

# THE NEW LEGAL WRITING SCHOLARSHIP

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In this symposium issue we have gathered various and differing accounts of law teachers struggling with the teaching of legal writing. Some of the articles are analytical, others exploratory, some focus on the structures within which legal writing pedagogy takes place, others deconstruct the practices that have become conventional in our teaching. The articles evidence self-reflection, analysis, risk-taking, and wisdom about legal writing, narrative, and learning theory.

Two themes emerge: the need for a stronger sense of narrative in legal writing (and throughout the law school curriculum) and learning through writing. The papers derive from and in some instances will be the basis for presentations delivered at the American Association of Law Schools (AALS) Annual Meeting in San Antonio in January of 1996 and the meeting to be held in Washington, D.C. in 1997.

In the presentations at the AALS meeting in San Antonio, the principal theme was "the place of narrative in legal writing and beyond." In the program brochure each presenter described and introduced their presentations. James R. Elkins observed: "One reason stories and narratives have been accorded so much attention is that they are liberatory. Legal Writing is in need of liberation, from itself, from our set ways of thinking about it, teaching it, and doing it. I have a sense that teachers of legal writing would welcome liberation and a new life. Legal writing needs a new story. If we can't imagine a story that returns our curiosity about the power of language to channel our passionate zeal and diligence on behalf of clients then legal writing will languish." In response to Elkins, Teresa Godwin Phelps asked: "Can we possibly do our jobs, do what is required of us — i.e., turn out competent legal writers — without becoming academic vampires, draining our students of the lifeblood of creativity and storytelling?"

Phelp's answer: "Legal writing teachers need not apologize for teaching disciplined writing, that they are in fact freeing their students to become the kind of writers Jim Elkins desires." Phelps went on to pose questions about "how we move from merely teaching forms and discipline (technical writing) to introducing the possibility of storytelling in our classes." Kim Lane Scheppelle spoke more broadly on: "the relationship of culture and context by specifically looking at the contexts in which people (judges, lawyers and litigants) find it necessary to tell stories and the settings in which there is resistance to legal storytelling as a mode of discourse."

The articles by Linda H. Edwards and Kate O'Neill will be the basis for presentations at the 1997 AALS conference. The theme of the AALS panel for 1997 is described in the section newsletter: "This interdisciplinary synthesis of composition and learning theory and jurisprudence will explore the ways in which certain writing techniques can enhance law students' ability to reason, report and communicate fully and effectively about the law." The articles by O'Neill and Edwards in this journal go beyond the theme of the 1997 conference. They are complemented by Neal R. Feigenson's article, illustrating his work with cognitive theory and its relevance to teaching persuasive legal writing.

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Linda Holdeman Edwards teaches property, legal analysis, ethics and an advanced writing course, and directs the legal writing and lawyering skills program at Mercer. She is currently Chair of the AALS section on Legal Writing and Research. Her new book *Legal Writing: Process, Analysis & Organization* is one of the best legal writing texts available today. As I have said elsewhere, the book "marks the shift in the pedagogy of legal writing away from a document design orientation towards a true process orientation and captures changes in the pedagogy of teaching writing across the curriculum in the context of teaching legal writing and analysis." It is a text written with wisdom and balanced judgment reflecting Edwards' years as an experienced practitioner (in the public and private sector) and as a teacher of legal writing.

Edwards' article, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, is a thoughtful yet accessible explanation and exploration of the narrative dimensions of legal writing, reasoning and practice, and maps out how our embedded narratives and narrative imaginations find their place in all facets of legal analysis, practice, and writing. Edwards takes seemingly diverse and esoteric strands of reasoning and weaves them into a cohesive fabric that ties together the power of narrative as an underlying force in legal writing and law work. She explains why we should be attuned to narrative and points the way to a new pedagogy that takes account of narrative.

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Kate O'Neill directs the Legal Writing program at University of Washington School of Law. She is a masterful teacher and director of legal writing programs. She was director of the Legal Writing

Program at New York University before the NYU program became the Lawyering Skills Program. She is a literary person and a successful author. In fact, when I talked to Kate O'Neill several years ago she was on a book tour on behalf of her non-fiction, appearing on national and regional talk shows on television.

O'Neill's contribution to the symposium, *Formalism and Syllogisms: A Pragmatic Critique of Writing in Law School*, provides a micro-focused, deeply informed critique of the pedagogy of legal writing in law schools. It is thoughtful, balanced, confidently written and knowing. Kate's critique is, as the title implies, not abstract or theoretical. She speaks from her experiences and dissects the misconceptions conveyed by a typical first-semester legal writing assignment; she explains why our pedagogy often does not work. Her critique begins to describe what is missing in legal writing instruction and what we need to do to teach legal writing and analysis effectively. O'Neill provides insights on how we might begin to revision the legal writing curriculum and pedagogy.

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Neal R. Feigenson has taught and directed legal writing and lawyering programs. He also teaches torts and jurisprudence. He has written articles on legal history and family law, religion and constitutional law, and the pedagogy of legal writing reflected in legal writing texts. Most recently, Feigenson has applied cognitive and social psychology to an analysis of closing arguments. He is currently engaged in empirical work on juror decision-making, as well as a study of sympathy in legal judgment.

Feigenson's contribution to this symposium, *On Social Cognition and Persuasive Writing*, is adapted from his article on the cognitive psychology of closing arguments. He informs legal writing teachers of relevant psychological research, and identifies three effects that help explain how audiences respond to characteristic legal arguments. His synthesis of interdisciplinary developments furthers our understanding of how lawyers work and what we might do to teach our students better about the practice of law.

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Kim Lane Scheppele is a professor of law and sociology at University of Pennsylvania and was, at the time of her presentation at the AALS in 1996, the Arthur M. Thurnau Professor of Political Science, Public Policy and Law at the University of Michigan. Her book, *Legal Secrets: Equality and Efficiency in the Common Law*,

received special recognition and was awarded the Distinguished Scholarship Award for books published in the field of sociology. She has written numerous articles, many on law and narrative and law and storytelling. Her interdisciplinary scholarship has become part of the law and narrative "canon."

Scheppele recently spent two years as a consultant to the Government of Hungary, working in courts in a judicial system that does not listen to stories: where there are no "facts" in legal briefs or opinions and where decision making takes place exclusively in a "logical abstract space." "No characters. No details. No facts," Scheppele observes. In *Narrative Resistance and the Struggle for Stories*, her contribution to this symposium, her experiences provide a unique perspective on legal writing and scholarship in a law culture "addicted to facts."

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James R. Elkins has been called "the legal scholar who . . . best exemplifies the authentically heretical humanist . . . in the pursuit of a narrative jurisprudence." He is a scholar who often has his intellectual antennae extended for what is new and alive in legal scholarship. For example, Elkins was writing about narrative jurisprudence in 1985 in the *Legal Studies Forum* long before it became a school of jurisprudence. A prominent historian of the law and narrative movement, David Papke (former editor of this journal), has observed that Jim Elkins was "the first author whom I noted calling on scholars to turn to narrative." Now Jim's antennae seem to be turning him in a different direction, towards legal writing, analysis, and method.

In *What Kind of Story is Legal Writing?*, Jim presents a critical perspective on the teaching of legal writing. Underlying Elkins' observations there is a psychological presumption: the legal writing story is a sad story, filled with repression and pain. In blue lit and musty places, legal writing teachers do their devalued work, imposing order, discipline, linearity and structure, and struggle with (and against) creativity, imagination, and narrative.

Elkins' provides descriptions of legal writing that many legal writing teachers may recognize, but few will enjoy. He portrays a world we legal writing teachers know but seldom talk of in mixed company. Along the way Elkins deconstructs the texts we use to teach students legal writing. Ultimately, Elkins' prognosis may be a

bleak one, and perhaps, made too easily by an outsider. According to Jim, we need to find a new legal writing story.

Elkins' presentation generated controversy in the legal writing community. Specifically, legal writing professionals express concerns about easy criticisms of an "outsider." Legal writing teachers know that doctrinal teaching can be subjected readily to similar criticisms. Also, politically, criticisms of a doctrinal teacher represents those who confine us to our place in an institutional pecking order and then criticizes us for carrying out our marching orders. To many in legal writing, Elkins' criticisms seem undeserved.

A further word about Jim Elkins: I've gotten to know Jim well in recent years. He is a good friend, an eclectic scholar and a world traveler. In my introduction to his presentation at the AALS conference, I related to the audience how Jim reminded me of Andre in Louis Malle's movie, "My Dinner With Andre." As he, in turn, observed self-reflectively in an introduction to a symposium on "The Pedagogy of Narrative" published some years ago in the *Journal of Legal Education*, his story is that of a boy raised on a small farm in western Kentucky's rolling countryside, constantly longing to be away from the farm and into the world beyond. Consequently, Jim is always traveling: buying kilims (rugs) in Turkey, collecting weaving and folk art in Southeast Asia, journeying upstream to stay with native Iban tribesman in Sarawak long houses up unexplored rivers. Likewise, he is always traveling esoterically in the law, searching for something new: first in interviewing and counseling, then law and psychiatry, later ethics, and now law and narrative, and a most recent move into environmental justice. But, for Jim, these are all stops on the journey. From his travels and in his writings he tells the stories of what he has seen and learned, and proudly displays the artifacts he has collected along the way.

I say all of this, because, I think, there *was* an outsider's sting to some of his observations. But, I think, the sting came because there is much worth listening to here. It is the clarity perceived by an outsider on a journey, stopping briefly, making some observations about the local culture and then moving on.

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Teresa Godwin Phelps is a Professor of Law and directs the legal writing program at Notre Dame. She has taught in and supervised a legal writing program for many years, and has produced teaching materials for legal writing instruction. She was one of the first to recognize legal writing as a field for scholarly exploration and has

authored seminal articles about the place of legal writing in the law school curriculum, and legal writing pedagogy (what we do, what we don't do, and what we should be doing). But Terry Phelps is more than a legal writing teacher, and it is this perspective that informs her teaching and scholarship. She is one of the first prominent interdisciplinary scholars to emerge from the ranks of legal writing teachers. Phelps began as an English Professor, currently teaches law and literature, and has written elegantly about law and narrative. She is most eloquent when discussing "outsider" stories in literature from Sophocles' *Antigone* to John Irving's *Cider House Rules*, and when telling us what literature and literary criticism have to say about the law and legal writing.

Phelps has several other careers, she is something of a popular culture celebrity herself, and is a well-regarded guest speaker on nationally syndicated programs including National Public Radio. Her well-reviewed, and successful biography, *The Coach's Wife*, documents her other life that gives so much richness to her voice and her work in legal writing.

Phelps' essay, *Tradition, Discipline, and Creativity: Developing "Strong Poets" in Legal Writing*, responds to some of Elkins' observations. She suggests that Elkins' perception of disciplined technical writing and narrative is partially inaccurate. She also suggests that disciplined competence and creativity in legal writing can coexist. Nevertheless, legal writing is in need of a new story that does away with false dualities. While Phelps does not fully articulate this new story, she begins to put in place some building blocks, using literary sources from Eliot to Bloom to composition theory as hints about what the story will require. Phelps calls for the reimagination and reinvention of a broader discipline of legal writing, where we "do not bind our students to form" but, instead, "introduce them to the discipline of legal writing free them to find and use their own legal voices. . . their storytelling voices."

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I hope this introduction piques your interest in this New Scholarship of Legal Writing, narrative jurisprudence, legal storytelling, and other contemporary developments that are dramatically changing the way we think about law and legal education. I am excited by the breakthrough work in this symposium issue, and I hope you will find it of use.