars will flourish when they respond to their intrinsic desires regarding what they have to say and to whom they wish to say it. Specifically, legal writing scholars are likely to write more and find greater satisfaction in scholarship if they write to please themselves. Intrinsically motivated scholarship is more likely to be creative and complete. This comports, for example, with the often repeated advice to choose a topic that one

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72. In the 1960s, social scientists examining motivation in the workplace developed models to examine the difference between intrinsic and extrinsic work motivation. Marylene Gagne & Edward L. Deci, *Self-Determination Theory and Work Motivation*, 26 *J. Organiz. Behav.* 331, 331 (2005). Although this article focuses on self-determination theory, there are many theories of motivation. See generally *id.* at 340–345 (comparing Self-Determination theory to other motivation theories). Psychologists Edward L. Deci and Richard M. Ryan have written extensively about the differences between intrinsic and extrinsic motivation. See e.g. Edward L. Deci & Richard M. Ryan, *Intrinsic Motivation and Self-Determination in Human Behavior* (Plenum Press 1985). Their work on intrinsic and extrinsic motivation is closely allied with their self-determination theory, which posits that individuals who feel they are in control rather than constantly responding to outside demands enjoy more satisfaction and a better sense of well being. *Id.* at 29–32.

73. Richard M. Ryan & Edward L. Deci, *Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being*, 55 *Am. Psychol.* 68, 69 (Jan. 2000).

74. *Id.*

75. *Id.*

76. Extrinsic motivation can also vary in how much it evokes a feeling of choice. See generally *id.* at 71–73.

77. *Id.*; see also generally Deci & Ryan, *supra* n. 72.

should be passionate about, because she will need that passion to fuel the long process of thoroughly exploring a topic. It also suggests that because choosing an audience is part of the process of writing, scholars should choose audiences based on their intrinsic desires to join the conversation of a certain rhetorical community.

Extrinsic incentives in the legal academy can be high, however. For example the rewards offered for writing scholarship can include earning more money, more autonomy, colleagues' admiration, and job security; the harm may be second-class citizenship or even the loss of a job. Thus, the legal writing scholar who begins work based on an intrinsic interest in a topic or an intrinsic desire to contribute to the national conversation can find that intrinsic motivation evaporates under the extrinsic pressures of either a tenure process or another threat to job security.

An outgrowth of motivation studies, self-determination theory, may provide insight into mitigating this potential motivation loss. In contrast to goal-based theories, self-determination theory posits that fulfilling human needs can influence motivation.<sup>78</sup> Specifically, fulfilling the needs of competence, relatedness, and autonomy positively affects motivation. Of these three needs, autonomy can be of particular importance because it can lead individuals to internalize motivation.<sup>79</sup>

Psychologists Edward Deci and Richard Ryan have found that while extrinsic motivation impedes overall motivation, it is more complex than a simple finding that it uniformly destroys intrinsic motivation. They posit that extrinsic motivation operates on a continuum and that given the right circumstances, extrinsic motivation can become perceived as internal.<sup>80</sup> Although autonomy does not literally transform extrinsic motivation into intrinsic motivation, changing an individual's perception of where motivation originates may allow extrinsic motivation to mimic or

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78. Edward L. Deci & Richard M. Ryan, *The "What" and "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior*, 11:4 *Psychol. Inquiry* 227, 227 (2000) (available at [http://www.updatenet.ch/images/7/75/Selbstbestimmung\\_Deci\\_Ryan\\_2000.pdf](http://www.updatenet.ch/images/7/75/Selbstbestimmung_Deci_Ryan_2000.pdf)). "Needs" are defined as "innate psychological nutrients that are essential for ongoing psychological growth, integrity, and well-being." *Id.* at 229. Self-determination theory shares much with personality theories that emphasize innate needs such as the work of Abraham Maslow or R.W. White. *Id.* at 231. In contrast, goal-based theories, such as those of B.F. Skinner, *id.*, or Locke and Latham emphasize goal selection and pursuit rather than needs that drive behavior. Gagne & Deci, *supra* n. 72, at 341.

79. Deci & Ryan, *supra* n. 72, at 237.

80. Gagne & Deci, *supra* n. 72, at 331, 334.

increase intrinsic motivation.<sup>81</sup> In short, preserving autonomy may thus mitigate the erosion of motivation created by external rewards, and may help fuel motivation.<sup>82</sup>

Self-determination theory has been extensively explored in legal scholarship by Larry Krieger and other scholars who explore “humanizing legal education.”<sup>83</sup> These scholars contend that both students’ learning and professors’ teaching benefit from support for autonomy and intrinsic motivation.<sup>84</sup> Legal writing scholars have applied self-determination theory to the topic of teaching legal writing and have explored ways of increasing the opportunities for intrinsic motivation to improve the legal writing classroom.<sup>85</sup>

In the context of motivating legal writing professors to write scholarship, this needs-based analysis implies that when authors feel competent to write, connected to the rhetorical community that will receive their communication, and most importantly, in charge of their writing decisions, they are more likely to succeed. Extrinsic rewards will not extinguish intrinsic motivation as readily when authors experience “autonomy support” for their writing decisions.

This research thus suggests that those in the best position to write and support writing are professors outside the reach of the

81. *Id.*

82. Deci & Ryan, *supra* n. 78, at 237–239.

83. See e.g. Lawrence S. Krieger, *Institutional Denial about the Dark Side of Law School and Fresh Empirical Guidance for Breaking the Silence*, 52 J. Leg. Educ. 112 (2002); Lawrence S. Krieger, *Psychological Insights: Why Our Students and Graduates Suffer and What We Might Do About It*, 1 J. ALWD 259 (2002); Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 Personality & Soc. Psychol. Bull. 883 (2000); Kennon M. Sheldon & Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 St. Thomas L. Rev. 249 (2005).

84. Barbara Glesner Fines, *Competition and the Curve*, 65 UMKC L. Rev. 879, 911 (arguing that law school teachers should model intrinsic motivation for students).

85. See e.g. M.H. Sam Jacobson, *Learning Styles and Lawyering, Using Learning Theory to Organize Thinking and Writing*, 2 J. ALWD 27 (2004); Sheila Rodriguez, *Using Feedback Theory to Help Novice Writers Develop Expertise*, 86 U. Det. Mercy L. Rev. 207 (2009); Robin Wellford Slocum, *The Law School Student-Faculty Conference: Toward a Transformative Learning Experience*, 45 S. Tex. L. Rev. 255 (2004); Nancy J. Soonpaa, *Stress in Law Students: A Comparative Study of First-Year, Second-Year, and Third-Year Law Students*, 36 U. Conn L. Rev. 353 (2004); Emily Zimmerman, *An Interdisciplinary Framework for Understanding and Cultivating Law Student Enthusiasm*, 58 DePaul L. Rev. 851 (2009).

rewards and threats of the tenure process; those already tenured professors whose motivation was not damaged by the tenure process or those for whom tenure is not an option. It also suggests that those in the tenure process surrounded by extrinsic rewards and threats may want to focus instead on the parts of the process where they exercise autonomy. Likewise, these scholars can be supported by increasing their feelings of autonomy, competence, and relatedness. For example, efforts to persuade traditional faculty to give pre-tenure scholars the freedom to write in any area they choose should be helpful. The legal writing community should remain open about how legal writing professors choose topics, whether inside or outside the legal writing field. Further, we should continue workshops and mentoring systems to encourage scholars to feel competent and connected. We must encourage legal writing professors, whatever their situation, to write.

### III. THE FUTURE OF LEGAL WRITING SCHOLARSHIP

So far, this Article has surveyed our past and taken stock of our present. It is now time to look down the road, toward the horizon. If, as this Article has suggested, the future of our discipline is inextricably linked to our scholarship, then we should think carefully about what we will write in this next generation and what purposes that scholarship should serve.

#### A. Why Write?

Scholarship is expensive, after all, requiring significant institutional and personal resources.<sup>86</sup> So we should remind ourselves of the purposes to be achieved by that investment.<sup>87</sup> Perhaps the most important purpose of scholarship is the obligation to advance human knowledge. Scholars owe that obligation to identi-

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86. The costs of scholarship may range from economic to emotional:

There are large economic costs—support for the ever-growing host of law reviews, research grants, research collections of law libraries, and compensation for student research assistants. There are time and opportunity costs—the hours that faculty spend on scholarly research and writing leave less time available for teaching, counseling students, and engaging in university and community service. Finally there are substantial psychic costs to professors who worry about the quality and quantity of their writing.

Banks McDowell, *The Audiences for Legal Scholarship*, 40 J. Leg. Educ. 261, 265 (1990).

87. Pollman & Edwards, *supra* n. 2, at 15.

fiable legal constituencies like judges and lawyers, who will put the knowledge to good use in the world of practice. Law teachers have both the opportunity to engage legal questions from a relatively objective perspective and the time and resources to study professional skills and responsibilities more deeply than can those outside the academy. Scholarship can and should help judges and practitioners think more clearly about thorny legal problems and their own professional responsibilities.<sup>88</sup>

But the obligation to advance knowledge extends more broadly than these predominantly instrumental uses imply, for humanity itself advances in often unpredictable ways when human understanding grows. Members of the academy are optimally situated to discover new information, identify unrealized effects, and make new connections—to “understand as fully and as fundamentally as possible,”<sup>89</sup> even if purely for the sake of doing so. Scholarship does not require an instrumental justification; scholars teach and learn purely for the sake of understanding our world and sharing that understanding with others. If legal writing professors are to take our place as full members of the academy, we too must undertake a responsibility to advance human understanding, taking the intellectual inquiry wherever it leads us.

Perhaps we might think that the responsibility to advance knowledge need not apply to legal writing teachers because other professors who are not as busy can fulfill this responsibility. As tempting as this idea may be, though, it is not a satisfactory answer. First, many law professors who do not teach legal writing are extraordinarily busy, just as busy in fact as most legal writing professors. Are they exempt as well? Does the responsibility to advance human knowledge fall only on those with leisure time? That would mean that some of the very best minds would be taken out of the game, and human knowledge would be the poorer for

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88. See e.g. Dennis Archer, *The Importance of Law Reviews to the Judiciary and the Bar*, 1991 Det. C.L. Rev. 229, 236–237; Ronald Benton Brown, *A Cure for Scholarship Schizophrenia: A Manifesto for Sane Productivity and Productive Sanity*, 13 Nova L. Rev. 39, 46 (1988); Michael J. Graetz & Charles H. Whitebread II, *Monrad Paulsen and the Idea of a University Law School*, 67 V. L. Rev. 445, 454 (1981) (“A university law school is among the few institutions for anticipating future social needs and for relating the role of law to furthering those needs. It must produce lawyers for tomorrow.” (Cited in Donald J. Polden, *Scholarship in Legal Education*, 24 Mem. St. U. L. Rev. 1, 2 n. 8 (1993))).

89. Archer, *supra* n. 88, at 279.

it. Second, and perhaps more important, scholarly contributions are not generic. Legal writing professors have a unique perspective, a unique set of skills, and a unique knowledge base. Realistically, some contributions to knowledge will be made only if they are made by a legal writing professor. To exempt legal writing professors from any responsibility for scholarship would be to choose to forego the contributions no other group is likely to make.

Another important purpose of scholarship is the enhancement of teaching.<sup>90</sup> Obviously, the more a professor knows, the more the professor can share with students,<sup>91</sup> but that simple correlation does not fully describe the relationship between teaching and scholarship. Writing also enhances teaching when it contributes to students' moral education,<sup>92</sup> when it provides examples of excellence,<sup>93</sup> and when it enhances the professor's own analytical abilities, and is then put to use in teaching.<sup>94</sup> For legal writing professors, though, perhaps the most important link to teaching is the discipline of doing what we expect our students to do. We can forget how excruciatingly difficult writing can be; how frustrating it can be to try to master a new subject and present new material in a logical way; and how intimidating it can be to expose oneself in print. We can forget how confusing and disorienting it is to write in a new language or voice or in a new genre, or to a new audience. If we ask our students to do these things, can we ask less of ourselves? Tennis coaches play tennis. Cooking teachers cook. And for the same reasons, writing teachers should write.

If legal writing professors should write because we teach writing, what exactly is it that we should write? One might respond that the *teaching* rationale for writing leads to the conclu-

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90. See Brown, *supra* n. 88, at 49–51; Clark Byse, *Legal Scholarship, Legal Realism and the Law Teacher's Intellectual Schizophrenia*, 13 *Nova L. Rev.* 9, 29–30 (1988).

91. James Boyd White, *Why I Write*, 53 *Wash. & Lee L. Rev.* 1021, 1032 (1996).

92. Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 *Yale L.J.* 955, 968 (1981) (A scholar's pursuit of the truth can "preserve in his students an attitude of friendship, or goodwill, towards those who seek the truth and indeed toward the truth itself.").

93. David L. Gregory, *The Assault on Scholarship*, 32 *Wm. & Mary L. Rev.* 993, 1003 (1991) ("So why write? Fundamentally, the answer is a matter of vocation and ethics. The aspiration to excellence breeds excellence in students and in legal audiences.").

94. *Id.* at 999 ("Although scholarship as an intellectual pursuit is commendable for its own worth, that is not its *raison d'être* in the professional law school. If professors do not engage in scholarship, they cannot fully foster critical analytical skills in their students, because their own skills will atrophy.").

sion that we should write briefs and office memos, not scholarship. If part of the value of writing is our own practice of what we teach, then perhaps we should write primarily examples of the precise genres we teach. That argument has a certain appeal, but ultimately, it misses the primary value our writing can have for our teaching. Most of us can write an office memo or a brief quite easily. Most of us have to work much harder and experience much more confusion and insecurity in order to write a law review article. The greatest teaching value in our writing is experiencing again the kinds of difficulties our students experience. For us, it is most likely that we will experience those difficulties if we write in a genre *other than* the genre we teach.

Scholarship carries another obligation—the obligation to speak truth to power.<sup>95</sup> Face to face with power, the only options are to retreat into an ivory tower; to speak on behalf of and therefore to serve the structure of power; or to confront that power, that is, to speak the language of prophetic confrontation.<sup>96</sup> A scholar might be called to confront governmental power or the practices of the profession, but a scholar is called also to speak truth to the powerful structures of legal education. The purposes of scholarship are well served when legal education is critiqued, and no one is better situated to critique and improve legal education than those on the inside, those who know it best.<sup>97</sup>

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95. As James Boyd White writes, the activity of expression not only “is the heart of intellectual and ethical life,” but also has a public and political dimension, for there is always the question whether we shall find ways to insist upon our own freedom and responsibility in a world of constraint, to respect the humanity and reality of other people and their experience, and to contribute to the formation of a culture and a policy that will enhance human dignity—or whether we shall instead lead lives imprisoned in dead modes of thought and expression that deny the value of ourselves and other people, and the activities of life we share.

James Boyd White, *Living Speech: Resisting the Empire of Force*, at preface (Princeton U. Press 2006).

96. David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 Pitt. L. Rev. 127, 172 (1988) (relying on the work of Arthur Schlesinger and Hans Morgenthau).

97. Much legal writing scholarship has critiqued legal education on issues ranging from status to curriculum design. On status issues, see e.g., Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 Temp. L. Rev. 117 (1997); Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 UMKC L. Rev. 253 (2004); Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. Leg. Educ. 562 (2000); Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 Cardozo Women's L.J. 75 (1997); Emily Grant, *Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession*, 27 Vt. L. Rev.

Scholarship brings individual rewards as well. Writing can be personally and professionally transformative.<sup>98</sup> Scholars should write for the sheer pleasure of doing a difficult task well<sup>99</sup> and for the excitement of the new territory to be explored. This personal and professional pleasure and transformation have value beyond the scholar's own enjoyment. The best teachers are curious, constantly learning and adapting, and intellectually engaged. Students, institutions, judges, and lawyers are well served by such energized teacher/scholars, whose own transformation can spark transformation in others as well. This transformative pleasure may be especially important for legal writing professors whose teaching load is both heavy and unchanging. Many legal writing professors teach nothing but legal writing: two sections of memo writing in the fall of students' first year and two sections of persuasive writing in the spring. Law professors who do not teach legal writing usually teach courses on three or four different

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371 (2003); Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. Leg. Educ. 530 (1995); Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 Wm. & Mary J. Women L. 551 (2001); Richard K. Neumann, Jr., *Women in Legal Education: A Statistical Update*, 73 UMKC L. Rev. 419 (2004); Robbins, *supra* n. 65; Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. Rev. 467 (2004); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 Berkeley Women's L.J. 3 (2001).

On curriculum, see e.g., Kenneth D. Chestek, *MacCrate (In)action: The Case for Enhancing the Upper-Level Writing Requirement in Law Schools*, 78 U. Colo. L. Rev. 115, (2007); *Erasing Lines*, *supra* n. 42; Pamela Lysaght & Cristina D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications*, 2 J. ALWD 73 (2004); Carol M. Parker, *A Liberal Education in Law: Engaging the Legal Imagination Through Research and Writing Beyond the Curriculum*, 1 J. ALWD 130 (2002); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 Neb. L. Rev. 561 (1997).

98. James Boyd White described this transformation when he wrote,

The task the course set me, then, was the direct analogue of Thoreau's task: to write my way out of Concord, out of false and inauthentic forms of speech and thought, to a kind of Walden, to a voice and language of my own. Writing to me thus became a way of creating a voice with which to speak and be, with which to represent and transform my own experience.

White, *supra* n. 91, at 1030.

99. Arthur Leff, claiming the last word at the Yale symposium, wrote,

And of course, for all that, legal scholarship is also something that produces pleasure. I do not want to end this symposium on the note of pure Yellow-Book aestheticism, but I defy any of the symposiasts (and at least many of the readers) to deny that they're also in the game . . . for those occasional moments when they say, in some concise and illuminating way, something that appears to be true. . . . [T]o have crafted, on occasion, something true and truly put—whatever the devil else legal scholarship is, is from, or is for, it's the joy of that too.

Arthur A. Leff, *Afterword*, 90 Yale L.J. 1296, 1296 (1981).

topics each year. It would not be surprising to find that it is the legal writing professor who is most in need of the excitement of learning new material and exploring new intellectual territory.

These purposes are compelling in and of themselves, and the desire to fulfill them is a powerful internal justification for the practice of scholarship. Ideally, these are the reasons we will write. But the legal writing community has an additional external reason to write. If we are ever to achieve full membership in the academy, we will need to take our places as scholars as well as teachers, engaging fully in important ongoing conversations and initiating some new conversations as well. If we expect to be subject to reduced professional expectations, we will always be subject to reduced status. Inferior status results in unfairness for individual legal writing professors personally, and even more importantly, it often reduces our effectiveness with our students.

Yes, scholarship is hard. It takes significant personal and institutional resources. But even for legal writing professors, maybe especially for legal writing professors, these purposes for scholarship justify the institutional and personal costs good scholarship requires. The spectrum of scholarship we produce should serve these articulated values. If it does, we will be fulfilling our responsibilities to our students, to the practice, to other scholars, to humankind, and to ourselves as well.

### B. Why Rhetoric?

Making the rhetorical turn to (1) study the “effects of texts”<sup>100</sup> and to (2) practice and (3) teach the construction of “effective texts” places our professional work in new lights and relationships. Because rhetoric explores a meaning-making process in which the law is “constituted” as human beings located within particular historical and cultural communities write, read, argue about, and decide legal issues, it provides an attractive picture of what we do in our scholarship, teaching, and professional interactions.<sup>101</sup>

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100. Mailloux, *supra* n. 3, at 40.

101. For discussion of “law as rhetoric” generally, see White, *supra* n. 7. For discussion of teaching “law as rhetoric,” see Linda L. Berger, *Studying and Teaching “Law as Rhetoric”: A Place to Stand*, 16 *Leg. Writing* 3 (2010).

The “rhetorical turn” in legal scholarship has been much discussed. See e.g. Stanley Fish, *Rhetoric*, in *Doing What Comes Naturally: Change, Rhetoric, and the Practice of*

Rhetoric makes it possible for us to view our teaching and scholarship as creative, constructive, and productive while still grounded in law, language, and reason.<sup>102</sup> Adopting rhetoric as the focus for our study and practice seems like a straight and narrow path to some: “Lawyers are rhetors. They make arguments to convince other people. They deal in persuasion.”<sup>103</sup> Proposing “that the law is a branch of rhetoric,” James Boyd White wrote, “Who, you may ask, could ever have thought it was anything else?”<sup>104</sup> In this view, rhetoric is not “merely” a tool or a set of techniques, nor even the art or craft of persuasion, but instead, it is an interactive process of persuasion and argumentation that is used to resolve uncertain questions in this setting and for the time being.

For many, however, rhetoric remains suspect, on the grounds that rhetoric is not reality, but trickery, or that it is “cooking” and not science.<sup>105</sup> For them, we offer these arguments.

First, although rhetoric and law have a long relationship and a rich history,<sup>106</sup> their relationship is often denied<sup>107</sup> and remains a relatively unexplored field of study.<sup>108</sup> Second, rhetoric provides

*Theory in Literary and Legal Studies* 471, 485–494 (1989) (discussing disciplines in which rhetoric has been “on the upswing”); Francis J. Mootz, III, *Rhetorical Knowledge in Legal Practice and Theory*, 6 S. Cal. Interdisc. L.J. 491, 572 (1998) (“Legal practice is rhetoric all the way down, with rhetorical engagements layered upon rhetorical engagements in a dynamic and challenging confluence that cannot be constrained by pretenses of analytical certainty.”); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 Vt. L. Rev. 681, 685–686 (1994) (“In the legal culture today one can discern the rhetoric of multivocality, empathy, and emotion playing out against a living backdrop of drama, myth, and metaphor.”); Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 Va. L. Rev. 1545, 1549 n. 14 (1990) (discussing a range of ideas related to the “epistemological consequences of rhetoric”).

102. See Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* 279 (Oxford U. Press 2005) (“Rational legal argument . . . is not demonstrative argument . . . It is rationally persuasive, rather than rationally demonstrative.”).

103. Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 Yale J.L. & Humanities 155, 177 (2006).

104. White, *supra* n. 7, at 684.

105. See Steven L. Winter, *A Clearing in the Forest: Law, Life, and Mind* 6–12 (U. Chi. Press 2001) (discussing the “ideology” of rationalism).

106. White, *supra* n. 7, at 684–685. Gorgias, the most famous of the Sophists, said that rhetoric was “the art of persuading the people about matters of justice and injustice in the public places of the state.” See *id.* at 684 (quoting Plato’s dialogue of the same name).

Despite the close historical ties between law and rhetoric, Peter Brooks has written that “the professionalization of law and legal education has over time tended to obscure the rhetorical roots of legal practice.” Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?* 18 Yale J.L. & Humanities 1, 2, 28 (2006).

107. Wetlaufer, *supra* n. 101, at 1554–1555.

108. See e.g. Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal*

a middle ground between the views that law is all rules (reason) or all power (politics).<sup>109</sup> In this way, rhetoric offers the possibility of “improving life within one’s community in temporary and incomplete, but nonetheless meaningful, ways” as well as more positive ways of re-envisioning the concept of agency and the status of science.<sup>110</sup>

For legal writing teachers, both our teaching and our reading have a natural relationship to the study and practice of rhetoric.<sup>111</sup> Moreover, because the academy prefers reading over writing and the interpretation of text over the composition of text, we can only benefit by marrying the two: “rhetoric [can be used] as a

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*Analysis* 39 (Palgrave Macmillan 1987) (“Despite the glaringly obvious fact that both legal theory and legal practice are, and have always been, heavily dependent upon the tools of rhetorical and linguistic analysis, no coherent or systematic account of the relationship of law to language has ever been achieved.”); Barbara J. Shapiro, *Classical Rhetoric and the English Law of Evidence*, in *Rhetoric & Law in Early Modern Europe* 54 (Victoria Kahn & Lorna Hutson eds., Yale U. Press 2001) (“Given the long-standing association between law and rhetoric, there has been surprisingly little real study of the impact of rhetoric on the Anglo-American legal tradition.”).

109. Anthony T. Kronman, *Rhetoric*, 67 U. Cin. L. Rev. 677, 691 (1999). A related argument has been made in the field of contemporary rhetorical theory: that rhetoric provides an alternative between modernism (in the sense of discovering eternal truths) and postmodernism (in the sense of uncovering certainties and revealing them as essentially changeable). John Louis Lucaites & Celeste Michelle Condit, *Epilogue: Contributions from Rhetorical Theory*, in *Contemporary Rhetorical Theory: A Reader* 609–610 (John Louis Lucaites et al. eds., Guilford Press 1999).

110. *Id.* at 610–613.

111. Professors who teach legal writing have long argued for rhetoric’s place in legal writing pedagogy. See e.g. Fajans & Falk, *supra* n. 27; Neil Feigenson, *Legal Writing Texts Today*, 41 J. Leg. Educ. 503 (1991); Phelps, *supra* n. 25; J. Christopher Rideout & Jill Ramsfield, *Legal Writing: A Revised View*, 69 Wash. L. Rev. 35 (1994).

Several legal writing textbooks explicitly apply classical and contemporary rhetoric to professional legal writing: Kirsten Konrad Robbins-Tiscione, *Rhetoric for Legal Writers: The Theory and Practice of Analysis and Persuasion* (West 2009); Michael R. Smith, *Advanced Legal Writing: Theories and Strategies in Persuasive Writing* (2d ed., Aspen Publishers 2008). In a series of articles, Michael Frost has extensively applied classical rhetorical analysis to legal interpretation and composition. See Michael H. Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage* (Ashgate 2005) (collection of articles published between 1990 and 2003).

Articles advocating more use of rhetorical teaching throughout the law school curriculum include Leslie Bender, *Hidden Messages in the Required First-Year Law School Curriculum*, 40 Clev. St. L. Rev. 287 (1992) (arguing that the traditional focus on appellate cases and authority underscores the hidden message that specific facts, contexts, and people are nearly irrelevant); Elizabeth C. Britt et al., *Extending the Boundaries of Rhetoric in Legal Writing Pedagogy*, 10 J. Bus. & Tech. Comm. 213, 213 (1996) (proposing a new conception of rhetoric’s role in the law school curriculum); Leigh Hunt Greenhaw, *To Say What the Law Is: Learning the Practice of Legal Rhetoric*, 29 Val. U. L. Rev. 861 (1995) (suggesting that legal writing is “not something distinct from what is taught in other law classes” but instead that both doctrinal and legal writing courses “can and do teach the practice of legal rhetoric”).

guide for composing and as a stance for interpreting.”<sup>112</sup> Finally, having been on the “outside”<sup>113</sup> of the legal academy and having been relegated for the most part to teaching the housekeeping details of rhetoric (arrangement and style), legal writing professors can find many uses for rhetoric’s most creative and thoughtful component, invention.<sup>114</sup>

Because of the decline of formalism and the advent of a particularly cynical form of realism, this seems an opportune time for us to participate more fully in building better understandings of “how things work” in the law. If formalism, the idea that judges simply apply the rules like umpires do, is in decline, this decline should also be a blow to traditional legal scholarship because such scholarship “focuse[s] on the careful, comprehensive, and precise analysis of relatively abstract doctrinal standards found in the legal forms of cases, statutes, administrative rulings, and legislative histories.”<sup>115</sup>

In contrast to the view that legal outcomes are determined solely by the rules (formalism) or only by politics and power (the current brand of realism), the rhetorical perspective affords a richer possibilities. That is, it envisions lawyers, teachers, and law students as being engaged in a process of making meaning by the back and forth of conversation and argument. Rhetoric opens the lens for legal writing scholars because it allows us to concentrate on the kinds of textual analysis lawyers already engage in, but to introduce as well the kinds of broader contextual analyses recommended by rhetoricians.

More than any other teacher in the law school setting, legal writing teachers explicitly teach legal rhetoric—the analysis, interpretation, criticism, and composition of legal arguments. We help students learn to read legal texts; we help them learn how to use legal authorities; and we help them learn how to articulate legal rules and construct legal arguments.

112. Mailloux, *supra* n. 3, at 40.

113. “Rhetoric is often about who’s in and who’s out, what’s included and what’s excluded, who is placed inside and who outside a cultural community, a political movement, a professional organization.” *Id.* at 124.

114. Invention in classical rhetoric is not creating something out of nothing, but seeing something in a new way. See J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, in *Law’s Stories: Narrative and Rhetoric in the Law* 211, 221–224 (Peter Brooks & Paul Gerwitz eds., Yale U. Press 1996).

115. Pierre Schlag, *The Problem of the Subject*, 79 *Tex. L. Rev.* 1627, 1743 (1991).

When we work with students who are struggling to state the rule that a case stands for, or what that rule means, we recognize what an intensely creative and intellectually difficult activity legal reading and writing can be. This is even more the case when students grasp the concept that opinions are not rulebooks but instead are pots full of rhetorical possibilities,<sup>116</sup> that language is not so much ambiguous as it is “resourceful.” When we work with students struggling to write persuasively, who want to know the “one right way” to achieve a particular purpose, we realize how complex and imaginatively demanding is the work of persuasion.

Moreover, legal writing raises troubling questions about the practice of legal rhetoric in concrete form—the lives of our students. What kinds of rhetoricians are we teaching our students to be, and what kinds of rhetorical communities are we asking them to join? This question shows up as the fear that in writing the torture memos, John Yoo was conducting himself the way he had been taught; as a really good law student, he was doing exactly what we taught him to do, manipulating language and meaning.<sup>117</sup> Or from a different perspective, it shows up in James Boyd White’s concern that in much of legal writing, no one is at home because of the kind of voicelessness we encourage students and lawyers to adopt.<sup>118</sup> As we teach students to master the forms of speech and writing that they need to know in the culture into which they are moving, are we guiding them toward becoming alienated from their own minds and experiences and teaching them to produce an imitation of expression?<sup>119</sup>

For law professors, rhetoric offers a way to bring together the objects of their study (the variety of legal “texts” that are the “objects of interpretive attention”<sup>120</sup>) with the subject matter of their teaching and the composition of their scholarship. For example, the professor who use a rhetorical approach to analyze a judicial opinion will be better able to teach students how to interpret and

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116. Wetlaufer, *supra* n. 101, at 1560.

117. See Peter Brooks, *What to Do About Yoo?* 55 *Chron. Higher Educ.* B4 (May 8, 2009).

118. See e.g. James Boyd White, *Legal Writing*, in *From Expectation to Experience: Essays on Law & Legal Education* 27 (U. Mich. Press 2000) (Legal writing “will often seem to be a training in forms of expression that are rigid, mechanical, or dead; to allow no room for the work of the individual mind or the expression of the individual imagination.”).

119. *Id.*

120. Mailloux, *supra* n. 3, at 40.

construct legal arguments because she has taken apart the structure of an argument and evaluated the effectiveness of an author's rhetorical choices. Similarly, the law professor may directly apply rhetorical theory to the classroom conversation, treating the semester's work as a series of rhetorical transactions between student and teacher, reader and writer, inherited texts and current arguments, individuals and social contexts.<sup>121</sup>

Beyond suggestions for the individual scholar, focusing on rhetorical theory and analysis can help build an intentional framework for meeting institutional goals. Rhetoric lends itself to the further evolution and building of our discipline. For example, rhetorical study is a device for transforming "practical wisdom into accredited techniques."<sup>122</sup> Such rhetorical scholarship would describe and evaluate interpretive practices, that is, ways to read, research, and teach about legal documents; it would help us derive theories for categorizing and studying texts; and it would allow us to describe, compare, and evaluate traditions.<sup>123</sup>

### C. What Would It Mean to Focus on Rhetoric?

This section provides initial suggestions for using the modes and methods of rhetoric in our teaching, scholarship, and professional outreach. For this purpose, we divide "rhetoric" into (1) the study of legal texts, (2) the process of composing legal documents, and (3) the use of rhetorical perspectives to spur invention and imagination.<sup>124</sup>

#### 1. *Rhetoric as the Study of Legal Texts.*

Rhetoric provides many alternative methods for interpretation, analysis, and criticism; in both our teaching and our scholarship, we can apply these to better understand all forms of legal argument. Among its other benefits, rhetoric suggests that to effectively read a legal document, we must read beyond the text

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121. See e.g. Linda L. Berger, *A Reflective, Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 *Leg. Writing* 57 (2000).

122. Mailloux, *supra* n. 3, at 5.

123. See also Stratman, *supra* n. 6, at 210. These might include the kinds of arguments most often used by members of the discipline, characteristic approaches and questions of the discipline, stock stories and myths, and canonical examples. For examples, see Smith, *supra* n. 40.

124. This categorization comes from Berger, *supra* n. 101.

itself, recognizing that we cannot find meaning in the language alone without reference to the context provided by history, culture, language uses, author, and audience.

Both classical and contemporary rhetoric offer methods for teaching students to engage in close or critical reading and for engaging in such reading ourselves. These methods range from reading to identify appeals based on classical rhetoric's modes of persuasion (logos, ethos, and pathos) or topics<sup>125</sup> to applying James Boyd White's questions for rhetorical analysis (context, art of the text, rhetorical community).<sup>126</sup> Similarly, understanding narrative structure<sup>127</sup> and argument framing (categories and metaphors)<sup>128</sup> aids students in their interpretations and assessments of the opinions they read as well as the briefs they write and respond to.

Such rhetorical approaches not only enrich our teaching—and they can be applied to “teaching” practicing lawyers as well—but also can result in valuable scholarship. For example, legal writing scholars have used these approaches to evaluate the effectiveness of briefs, opinions, and oral arguments<sup>129</sup> and to study par-

125. See Corbett & Connors, *supra* n. 3, at 1.

126. White, *supra* n. 7, at 701–702.

127. For helpful descriptions of narrative theory and structure, see Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* 110–142 (Harv. U. Press 2002) and articles cited in Stanchi, *supra* n. 46, at 77–79. For articles describing how narrative theory may be used to interpret legal arguments, see for example, Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 Tenn. L. Rev. \_\_\_\_ (forthcoming 2010).

128. For descriptions of category and metaphor theory, see Amsterdam & Bruner, *supra* n. 127, at 19–53, and articles cited in Stanchi, *supra* n. 46, at 79–81, 83–84. For articles applying category and metaphor theory to interpretation of legal arguments, see Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. Cal. Interdisc. L.J. 259 (2009); Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 Mercer L. Rev. 949 (2007) (analyzing the use of metaphor and metonymy in Supreme Court opinions); Linda L. Berger, *What Is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ALWD 169 (2004) (applying metaphor theory to analyze the briefs filed in the Supreme Court in a case raising First Amendment corporate speech issues); Laura E. Little, *Characterization and Legal Discourse*, 46 J. Leg. Educ. 372 (1996) (suggesting ways to use framing to improve legal arguments).

129. See e.g. Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y. L. Sch. L. Rev. 55 (1992) (applying a range of rhetorical analyses to closing arguments); Elizabeth Fajans & Mary R. Falk, *Shooting from the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. Haw. L. Rev. 1 (2000) (examining the ethics of “role-differentiated rhetoric”); Michael Frost, *Brief Rhetoric—A Note on Classical and Modern Theories of Forensic Discourse*, 38 U. Kan. L. Rev. 411 (1990) (applying classical rhetorical analysis to briefs filed with the United States

ticular author practices and audience responses.<sup>130</sup> Such scholarship, in turn, may apply directly to our teaching.<sup>131</sup>

## 2. *Rhetoric as the Process of Composing Legal Texts.*

Perhaps the most obvious application of rhetorical theory and analysis for legal writing teachers is its usefulness in teaching the process of composition. Contemporary rhetoric, specifically the New Rhetoric, is the source of much of our understanding about how to teach writing as a process for making meaning through the interaction of reader and writer, text and context.<sup>132</sup> As for specific applications, classical rhetoric provides frameworks for invention as well as guides that help law students and lawyers check their logical arguments for validity and effectiveness; classical rhetoric also is the foundation for all later advice about arrangement (organization) and style.<sup>133</sup> Other rhetorical methods well suited for the legal writing classroom include those associated with Joseph Williams, in which students are asked to read samples, extract vocabulary to describe the good and bad aspects

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Supreme Court).

130. See e.g. Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. App. Prac. & Process 417 (2002); Kenneth D. Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. ALWD \_\_\_ (forthcoming 2010); Bryan A. Garner, *Judges on Briefing: A National Survey*, 8 Scribes J. Leg. Writing 1 (2002); Susan Hanley Kosse & David ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. Leg. Educ. 80 (2003); Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 Leg. Writing 257 (2002); James F. Stratman, *Investigating Persuasive Processes in Legal Discourse in Real Time: Cognitive Biases and Rhetorical Strategy in Appeal Court Briefs*, 17 Discourse Processes 1 (1994).

131. See e.g. Kate O'Neill, *Rhetoric Counts: What We Should Teach When We Teach* Posner, 39 Seton Hall L. Rev. 507 (2009).

132. Berger, *supra* n. 4, at 155–156; Jo Ann Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. Pitt. L. Rev. 719 (1997); Ellie Margolis & Susan L. DeJarnatt, *Moving beyond Product to Process: Building a Better LRW Program*, 46 Santa Clara L. Rev. 93 (2003); Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 Leg. Writing 1 (2000); Nancy Soonpaa, *Using Composition Theory and Scholarship to Teach Legal Writing More Effectively*, 3 Leg. Writing 81 (1997).

133. See e.g. Corbett & Connors, *supra* n. 3, at 33–71 (logic), 84–130 (topics for invention), 256–292 (arrangement), 376–411 (style); Frost, *supra* n. 129, at 411–423 (arrangement), 423–431 (style); Robbins-Tiscione, *supra* n. 111, at chs. 5–7 (invention), ch. 8 (arrangement), ch. 9 (style); Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 Vt. L. Rev. 483 (2003); Smith, *supra* n. 111, at pt. II (logos strategies), pt. III (pathos strategies), pt. IV (ethos strategies), pt. V (rhetorical style).

of the models, and then apply the insights to diagnose and revise their own work.<sup>134</sup>

As for scholarship centering on the rhetorical processes of composition, legal writing scholars have used rhetorical theory to describe and evaluate the development of the field.<sup>135</sup> Similarly, composition and rhetoric theory has been the basis for articles written about law school applications of the use of reading journals;<sup>136</sup> writers' memos;<sup>137</sup> peer review;<sup>138</sup> feedback, drafting, and revision;<sup>139</sup> portfolios;<sup>140</sup> writing conferences;<sup>141</sup> and other forms of self-evaluation and reflection.<sup>142</sup> More recently, legal writing scholars are turning to rhetorical theories to provide advice to students and lawyers about how to construct arguments.<sup>143</sup>

134. See Joseph M. Williams, *Style: Lessons in Clarity and Grace* (9th ed., Longman 2007); Hillary Burgess, *Little Red Schoolhouse Goes to Law School: How Joe Williams' Teaching Style Can Inform Us About Teaching Law Students*, 17 *Persps.* 180 (Spring 2009).

135. See Berger, *supra* n. 4; Joel R. Cornwell, *Legal Writing as a Kind of Philosophy*, 48 *Mercer L. Rev.* 1091 (1997); Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 *Duq. L. Rev.* 489 (2002); Anne Ruggles Gere, *Narratives of Composition Studies*, 3 *Leg. Writing* 51 (1997); Leigh Hunt Greenhaw, "To Say What the Law Is": *Learning the Practice of Legal Rhetoric*, 29 *Val. U. L. Rev.* 861 (1995); Phelps, *supra* n. 25; Pollman, *supra* n. 54; Rideout & Ramsfield, *supra* n. 111; Lorne Sossin, *Discourse Politics: Legal Research and Writing's Search for a Pedagogy of Its Own*, 29 *New Eng. L. Rev.* 883 (1995); Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 *Dick. L. Rev.* 7 (1998).

136. Berger, *supra* n. 4, at 172–174; Fajans & Falk, *supra* n. 27, at 202–203.

137. Berger, *supra* n. 4, at 178 n. 139; Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 *Temp. L. Rev.* 885, 894–895 (1991).

138. Berger, *supra* n. 4, at 179–183; Bari R. Burke, *Legal Writing (Groups) at the University of Montana: Professional Voice Lessons in a Communal Context*, 52 *Mont. L. Rev.* 373, 397 (1991); Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 *Leg. Writing* 1 (2003); DeJarnatt, *supra* n. 135.

139. See e.g. *Leg. Writing Inst. Monograph Series*, *supra* n. 45.

140. See e.g. Steven J. Johansen, "What Were You Thinking?": *Using Annotated Portfolios to Improve Student Assessment*, 4 *Leg. Writing* 123 (1998).

141. See e.g. Robin Wellford, *The Law School Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 *S. Tex. L. Rev.* 255 (2004).

142. See Richard K. Neumann, Jr., *Donald Schon, the Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 *Clin. L. Rev.* 401 (2000).

143. For textbooks, see Robbins-Tiscione, *supra* n. 111; Smith, *supra* n. 111; see also Frost, *supra* n. 111. For a sampling of articles, see Stanchi, *supra* n. 46, at 77–87; Symposium, *Applied Storytelling*, 14 *Leg. Writing* 3 (2008); *Metaphor & Narrative*, 7 *J. ALWD* — (forthcoming 2010). See also Dan Hunter, *Reason Is Too Large: Analogy and Precedent in Law*, 50 *Emory L.J.* 1197 (2001); Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 *J. Leg. Educ.* 108 (1993) (applying classical rhetoric and the approach of Lloyd F. Bitzer, *The Rhetorical Situation*, 1 *Phil. & Rhetoric* 1 (1968) to legal argument); Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*,

### 3. *Rhetoric as Perspective or Lens.*

Finally, and perhaps most fundamentally, legal writing professors may use rhetoric as a perspective or lens to guide the process of imagination and invention. Rhetoric's ability to unearth embedded pathways and to unsettle preconceptions can be tapped in a number of ways. Thus, rhetoric can help writers see through new eyes,<sup>144</sup> make the familiar strange, look from the outside in and the inside out, and link abstractions to concrete images and stories.<sup>145</sup>

As already noted, classical rhetoric's general and special topics can serve as a heuristic for generating lines of argument.<sup>146</sup> Other special topics that lend themselves to re-seeing legal arguments may include those identified with literary criticism,<sup>147</sup> such as contrasting appearances with reality; finding a previously overlooked, but "ubiquitous" argument; discovering a paradigmatic structure in a literary text that provides form and framework; and arguing that previous interpreters have repeatedly overlooked some important characteristic. Contemporary rhetorical approaches that can be used to encourage invention include such

34 U.S.F. L. Rev. 197 (2000); Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. Leg. Educ. 566 (1994) (applying Toulmin's and Perelman's approaches to legal argument); Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 Willamette L. Rev. 255 (2009); Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 Mercer L. Rev. 919 (2007); Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 Mich. St. L. Rev. 411.

144. For example, to use metaphor to resolve problems, Donald Schön suggested that the problem solver must attend to new features and relationships of the situation, and then rename the pieces, regroup the parts, reorder the frameworks, and try to "see" one situation "as" other situations. Donald A. Schön, *Generative Metaphor: A Perspective on Problem-Setting in Social Policy*, in *Metaphor and Thought* 150–161 (Andrew Ortony ed., 2d ed., Cambridge U. Press 1993); see also John Dewey, *Human Nature and Conduct: An Introduction to Social Psychology* 196 (Henry Holt & Co. 1922) ("[T]he elaborate systems of science are born not of reason but of impulses at first sight and flickering; impulses to handle, move about, to hunt, to uncover, to mix things separated and divide things combined, to talk and to listen.").

145. The concept of making the familiar strange comes from Amsterdam & Bruner, *supra* n. 127, at 1 and throughout the book; the concept of looking from the outside in and the inside out comes from bell hooks, *Feminist Theory: From Margin to Center*, at preface (S. End Press 1984).

146. See Corbett & Connors, *supra* n. 3, at 84–130.

147. See Coulson, *supra* n. 12, at 173–174 (citing Jeanne Fahnestock & Marie Secor, *The Rhetoric of Literary Criticism*, in *Textual Dynamics of the Professions* 84 (Charles Bazerman & James Paradis eds., U. Wis. Press 1991)).

concepts as Kenneth Burke's pentad for examining narrative action<sup>148</sup> (narrative structure) or his suggestions for metaphor modeling (try to consider the many different ways in which a concept could be described);<sup>149</sup> bell hooks's "from the margins" perspective;<sup>150</sup> Chaim Perelman's "starting points";<sup>151</sup> and Stephen Toulmin's layout of practical argument and "good reasons" approach to ethics.<sup>152</sup>

As always, rhetoric as a perspective becomes both topic and tool. That is, we can write about the use of invention methods themselves, and we can write about what we discover when we use these methods. In other words, rhetoric again brings us new ways of looking at things that can bring about change in our academic and professional lives and communities.

#### IV. CONCLUSION

Rhetoric tells us that our reading and writing can be used to construct meaning, and it allows us to engage in research and scholarship that informs and enriches our understanding of how the law works as well as our teaching of current and future lawyers. Because of the topics we teach, "[t]he meaning-making view of writing [should] appeal to those [of us] who view reading and writing as ways to live, not just as ways to make a living."<sup>153</sup>

For legal writing professors, as well as for our students, "writing creates situations in which [we] learn to think."<sup>154</sup>

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148. Kenneth Burke, *A Grammar of Motives and A Rhetoric of Motives* xvii–xxiv (World Publ. Co. 1962) (describing dramatism, which treats language and thought as modes of action); Sonja K. Foss et al., *Contemporary Perspectives on Rhetoric* 191–204 (3d ed., Waveland Press 2002).

149. "If we are in doubt as to what an object is . . . we deliberately try to consider it in as many different terms as its nature permits: lifting, smelling, tasting, tapping, holding in different lights, subjecting to different pressures, dividing, matching, contrasting, etc." Burke, *supra* n. 148, at 504 (discussing metaphor, metonymy, synecdoche, and irony in connection "with their role in the discovery and description of 'the truth'").

150. hooks, *supra* n. 145.

151. Chaim Perelman & Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (John Wilkinson & Purcell Weaver trans., U. Notre Dame 1969).

152. See Foss et al., *supra* n. 148, at 117–153; see also Saunders, *supra* n. 143, at 568–572.

153. Berger, *supra* n. 4, at 159–160 n. 35.

154. Elaine P. Maimon et al., *Thinking, Reading, and Writing* 3 (Longman 1989).