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## Legal Writing's Harmful Psyche

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## Essay

# Legal Writing's Harmful Psyche

Kevin Bennardo<sup>†</sup>

### INTRODUCTION

As a discipline, legal writing faculty put a lot of energy, effort, and attention into describing what others should do to support our discipline. This essay recommends that some of that energy, effort, and attention should be redirected inwardly to build the discipline from within through critical engagement with legal writing scholarship.

In particular, this essay discusses the narrative that many in the legal writing discipline choose to tell about the discipline, and how that self-perception is harmful to the discipline's advancement. In this narrative, legal writing is portrayed as the victim of unfair treatment within the legal academy. You need not search very hard to find a legal writing professor who feels dissatisfied with lesser pay, lack of institutional support, greater teaching and service loads, and lack of opportunities to pursue tenure or to teach a diversity of classes. This litany of grievances is so often repeated that it has become ingrained into the fabric of the discipline.

At base, these dissatisfactions stem from the view that legal writing professors are undervalued and unfairly treated relative to their peer professors in other legal disciplines. Those peer professors—the so-called “casebook professors”—are afforded greater pay, access to tenure, and institutional support. In other words, there is a strong sense of unequal treatment—discrimination even—based on subject-matter expertise. Professors with expertise in certain areas are treated differently than professors with expertise in certain other areas. According to many legal writing professors, that is not fair.

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This essay proceeds in four parts. It first supports the descriptive claim that many in the legal writing discipline perceive themselves as victims of unfair treatment within legal academia. Second, it explores the consequences of that self-perception, including the norm of protectionism that has developed within the discipline. The narrative that legal writing professors are mistreated by those outside the discipline has resulted in an internal culture in which many members of the discipline support their own no matter what.

Third, the essay explores how such protectionism is harmful to the development of the legal writing discipline. An academic discipline thrives on critical evaluation and internal debate, not on unflinching support for its members' ideas. By crafting itself into an academic safe space, the legal writing discipline has undermined its own development by shifting too far toward the pole of constant support.

Finally, the essay concludes by offering a positive prescription to remedy the issue. Reformed self-perception within the legal writing discipline is vital for the discipline to prosper. Those within the legal writing community who seek a healthy and robust discipline—which could in turn lead to the type of advancement they feel they have been unfairly denied—would be better served by deploying some of their energies toward internal reform rather than using it on external complaints. This essay is a call for more balance between internal criticism and support within the discipline.

### I. THE PERCEPTION OF UNFAIRNESS

Many legal writing professors perceive themselves as victims of unfair treatment. Collectively, status is an important concern to legal writing professors. As a group, legal writing professors devote a lot of energy to status issues and frequently discuss status as a topic. They do that because they feel that they have been unfairly accorded a lesser status than they deserve within the legal academy.<sup>1</sup>

A cursory foray into any outlet through which legal writing professors communicate will demonstrate that status issues are at the

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1. This essay does not engage with the substance of that perspective. It will not make the case that legal writing professors are the victims of unfair treatment. For the purposes of this essay, it does not matter whether that claim is factually true or not. The important point for this essay—and one that I think is beyond dispute—is that legal writing professors as a group believe it to be true. Thus, there is no need here to wade into the substance of the marginalized status claim. That is why the essay repeatedly uses language like the “perception” of lesser status or the “feeling” of unfair treatment. That language is not meant to suggest that such perceptions or feelings are unfounded, but rather to acknowledge that it is unimportant to this essay's thesis whether they are unfounded or not.

fore. Take, for example, Susan Ayres's poem "Pink Ghetto" published in the *Yale Journal of Law & Feminism*.<sup>2</sup> The poem begins:

I teach legal writing.  
That says it all  
for about 80% of the faculty  
nothing more to ask.<sup>3</sup>

These are not the words of someone who feels professionally appreciated by her colleagues. A more recent article written by a legal writing professor made the claim that "law professors of legal writing are forced to serve as handmaidens of hierarchy" and to "writ[e] at the master's table [in] chairs with missing legs, no legs, or . . . are forced to stand in inequity and job instability."<sup>4</sup> Again, these are not the words of someone who feels appropriately valued in the legal academy.

In her forthcoming essay, *Legal Writing as Office Housework?*, Mary Bowman applies the idea of "office housework" to the law school setting.<sup>5</sup> Office housework is defined as "tasks that are not valuable for career advancement, even when they are necessary for an organization's success."<sup>6</sup> Bowman argues that legal writing faculty disproportionately bear the burden of three types of office housework in the law school setting: (1) important but undervalued assignments, (2) emotional labor, and (3) work that sounds impressive but is undervalued

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2. Susan Ayres, *Pink Ghetto*, 11 *YALE J. L. & FEMINISM* 1 (1999). The label of the "pink ghetto" refers to the greater proportion of women among legal writing professors than among law professors generally and attributes the lesser status of legal writing professors to gender-based discrimination. See, e.g., Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 *J. LEGAL EDUC.* 562, 563-65 (2000) (describing how, when law faculties attempted to achieve greater gender balance, women were steered into lower-status positions in legal writing or clinical education); see also Tiffany Jeffers, *The Choice to Stay in the "Pink Ghetto"*, 23 *LEGAL WRITING* 41, 41 (2019) (describing a scholarly session entitled "Pink Collar Pedagogy" at a national legal writing conference). The term "pink ghetto" is linked to legal writing in scores of articles in legal academic journals. A search of the "Law Reviews & Journals" database on Westlaw returned 133 results containing the exact words "pink ghetto." Of those results, 90 also contained the exact words "legal writing." And, of those results, 72 contained the exact words "pink ghetto" and "legal writing" in the same sentence.

3. Ayres, *supra* note 2, at 1.

4. Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy*, 21 *SCHOLAR* 255, 257, 290 (2019).

5. Mary Nicol Bowman, *Legal Writing as Office Housework?*, 68 *J. LEGAL EDUC.* (forthcoming 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3491965](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3491965). The page citations that appear below are to the draft version of the essay.

6. *Id.* at 1.

for salary or promotion purposes.<sup>7</sup> Bowman's essay then recommends strategies that law schools can take to alleviate the "inequities" that such housework imposes on legal writing faculty.<sup>8</sup> Bowman's essay does not recommend anything that legal writing faculty can do to improve their own situation or attribute any responsibility to legal writing faculty; rather, Bowman's narrative describes inequities that are all unfairly imposed upon legal writing professors by external forces.<sup>9</sup>

At a national level, the legal writing discipline is well organized relative to other legal disciplines. There are three major national organizations: the Association of Legal Writing Directors (ALWD), the Legal Writing Institute (LWI) and the Legal Writing, Reasoning and Research section of the Association of American Law Schools (AALS-LWRR). Advancing the status of legal writing professors is a major component of the work of ALWD<sup>10</sup> and LWI,<sup>11</sup> and these organizations have coordinated their status-related advocacy efforts on behalf of legal writing professors.<sup>12</sup>

Along with The Society of American Law Teachers, ALWD and LWI have adopted the following policy statement relating to the citizenship rights of law faculty:

No justification exists for subordinating one group of law faculty to another based on the nature of the course, the subject matter, or the teaching method. All full-time law faculty should have the opportunity to achieve full citizenship at their institutions, including academic freedom, security of position, and governance rights. Those rights are necessary to ensure that law students and the legal profession benefit from the myriad perspectives and expertise that all faculty bring to the mission of legal education.<sup>13</sup>

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7. *Id.* at 1, 4–7.

8. *Id.* at 7–12.

9. *See generally id.*

10. *About ALWD*, ALWD, <https://www.alwd.org/about> [<https://perma.cc/F4R4-AXMX>] (last visited Dec. 9, 2019) (listing "advocacy" and specifically "Status-Related Advocacy Work" as one of the four ways the organization serves its members).

11. *About LWI*, LWI, <https://www.lwionline.org/index.php/about> [<https://perma.cc/K5LB-SVR7>] (last visited Dec. 9, 2019) ("In addition to building the discipline of legal writing, LWI is also committed to improving the status of legal writing faculty across the country.").

12. According to a joint document, "ALWD has an external focus, with an emphasis on accreditation issues before the ABA and Council on Legal Education" while "LWI has a more internal, member-facing focus, with an emphasis on helping LWI members advocate to their schools for status improvements." *Summary of ALWD and LWI's Status-Related Advocacy Work*, ALWD, <https://www.alwd.org/images/resources/Summary-ALWD-LWI-Models.pdf> [<https://perma.cc/Q2D5-4XLT>] (last visited Oct. 29, 2020).

13. This policy statement is part of the "Full Citizenship Campaign for All Law Faculty" championed by LWI's standing Professional Status Committee. *See The Professional Status Committee and Status-Related Advocacy*, LWI, <https://www.lwionline>

Information regarding the structure of legal writing curricula and status of legal writing professors is collected annually through a survey that is jointly conducted by ALWD and LWI.<sup>14</sup> This survey and the annual report that it yields is a major undertaking—the most recent of which was 233 pages.<sup>15</sup> The survey gathers data on issues like pay, voting rights, contract terms, teaching loads, research grants, and teaching assistants.<sup>16</sup> This information is meant to help legal writing professors advocate for improved working conditions at their home institutions.<sup>17</sup> Similarly, LWI's Professional Status Committee has created a series of "toolkits" to assist legal writing professors in their negotiations regarding issues like salary and security of position.<sup>18</sup>

Conferences and conference presentations play a large role in the communication of ideas within the legal writing discipline. ALWD and LWI each host national biennial conferences on alternating years.<sup>19</sup> These biennial conferences are supplemented throughout the year by an array of regional and topical conferences.<sup>20</sup> In addition, every December, LWI arranges for ten to twelve one-day workshops to be hosted by law schools throughout the country.<sup>21</sup>

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.org/resources/status-related-advocacy [https://perma.cc/44KY-9HN9] (last visited Feb. 19, 2020). The committee's website seeks endorsements of the policy statement. In addition, the committee regularly presents its work on status-related issues at LWI's biennial conference, *id.*, "serve[s] as a resource for members facing specific employment or professional development issues," and "promote[s] efforts to achieve equality of status." *Committees*, LWI, <https://www.lwionline.org/resources/committees> [https://perma.cc/7B6Q-72UQ] (last visited Dec. 9, 2019).

14. *Survey*, ALWD, <https://www.alwd.org/resources/survey> [https://perma.cc/77JB-FWMF] (last visited Dec. 9, 2019).

15. *ALWD/LWI Annual Legal Writing Survey, Report of the 2017-18 Institutional Survey*, ALWD & LWI, <https://www.alwd.org/images/resources/ALWD-LWI-2017-18-Institutional-Survey-Report.pdf> [https://perma.cc/N78C-M5ZY] (last visited Oct. 30, 2020).

16. *Id.*

17. *Id.* at iii ("This information allows us to better understand the evolution of our field and to support arguments in favor of strengthening the legal writing curriculum and improving the citizenship rights of legal writing faculty.").

18. *See The Professional Status Committee and Status-Related Advocacy*, LWI, <https://www.lwionline.org/resources/status-related-advocacy> [https://perma.cc/W5SE-6ZFZ] (last visited Feb. 19, 2020).

19. *Conferences of All Types*, LWI, <https://www.lwionline.org/conferences> [https://perma.cc/3KPG-GNKJ] (last visited Dec. 9, 2019); *About the Biennial Conference*, ALWD, <https://www.alwd.org/about-conference> [https://perma.cc/LZZ3-VXA7] (last visited Oct. 30, 2020).

20. *See, e.g., Conferences of All Types*, LWI, <https://www.lwionline.org/conferences> [https://perma.cc/3KPG-GNKJ] (last visited Dec. 9, 2019).

21. *Id.*

At these legal writing conferences, issues relating to status are routinely raised as either the main topic of a presentation or as a lens through which to view another issue. One recent example was the presentation “Leading in the Face of Hierarchy,” which discussed “how economic market logic works to silence the leadership voices of legal skills professors.”<sup>22</sup> There are speed mentoring sessions in which new professors are mentored on topics like “Status Issues and Law School Politics.”<sup>23</sup>

Indeed, one of the most recent LWI-sponsored, one-day workshops was organized around the theme “Dismantling the Separate but Equal Paradigm: Integrating Legal Research and Writing into the Law School Curriculum.”<sup>24</sup> The workshop description posed provocative questions like “[i]s the lack of curricular integration of legal research and writing a symptom of the hierarchical structure of the legal academy, often placing LRW faculty and law librarians at the bottom of the totem pole?” and “[h]ave you struggled to overcome hierarchical structures that negatively impact you as a legal writing professor or law librarian?”<sup>25</sup>

In a recent newsletter from the AALS Section on Legal Writing, Reasoning, and Research, the opening message from the section chair mentioned how the section has progressed from “feel[ing] like the redheaded stepchild of the academy” to enjoying a fuller seat at the table.<sup>26</sup> Nonetheless, the chair noted that “our discipline still struggles to bridge the divide between ourselves and those remaining academic peers who still think of us as local law firm dropouts who teach for two years and move on.”<sup>27</sup> Within the newsletter, there is a series of micro-essays in which legal writing professors wrote letters to their younger selves.<sup>28</sup> One such letter states that “[y]ou perceive (often

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22. 2019 ALWD Biennial Conference Program, ALWD, [https://www.alwd.org/images/conferences/2019\\_Conference/ALWD\\_2019\\_Biennial\\_Conference\\_Program.pdf](https://www.alwd.org/images/conferences/2019_Conference/ALWD_2019_Biennial_Conference_Program.pdf) [<https://perma.cc/X4GL-GCUD>], 32–33 (last visited Nov. 9, 2020).

23. 2018 Biennial Conference Tentative Schedule, LWI, <https://www.lwionline.org/sites/default/files/LWI%202018%20Biennial%20Conference%20Tentative%20Schedule%20as%20of%207-4.pdf> [<https://perma.cc/F4P6-7KCN>], 23 (last visited Oct. 30, 2020).

24. *One-Day Workshops*, LWI, <https://www.lwionline.org/one-day-workshops> [<https://perma.cc/V7DA-T4TD>] (last visited Dec. 9, 2019).

25. *Id.*

26. Suzanna K. Moran, *From the Chair*, ASS’N AM. L. SCH., SECTION ON LEGAL WRITING, REASONING, AND RESEARCH NEWSLETTER, Summer 2018, at 1, 1–2.

27. *Id.* at 2.

28. See *LWRR Micro-Essays: A Letter to My Younger (Teaching) Self*, SECTION ON LEGAL WRITING, REASONING, AND RESEARCH NEWSLETTER, Summer 2018, at 10, 10–12, 14–18.

justifiably) your tenured colleagues and the administration as enemies, and it shows,” but that “[y]our efforts at calling things as you saw them opened the eyes of many and made you revered from the perspective of the oppressed.”<sup>29</sup> With regard to the “established hierarchy of Academia,” it advises “not [to] hold back in your truth-telling when you depict the caste system as it is.”<sup>30</sup>

I could go on with anecdotes, but I will stop there. Many legal writing professors do not feel included. They describe their lot using charged words like *ghetto*, *caste system*, *oppressed*, *subordinated*, *handmaidens*, and references to separate-but-equal treatment. They feel like outsiders and victims. They feel put down. These feelings have consequences.

## II. PROTECTIONISM AS A CONSEQUENCE OF A SELF-PERCEPTION OF VICTIMHOOD

It is important to separate being victimized from perceiving oneself as a victim. While the latter usually results from the former, the latter carries its own set of consequences. As Martha Minow observed, “[s]eeing oneself as a victim can [] relieve a burdensome sense of responsibility or self-blame” and “support[s] a sense of solidarity with others who have suffered in similar ways.”<sup>31</sup> Social psychologists have long observed that shared negative experiences can increase cohesiveness within a group.<sup>32</sup> A natural response to group victimization is to bond together and to protect your own.<sup>33</sup> While that response is

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29. Karin Mika, *The Consequences of Truth-telling*, ASS’N AM. L. SCH., SECTION ON LEGAL WRITING, REASONING, AND RESEARCH NEWSLETTER, Summer 2018, at 11, 11–12.

30. *Id.*

31. Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1413 (1993).

32. See, e.g., J.C. Turner, M.A. Hogg, P.J. Turner & P.M. Smith, *Failure and Defeat as Determinants of Group Cohesiveness*, 23 BRITISH J. SOC. PSYCH. 97, 97 (1984) (surveying past studies that demonstrated “that negative outcomes can sometimes produce as much or more cohesiveness than positive ones” and noting that “[t]here is also much historical evidence that national, ethnic, or military groups often emerge from defeat or deprivation with heightened solidarity.”); Nyla R. Branscombe, Daniel L. Wann, Jeffrey G. Noel & Jason Coleman, *In-Group or Out-Group Extremity: Importance of the Threatened Social Identity*, 19 PERSONALITY & SOC. PSYCH. BULL. 381, 386 (1993) (“Among persons who care a great deal about the group membership at stake, a disloyal in-group member represents a threat to that identity and must be rejected to protect or bolster the value of that social identity.”).

33. See, e.g., CHARLES STANGOR, PRINCIPLES OF SOCIAL PSYCHOLOGY 535 (2011) (“We are particularly likely to show ingroup favoritism when we are threatened or otherwise worried about our self-concept. . . . Furthermore, when individuals feel that the value of their ingroup is being threatened, they respond as if they are trying to regain their own self-worth—by expressing more positive attitudes toward ingroups and more negative attitudes toward outgroups.”); Russell Spears, Bertjan Doosje & Naomi

understandable and may even be beneficial in some contexts, it is unfortunate and harmful in the context of an academic discipline.

Consistent with the social psychology research, one effect of legal writing professors' self-perception as victims of collective mistreatment is that the group has formed a powerful sense of solidarity. There is perhaps no other legal academic discipline with members who are as bonded together as a group. Legal writing professors routinely refer to the discipline as a "family" with neither irony nor sarcasm.

One example that evidences this solidarity was on display in a recent AALS-LWRR newsletter, which celebrated the theme of the legal writing discipline as "family."<sup>34</sup> The section chair's message emphasized the family-like nature of the legal writing community and opined that "[t]he true meaning of family focuses on love and support."<sup>35</sup> The newsletter also contained fourteen separate essays by legal writing professors on the topic of how the legal writing discipline is like a family.<sup>36</sup>

One such essay, titled "Family Atmosphere—A Supportive Space for Creative Endeavors," was by Charles Calleros, the 2019 AALS Section Award Winner.<sup>37</sup> In the essay, Calleros recounted that, twenty years ago, he had an idea for a conference presentation that was so "unusual" and "bizarre" that he hesitated to even suggest it.<sup>38</sup> He

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Ellemers, *Self-Stereotyping in the Face of Threats to Group Status and Distinctiveness: The Role of Group Identification*, 23 PERSONALITY & SOC. PSYCH. BULL. 538, 539 (1997) ("[S]ocial identity theory predicts intergroup discrimination to occur only when the identity of a social group is threatened. For example, it has been argued that members of low-status groups in particular are motivated to elevate their social identities and are consequently more likely to display in-group bias.").

For example, in her work on protectionism within the African-American community, Katheryn Russell-Brown defines the phenomenon of what she calls Black protectionism, explains how it works, and considers how it could be reformulated to better advance the interests of the African-American community. See KATHERYN RUSSELL-BROWN, PROTECTING OUR OWN: RACE, CRIME, AND AFRICAN AMERICANS xix (2006). While Russell-Brown opines that Black protectionism is unique in the way that it is practiced, she notes that protectionism and "walls of silence" are observable in many groups, including racial, ethnic, and professional groups. Katheryn Russell-Brown, *Black Protectionism as a Civil Rights Strategy*, 53 BUFFALO L. REV. 1, 7 n.29 (2005).

34. Wendy-Adele Humphrey, *From the Chair*, ASS'N AM. L. SCH., SECTION ON LEGAL WRITING, REASONING, AND RESEARCH NEWSLETTER, Summer 2019, at 1.

35. *Id.* at 1–2.

36. *Id.*

37. Charles Calleros, *Family Atmosphere—A Supportive Space for Creative Endeavors*, ASS'N AM. L. SCH., SECTION ON LEGAL WRITING, REASONING, AND RESEARCH NEWSLETTER, Summer 2019, at 15–16.

38. *Id.*

imagined that, in some other academic disciplines, the presentation would fall flat, and he would be confronted with a sea of perplexed and disappointed faces in the audience.<sup>39</sup> However, Calleros overcame his concerns and went ahead with the presentation:

But a moment's reflection allayed my concerns and helped me summon the courage to take the risk. I knew that participants at this [legal writing] conference would come with creative, lively, open minds. After all, an academic community so steeped in thoughtful pedagogy would be open to a metaphoric exploration of pedagogy and would be drawn to an unusual method of presentation—or at least would be forgiving. It was and is a community not just in the technical sense of faculty members who share an academic discipline, but in the sense of an extended, diverse, supportive *family*.<sup>40</sup>

He concluded about his potentially bizarre presentation that “[i]f there’s anyplace I can do it, it would be at this session—and I was right about that.”<sup>41</sup>

And, indeed, he was right about that. His presentation—which involved exploring the merits of experiential learning through flamenco dancing<sup>42</sup>—is regarded by many as iconic in the legal writing discipline.<sup>43</sup> Calleros has since given the presentation numerous times and even recreated the experience twenty years later for the participants of the most recent Rocky Mountain Legal Writing Conference.<sup>44</sup> If there was a hall of fame for legal writing presentations, Calleros’s presentation would get in on the first ballot. Thus, I want to be clear that I am not questioning the substance or the success of the presentation itself. I simply want to highlight the stated decisional process that led Calleros to give the presentation. He understood that the risk of giving a potentially bizarre presentation was minimal because the legal writing community is a “forgiving” environment that shies away from public criticism of its own members.

To further this point, consider a speaker’s comments during a recent presentation at a national legal writing conference. A legal writing professor was reporting the results of an empirical study. As part of the presentation’s background information, the presenter

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39. *Id.*

40. *Id.*

41. 2019 AALS LWR Section Award Winner: Charles Calleros, ASS’N AM. L. SCH., SECTION ON LEGAL WRITING, REASONING, AND RESEARCH NEWSLETTER, Summer 2019, at 4, 4.

42. See Charles R. Calleros, *Reading, Writing, and Rhythm: A Whimsical, Musical Way of Thinking About Teaching Legal Method and Writing*, 5 LEGAL WRITING 2 (1999).

43. See, e.g., *Charles Calleros to Receive 2019 AALS Section Award*, LEGAL WRITING PROF BLOG (Oct. 12, 2018), <https://lawprofessors.typepad.com/legalwriting/2018/10/charles-calleros.html> [<https://perma.cc/Z6D6-YBX7>].

44. The 2019 version of the presentation may be viewed at <https://www.youtube.com/watch?v=WC2N2TidXTM>.

identified certain writing advice that he had come across that contradicted commonly accepted legal writing doctrine. The audience collectively groaned at the idea that such wrongheaded advice was still being circulated. One audience member raised her hand and asked who it was that was giving such awful advice.<sup>45</sup> The presenter declined to identify the offenders, although he did note that it was others within the legal writing community. His stated reason was that such direct criticism of other legal writing professors would run counter to the extremely collegial nature and supportive culture within the discipline.<sup>46</sup> Such withholding of criticism is the norm of protectionism at work.

### III. STUNTED DISCIPLINARY GROWTH AS A CONSEQUENCE OF PROTECTIONISM

As noted above, perceiving oneself as an unfairly treated victim reduces or removes a sense of personal accountability. If someone is a victim, we are trained not to blame them.<sup>47</sup> If legal writing professors view themselves as victims and victims are not to be blamed, it follows that legal writing professors tend to avoid blaming themselves or each other for their collective lot. If the discipline believes it is being held down by external forces, a natural response is for the discipline to avoid self-inflicting further wounds. Public criticism within the legal writing community is therefore discouraged to avoid the risk of providing fodder that would validate the community's lesser status

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45. The audience member hypothesized that it was likely a casebook professor—truly the all-purpose bogeyman.

46. I am purposefully not identifying the presenter here, a decision that may seem to contradict my thesis. If accountability is the key to progress, should not the presenter be held accountable? Not in this case. The presenter should not be held personally accountable for a discipline-wide problem. He was acting out the values of his discipline. The purpose of the anecdote is to simply illustrate the powerful norm of silencing criticism within the legal writing community, not to isolate and criticize the actions of any single member of that community. It is a community problem, and it would therefore be unfair to hold any individual accountable for acting entirely consistently with the community's norm. The problem is the existence of the norm itself, not any particular manifestation of it.

47. See, e.g., Kayleigh Roberts, *The Psychology of Victim-Blaming*, THE ATLANTIC (Oct. 5, 2016), <https://www.theatlantic.com/science/archive/2016/10/the-psychology-of-victim-blaming/502661/> [<https://perma.cc/K4QZ-RMVX>] (explaining that victim-blaming is a normal psychological response, but also one that can be retrained); *How to Avoid Victim Blaming*, HARV. L. SCH. HALT, <https://orgs.law.harvard.edu/halt/how-to-avoid-victim-blaming/> [<https://perma.cc/4KP6-7N88>] (last visited Dec. 9, 2019).

within legal academia.<sup>48</sup> Thus, many group members have internalized the norm that they are not to publicly criticize the work of other members of the group.

That is what needs improvement. An academic discipline should *not* be a family in the mythical “family-before-duty” sense of the word.<sup>49</sup> An overly forgiving nature may be a positive attribute in some settings, but not in the context of scholarly discourse. Members of an academic discipline have a duty to identify the ideas that work and the ones that do not. A discipline whose members fail to carry out that duty will be stunted. Criticism is vital to improvement. We rightly teach our students to embrace their failures as productive learning opportunities.<sup>50</sup> We should take some of our own advice. Not every idea is a good one. Not every article by a legal writing professor is a home run. Acknowledging failures is how we can improve.

Moreover, criticism is, in its own way, a compliment. It takes time, effort, and energy to meaningfully critique another’s work. Critique is therefore often a show of respect because most people will only voluntarily expend the effort to critique something if they find it worthy of their time and attention in the first place.<sup>51</sup>

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48. I do not mean to suggest that this is the sole reason for the lack of internal criticism with the legal writing discipline. Another contributing factor may be the prevalence of term contracts among legal writing professors. The hesitation to criticize the work of legal writing professors may reflect discomfort with criticizing the work of someone who lacks the type of job security that is traditionally found in academia. The knowledge that a legal writing professor will face contract renewal in the next few years (or perhaps faces contract renewal every year) may make others less willing to criticize the professor’s work because they do not want their criticism to negatively affect the professor’s livelihood. These same concerns do not arise when the target of critique has tenure.

49. *E.g.*, BRUCE SPRINGSTEEN, *HIGHWAY PATROLMAN* (Columbia Records 1982) (“Well if it was any other man, I’d put him straight away; But when it’s your brother sometimes you look the other way.”).

50. *See generally* Kaci Bishop, *Framing Failure in the Legal Classroom: Techniques for Encouraging Growth and Resilience*, 70 *ARK. L. REV.* 959 (2018); *see also* Laura P. Graham, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, 41 *U. ARK. LITTLE-ROCK L. REV.* 29, 93–94 (2018) (describing Professor Bishop’s work favorably and concluding that “Gen Z law students may tend to resist criticism, but receiving critical feedback is essential to their learning.”).

51. The following passage is from a legal writing textbook’s chapter on peer feedback:

As difficult as it can be to *take* feedback, it can be equally difficult to *give* feedback. Effectively reviewing someone else’s work can be mentally tiring, not to mention time-consuming. In addition, your peer may be feeling nervous about how well you will receive the feedback. Express gratitude [for feedback]. Your peer has invested in your writing, and that deserves a sincere thanks.

Publicly acknowledging failures also creates the incentive to succeed. My concern here is that the legal writing discipline's failure to distinguish among the quality of ideas will, over time, deter legal writing professors from doing the labor necessary to produce strong scholarship. Critics of labor unions complain that self-protective organizations create an environment in which laborers do not directly experience positive or negative consequences tied to the quality of their work.<sup>52</sup> While the legal writing discipline is no labor union, its exercise of self-protectionism leads to some of the same consequences. Shielding substandard work from criticism begets more inferior work.<sup>53</sup>

Some of the ideas in the legal writing discipline are fantastic, some are middling, and some are weak. That is no different from any other discipline. As a discipline, we need to distinguish the good ideas from the poor ones. To reward the good, we need to identify the bad. If we do not—if every article and conference presentation receive the same chorus of “good jobs” and a pat on the head—then there is no incentive to push to create truly good ideas.<sup>54</sup>

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ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE LEGAL WRITER* 414 (2016). Again, we would benefit from taking a dose of our own advice.

52. See, e.g., RICHARD A. POSNER, *AN ECONOMIC ANALYSIS OF LAW* 347–48 (7th ed. 2007) (arguing that unionization does not benefit productivity); Martin H. Malin, *Sifting Through the Wreckage of the Tsunami that Hit Public Sector Collective Bargaining*, 16 *EMP. RTS. & EMP'T POL. J.* 533, 534 (2012) (summarizing the view that labor unions “protect employees who are mediocre or worse performers, stifle incentives to excel, and stifle innovation.”); Richard A. Posner, *Some Economics of Labor Law*, 51 *U. CHI. L. REV.* 988, 991 (1984) (“At common law, labor unions were recognized for what they were: worker cartels designed to raise the price of labor above the competitive level.”).

53. Others have suggested to me that this problem affects many areas of legal academia to some degree. While I do not doubt that the problem is not peculiar to legal writing, I lack the perspective to know whether and to what degree it is present in other academic disciplines.

54. I recently had the occasion to attend the annual Conference for Empirical Legal Studies (CELS). At CELS, each paper is discussed in a forty-minute block. The presenter has twenty minutes, a pre-selected discussant comments on the paper for an additional seven minutes, and the audience adds comments and questions for the remaining thirteen minutes. More often than not, the discussants' comments focused on identifying potential flaws in the presenters' methodologies. The audience comments and questions were in much the same vein. From my comfortable seat in the audience, presenting at CELS did not look like all that enjoyable of a way to spend forty minutes. But I guarantee you that the presenters at CELS flew home with more constructive and tangible feedback than did the presenters at any legal writing conference I have ever attended. For more information on CELS, see James Hines, J.J. Prescott & Sonja Starr, *Foreword: The 2018 Conference on Empirical Legal Studies*, 16 *J. EMPIRICAL LEGAL STUD.* 692, 692 (2019).

That is not to say that there are currently no avenues in the discipline through which to pursue candid feedback. My experience is that if I ask a legal writing colleague for critical feedback on a manuscript, that is exactly what I am going to get.<sup>55</sup> On a larger scale, the legal writing community has laudably taken strides to create mechanisms to facilitate the exchange of individual feedback during the development stages of scholarly works.<sup>56</sup> While some of these mechanisms are still in their infancy, they show potential to be useful to individual authors. However, this type of private pre-publication feedback—the “I’d be delighted to provide comments on your manuscript” variety of feedback—is not the type of critique that will be most beneficial to the discipline. Individual feedback is usually exchanged in private and primarily benefits individual authors. It is good, but it is not enough.

#### IV. PRESCRIPTION

The development of a public scholarly conversation is what would more effectively grow the legal writing discipline as a whole. The discipline would benefit tremendously from the “I’ve written an article responding to your article and pointing out its flaws” variety of feedback. The primary purpose of a response article is not to change the mind of the one individual who authored the original article. It is to identify an area of disagreement within a discipline so that others may consider, weigh in, and judge the merits of both sides.<sup>57</sup> This happens occasionally in legal writing—for example, the memorable exchange between Kristen Robbins-Tiscione and Kirsten Davis about the value of teaching analytical memoranda in first-year legal writing courses<sup>58</sup>—but not nearly enough. We need more authors who are

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55. Indeed, I received some highly critical feedback on this essay.

56. For example, the LWI Scholarship Development Committee maintains a Friendly Feedback database to allow authors to find willing mentors and reviewers, and a Peer Scholarship Exchange is being developed that will allow legal writing faculty to workshop scholarly ideas. See *Scholarship Development Committee*, LWI, <https://www.lwionline.org/scholarship-development-committee> [https://perma.cc/KVS7-X5XR] (last visited Feb. 21, 2020); *Peer Scholarship Exchange*, LWI, <https://www.lwionline.org/conferences/peer-scholarship-exchange> [https://perma.cc/CW2U-AF3L] (last visited Feb. 21, 2020).

57. This is exactly the sort of conversation illustrated by the hypothetical exchange between Professors Akin and Brown in the “Writing as Conversation” section of Linda L. Berger, Linda H. Edwards & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 *LEGAL WRITING* 522, 533–35 (2010).

58. Compare Kristen K. Robbins-Tiscione, *From Snail Mail to E-mail: The Traditional Legal Memoranda in the Twenty-First Century*, 58 *J. LEGAL EDUC.* 32 (2008), and Kristen Robbins-Tiscione, *Ding Dong! The Memo is Dead. Which Old Memo? The*

willing to publish views that challenge accepted legal writing doctrine, methods, or structures. Disagreement creates the opportunity to further explore a topic.<sup>59</sup>

To facilitate the development of such a conversation, the legal writing discipline would benefit from a culture shift. We need to reduce the perception of shared victimhood as a defining feature of the discipline. It may have served a useful purpose when the discipline was starting out, but that time has passed. While the discipline has come a long way on its journey toward equal status in legal academia, echoing and re-echoing the same timeworn grievances about perceived unfair treatment is no longer the most productive pathway forward.

Rather than enumerating grievances against casebook faculty in an attempt to convince them to grant us equal status, we would achieve more by emulating casebook faculty in certain respects. One way we can do that is by pouring more of our scholarly resources into the theory, doctrine, and study of our academic subject matter. What I am suggesting here is that perhaps we have crossed the threshold of diminishing returns when it comes to adding to the existing canon of literature designed to highlight inequities in the structure of legal education.<sup>60</sup> There is a lot of such literature.<sup>61</sup> As far as I know, no one debates the premise that legal writing faculty are generally afforded lesser status in legal academia. At some point, spending scholarly capital on identifying microaggressions does not meaningfully move us forward, and, at some point, it may actually prove counterproductive by driving legal writing and casebook faculty apart.<sup>62</sup> Much of the

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*Traditional Memo*, SECOND DRAFT, Spring 2011, at 6 (declaring analytical memoranda to be, well, dead), with Kirsten K. Davis, “*The Reports of My Death are Greatly Exaggerated*”: *Reading and Writing Objective Legal Memoranda in a Mobile Computing Age*, 92 OR. L. REV. 471 (2014) (seeking to “resurrect” analytical memoranda).

59. Berger, et al., *supra* note 57, at 535.

60. This is the category of scholarship that has previously been labeled “articles critiquing the institutional choices affecting the teaching of legal writing.” Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 LEGAL WRITING 3, 32 (2005).

61. LWI’s Professional Status Committee recently released a *Bibliography of Status-Related Sources*. By my count, it listed 64 articles on status-related issues published in legal academic journals plus additional articles in other outlets and books. *Bibliography of Status-Related Sources*, LWI (Feb. 6, 2020), <https://www.lwionline.org/sites/default/files/Final%20Bibliography%20of%20status%20related%20books%20and%20articles%20Feb%206.pdf> [<https://perma.cc/2TCD-ZH46>].

62. I do not mean to suggest that legal writing professors should stop advocating for changes to working conditions at their particular schools. If they are dissatisfied, they should absolutely go ahead and do that, and, for example, the data in the ALWD/LWI survey is a useful tool to that end.

effort that is presently exerted on shining a light on perceived inequities would actually go further toward building the legal writing discipline if it was focused instead on studying legal communication.<sup>63</sup>

In other words, what we should do is focus our energy on finding ways to improve the quality of the discipline from within. To do that, the legal writing discipline needs to shed its protectionist mindset and practice scholarly debate. When practiced properly, collegiality is about sharing responsibility, not about avoiding disagreement. Disagreement should not be considered “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.”<sup>64</sup> The process of error and correction may not always be pain free, but without it there cannot be meaningful growth or improvement. To that end, every member of the discipline shares the responsibility of critical evaluation and to identify and publicly voice disagreements as they arise.

What that will look like is an academic community that does not shy away from criticizing its own. If an idea for a presentation would be considered too bizarre for other disciplines, then maybe that presentation does not belong in our discipline either. Legal writing should not be an intellectual safe space where all ideas are validated.<sup>65</sup> The wheat cannot be recognized as wheat unless we also recognize the chaff as chaff. Moreover, saying that a fellow legal writing

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63. Another way we could perhaps elevate the legal writing discipline is if our scholarly outlets resembled the mainstream outlets for legal academic scholarship. Currently, ALWD and LWI both publish academic journals. However, the names of the journals are so far outside the norm of naming conventions for legal academic journals that I would not be surprised if many outside the legal writing community were confused about what these publications were. The two journals are named, respectively, *Legal Writing: The Journal of the Legal Writing Institute* and *Legal Communication & Rhetoric: JALWD*. Here, JALWD stands for the Journal of the Association of Legal Writing Directors.

If I told a casebook colleague that I published an article in something called *Legal Writing* or *Legal Communication & Rhetoric*, I would not blame them if they were unsure how to assess the accomplishment and accordingly were not terribly impressed by my placement. If I said I just got published in the *Journal of the Legal Writing Institute* or the *Journal of the Association of Legal Writing Directors*, I would not blame them for mistaking it for an organizational newsletter. The titles of these publications sound more like glossy magazines—something akin to a bar journal—than like serious academic publications. If we need to explain our accomplishments so that others can understand them, we have already set ourselves back by setting ourselves apart. Why not just call our journals the *Journal of Legal Writing* and the *Journal of Legal Communication & Rhetoric*? Those sound like what they are: legal academic journals.

64. Berger, et al., *supra* note 57, at 539.

65. *See id.* at 523 (“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.”).

professor's idea is unsound is not the same as saying that the professor is deserving of lesser status or pay. A healthy academic discipline cannot be guided by the fear that acknowledging its own shortcomings will be used against it as evidence of its unworthiness.

Critical disagreement within a discipline is a strengthening agent. The textualists would not be as good as they are without the purposivists, and the purposivists would not be as good as they are without the textualists.<sup>66</sup> Competition and criticism drive individuals to do better.<sup>67</sup> The legal writing discipline is largely missing out on that catalyst for growth. For example, we have witnessed the applied legal storytelling movement grow unchecked within the legal writing discipline for over a decade.<sup>68</sup> We badly need a counter-storytelling movement to argue that the storytellers have it all wrong. Each time a professor espouses the importance of using archetypes and a narrative arc to tell a client's story persuasively, the discipline would benefit from another professor responding that legal advocacy should focus instead on fortifying the analytical support for the argument. If we had that, I suspect that the result would be better honed ideas on both sides.

In short, we need more legal writing professors to dare to voice opinions that challenge popular conventions within the discipline. Regrettably, some legal writing professors may be reluctant to voice

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66. See generally John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

67. This principle is perhaps best embodied in the back-and-forth between Diane Court, the class valedictorian, and Sheila, another high-achieving student, in Cameron Crowe's 1989 film *Say Anything*:

Sheila: I know we were "ultra-competitive" this year but I just want to say that if it wasn't for "Diane Court-whoa" I probably wouldn't have gotten into Cornell because you made me study twice as hard... So thanks.

Diane: Really?

Sheila: God. Yes. I might as well tell you before you go off to your big "life."

Diane: You did the same for me.

CAMERON CROWE, *SAY ANYTHING* (Final Screenplay Jan. 18, 1988) (stage direction omitted). Sheila would not have performed as well without Diane and Diane would not have performed as well without Sheila. Competition improved them both.

68. Applied legal storytelling "examine[s] the use of stories—and of storytelling or narrative elements—in law practice, in law school pedagogy, and within the law generally." J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM'N & RHETORIC 247, 248 (2015) (surveying the progression of the movement and storytelling-related scholarship since 2007); see also J. Lyn Entrikin, Lucy Jewel, Susie Salmon, Craig T. Smith, Kristen K. Tiscione & Melissa H. Weresh, *Treating Professionals Professionally: Requiring Security of Position for All Skills-Focused Faculty Under ABA Accreditation Standard 405(c) and Eliminating 405(d)*, 98 OR. L. REV. 1, 46 (2020) (noting that over one hundred papers have been published on applied legal storytelling topics).

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controversial viewpoints for fear of retribution. Often the established scholars who set the discipline's existing norms and doctrines are the same individuals who hold powerful positions in the national legal writing organizations. These individuals decide which junior scholars will be selected for publication, will be chosen to give presentations, will win awards, and will be appointed as committee chairs, board members, or assistant editors. To foster a culture of scholarly conversation, it is incumbent on the discipline's leadership to welcome disagreement rather than lash out against it. Because, as we were warned a decade ago: a "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."<sup>69</sup>

I do not mean to suggest that it would necessarily be a positive step for the legal writing discipline to construct its own Thunderdome where two legal writing professors enter but only one leaves.<sup>70</sup> A culture of criticism can go too far if it loses sight of its purpose, which should be growth. There is certainly a spectrum between the poles of uncritical nurturing and overly critical silencing. While it may be difficult to discern exactly where the ideal balance lies, there is enough space in a discipline for nurture and criticism to coexist. In my observation, the current culture of the legal writing discipline has moved the needle too far in one direction and has imperiled our progress. More balance would be beneficial.

#### CONCLUSION

Publicly exchanging our internal criticisms will grow the legal writing discipline from within; in turn, that will enhance the respect and acceptance from those outside the discipline. Some of the energy that is currently spent pointing to perceived wrongs inflicted by outsiders would be better directed at developing a more robust culture of open critique. Accountability will strengthen the discipline more than protecting mediocrity. When practiced within the context of an academic discipline, accountability and critique is not a tearing down but a building up, and nothing benefits a discipline like building itself up from within.

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69. See Berger, et al., *supra* note 57, at 544.

70. Thunderdome is a fictional gladiatorial arena where conflicts are resolved by a duel to the death. See *MAD MAX BEYOND THUNDERDOME* (Kennedy Miller Productions 1985).