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ON (NOT) QUEERING LEGAL WRITING

The Writing Instructor (March 2015)

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On (Not) Queering Legal Writing

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Content:
After six years participating in a non-hierarchical collective structure and representing imprisoned transgender poor people and people of color as an attorney at the Sylvia Rivera Law Project, I accepted a job teaching Lawyering at NYU School of Law. Lawyering is a course about how to practice law; it is the only required class that focuses on developing skills rather than examining doctrine. The equivalent course at many law schools is called “legal writing” or “legal research and writing.” At virtually every law school, the people who teach it receive less pay and job security than other law professors.

At NYU, we call our class Lawyering rather than Legal Writing because we help our students develop and reflect on skills beyond research and writing, such as witness interviewing, client counseling, negotiation, and oral argument. The focus on “softer” skills is transgressive. Peggy Cooper Davis, who helped develop the program and directed it for many years, has written about the ways in which the intelligences relevant to these areas (interpersonal, intrapersonal, kinesthetic) are undervalued in traditional law school curricula in part because they are feminized and racialized (797). Despite this transgressive approach, an inescapable part of our purpose, like that of all law teaching, is to indoctrinate students into ways of thinking and acting perceived as “appropriate” to their new profession (Guinier 2).

When I began, I earnestly intended to teach from the perspective of critical race theory and trans feminisms, shaking up assumptions about the neutrality of law, supporting marginalized students, and resisting the social hierarchies that structure and are structured by law. I also had never taught in a formal setting before and wanted very much to learn how to do it well from people who had more experience than I did. I had to follow the same curriculum that everyone in the program used. I wanted to make sure I didn’t harm my students through omission—if they were going to be lawyers it would be really helpful to them to know some of the conventions for how to write a brief, for example. And I didn’t want to abuse my position of power as a professor to force my political views on my students or shame those who didn’t share them. Before long, I discovered in myself a deep impulse toward self-censorship. I was teaching at NYU Law, so surely I couldn’t share any ideas that were too left of “center,” could I? While it was quite foggy to me how I might actually get in trouble, on some level I remained stubbornly convinced that I would, even though I knew that a few critical race theorists with brilliant, searing analyses had taught at NYU for years (Caldwell; Bell). In all, I made some interventions, but they always seemed too little and too hedged. Here is my story of a few of them.

Inclusion?

On the first day of class, we had our students make oral arguments almost immediately. We described a situation with a legal dispute, then divided them into groups and had them all prepare (as much as they could in five minutes with no guidance) to deliver an oral argument for one side or the other as lawyers or to adjudicate the dispute as judges. They worked through a number of different situations and by the end of the class everyone, or almost everyone, had to speak in some role or another.
The situations that other Lawyering professors and I used involved variations on the “vehicles in the park” debate. This is a very famous debate in legal theory. If a statute says “no vehicles in the park,” what does that mean? One famous guy said, in essence, that you have to figure out what it means just based on what it says (Hart). Another famous guy said, in essence, that’s silly, you have to think about what the legislature that passed the law meant by it and what function the law should serve (Fuller). It’s a great exercise for students because they quickly figure out all on their own that even a word like “vehicle” can be open to multiple interpretations, and along the way they almost always articulate the main ways to interpret statutes (plain text, legislative intent, and function). What’s more, they learn from the start that the class will be highly interactive. Because most of us placed the students in groups randomly and forced everyone to speak, we also, for the most part, avoided the type of environment that leads to cisgender male students speaking more in class than women and trans people.

People created this plan for the first day of class long before I arrived in the program. Individual professors did, however, choose which vehicles to use in the scenarios. While we had discretion over our final choices, I learned about the common variants. The most popular ones in the years I taught tended to be the following:

- A hetero celebrity couple hang out in the park and hop on a moped to get away from paparazzi. They get a ticket and fight it.

- A pedicab driver loses control and strikes a pedestrian. The pedestrian sues and the only issue in the lawsuit is whether the driver violated the statute.

- Veterans want to bring a dismantled tank into the park and put it together on a pedestal as a part of a monument, but they get denied a license to do so because it’s a vehicle.

- Ronald and Stephanie Manning are having a picnic near the park entrance when Ronald has a heart attack; Stephanie runs just outside the park to where their car is parked, picks up Ronald and delivers him safely to the ER just in the nick of time to save his life. But she gets fined for driving a vehicle in the park.

- A man using a power wheelchair enters the park and runs over a kid’s foot. He gets a ticket.

In thinking through the implications of the scenarios before the first day of class, the wheelchair one immediately worries me. Is it really okay to use an example of such serious ableism? Will we have time to unpack that ableism while working through scenario after scenario and talking about the basics of statutory interpretation? How will I have a helpful conversation with students about ableism? By making some students argue that the person should have gotten fined for using a wheelchair in a park, will I imply that that position is legitimate and something they should feel comfortable arguing, even if they have to suppress instincts that such a position is wrong? I don’t want to avoid discussing disability in the classroom, so just cutting the scenario seems problematic as well, especially since it’s one of the more realistic ones (people using wheelchairs have been prosecuted for operating a “vehicle” under the influence of alcohol (State v. Greenman)).

I try rewriting the scenario. In this version, a Black man using a wheelchair enters a park. A white nondisabled cop approaches and says they don’t want homeless people in the park, tells him to go to a shelter instead. The Black disabled man, indignant, says that he’s not homeless and the cop should mind his own fucking business anyway. They argue and the cop then arrests him for having a “vehicle” in the
park. With this iteration we have ableism, racism, and classism to deal with in a scenario that seems more realistic to me. Maybe we can have a really good, serious discussion. I also create another scenario to use that leaves out the wheelchair entirely, though, because I’m still not sure how to have the conversation I want to initiate while achieving the other goals for the first day of class. I ask people I trust for advice. Some say, use the scenario with the wheelchair; others say, absolutely don’t use the scenario with the wheelchair. I decide to decide in the moment.

The other scenarios also present their own issues. During the years I taught in the program, every simulation in the curriculum throughout the entire year involved only people who were either explicitly straight or whose sexual orientation was unidentified. Given that setup, I don’t want to have heterosexual couples proliferate among my first day hypotheticals as well. For the heart attack scenario, I decide to rename the couple Tabitha and Stephanie Manning and refer to them both as “she.”

Simply changing the gender of one character does not alone queer the scenario. A couple with the same last name and a car picnicking together in the park could easily be perceived as a picture of homonormative domestic bliss. But still, now at least not everyone is hetero, and I like the dyke superhero image as Tabitha springs to Stephanie’s rescue. I’m curious if my students will assume that the two are mother and daughter or sisters instead of spouses given the new gender combination—nothing in the description names their relationship explicitly, although everyone seems to assume they’re married when they’re presented as a man and a woman.

When the first day of class arrives, and my students and I eye each other in those awkward moments before we know quite what to expect of each other, I decide not to use the wheelchair scenario. I don’t know whether the choice arises from wisdom or cowardice.

I present the Tabitha and Stephanie Manning scenario, and every student who discusses the couple refers to them as friends. I ask them why they assume they’re friends.

“Well, what else would they be?”

“They have the same last name. Did you think they might be related, or married?”

“They don’t necessarily have the same last name. Tabitha could have a different last name and you just didn’t give it.”

“Hm. I guess that’s true, although it’s a bit unusual to give a last name for one person but not the other in a sentence structured in this way. Would you have thought of it in the same way if it had been, say, Ronald and Stephanie Manning?”

The students fall silent. I wait one moment, then another. I decide to move on; we’re already not going to have enough time for my lecture on judicial hierarchy. “Okay, well, just think about that question for the future. We all make assumptions for a lot of different reasons and it’s helpful to be aware of them.” I don’t sense a lot of buy-in from students.

My next scenario, though, sparks unexpected debate. I’ve been bringing up a power point slide with a light-hearted picture for each scenario as I begin to describe it. This time, I have a picture of a blonde white woman driving a pedicab. My students laugh. I look at the picture to try to guess why. She does look a little carefree and almost child-like, with those pig tails trailing in the breeze. I wonder if that’s what makes it funny. “I thought all pedicab drivers were men!” blurs a male student, enlightening me.
“Yeah!” chorus a few other students.

“I think I’ve seen a woman one once,” mumbles a female student.

“Are there really woman pedicab drivers?” someone asks me directly.

I blink. “Honestly, folks, I had no idea what a pedicab was until I did some google image searching before this class. I guess from what you’re telling me it’s a pretty male-dominated occupation?” I hear vaguely affirmative mumbles. “Well, again, I honestly don’t personally know any pedicab drivers, but even in occupations that are very male-dominated, there are usually some women workers, and people have been fighting hard against gender discrimination in a lot of areas for a long time, right? Anyway, this particular pedicab driver, who’s about to be involved in—you guessed it, some legal trouble in the park—is a woman.” The students seem satisfied, and we move on.

I wonder later if I handled it poorly. My very first day and the students raise an issue of gender! Couldn’t I have built some sort of dialogue about it? Was there also a racial expectation that wasn’t voiced? Had I just accidentally played into a narrative of progress—don’t worry about that nasty sexism stuff, we’re basically over it now? And how could I have done it differently so that we didn’t all assume it was okay to assume that someone with breasts, no obvious facial hair, and long hair was a woman? What were the class implications in my saying I didn’t know any pedicab drivers? How do I manage time constraints, my competing goals for the class, and the students’ own various interests?

A safer space?

Back when I was at NYU law school as a student, I experienced a lot of transphobia. One set of problems revolved around my name. I only figured out how to change it legally in my second year, and NYU wouldn’t let me list a preferred name before then, so my first year was a mess.

On my first day of Lawyering, my professor read out my then-legal and very feminine name when taking attendance. I quickly told her the name I preferred to go by. She seemed confused and said my feminine name out loud again, to verify it was me. Again, I said it was, but I preferred to go by a different name. The next day, I got a call telling me I had to meet with the vice dean of student affairs.

When I went to see the vice dean, wondering how I could have possibly gotten into trouble so quickly, the vice dean told me that she wanted to talk to me because she heard I had had a sex change operation the summer before. She wanted to know if it was true.

I was shocked. I hadn’t told anyone at the law school that I was trans—I was still trying to decide how out I wanted to be. I found the term “sex change operation” offensive and hadn’t actually had any surgery the summer before law school, but more to the point, was a high-ranking administrator actually forcing me to tell her about my genitals and medical history? Out of curiosity?

When I finally gave her enough of an answer to get her to stop pressing me, she said that she just wanted me to know that I couldn’t use any name other than my legal one, and that I was welcome at NYU and should come to her if I had any problems. When I left her office, cheeks burning with humiliation, I vowed that I would never voluntarily go to student affairs about anything at all—a vow I kept, no matter what problems I had.
Later, I figured out it was probably my Lawyering professor who ratted me out to student affairs. All the vice dean said was that “faculty were talking” (faculty were gossiping about my gender identity and genitals by the second day of school?), but Lawyering was the only class I had had by then. And as a Lawyering professor, I got repeated messages that I should call student affairs about any student who was behaving oddly and might be “in distress,” whether or not I had that student’s permission. I imagined that my old Lawyering professor may have gotten the same instructions and decided my appearance and name were odd enough to merit a secret call to student affairs. So, as a new professor, I was intent on not recreating anything like what I experienced, and I wanted to support my colleagues in doing better as well.

Before classes start my first year of teaching, the e-mails from other Lawyering professors about taking attendance by calling names from the roster alarm me. I send some trans 101 info around and recommend that professors use a blank sign-in sheet and ask students to share their own preferred names and pronouns during introductions. Many professors thank me and agree that they will try to avoid names until students had a chance to self-identify.

But in the weeks following that interaction, getting closer and closer to the first day of class, I see model class plans and suggestions that incorporate student names based on the roster in more ways than I could have imagined. On the first day, some professors put students in groups by listing their first names (drawn from the roster) on a power point slide and telling them to find each other. Some professors have preprinted name tags and placards made for students, which they then require them to use for the first few classes. Some professors have files and attendance sheets created in all of the students’ names as listed on the roster. Some create letterhead for a fictional law firm made up of the class members, with student names drawn from the roster listed down the margin. I am appalled. I write colleagues again urging them to avoid using roster names. I suggest alternatives that I think are easy to follow. I circulate more trans 101 info. I share my personal experience. Again, I get only thanks and agreement. But I have no idea whether any of them incorporate any of my advice—-I get the impression that at least some make a real effort about preferred names, but that some think asking students for preferred pronouns would be “too much.”

Regardless of what they do, I, at least, can decide how to handle matters in my own classroom. The first day I avoid names and circulate a blank sign-in sheet. The second day I have my students share their preferred names and pronouns when they introduce themselves. I explain why I ask them the question, what I mean by it, and what sort of responses I want. I demonstrate by going first.

To my knowledge, in the three years I taught at NYU, not a single openly trans-identified student was enrolled in the law school—perhaps none were even admitted. Repeatedly, though, my current and former students talked about that moment on the second day as having a huge impact on them. They talked about how it pushed them to think about gender in a different way, how they had never realized how many assumptions they made, and how it still affects the way they think. Other professors who heard these student comments told me how impressed they were and sometimes wondered out loud why they didn’t do the same thing.

So, what I intended as a measure to create a safer space for trans students seems to have only directly benefitted cisgender students. What does it mean to talk about a “trans-friendly” classroom in a school so transphobic that it literally excludes all trans students from entering the classroom in the first place? What is the significance of the fact that the action in my classroom that I have gotten the most
extravagant praise for is a very brief exercise that has been a staple of trainings and activist meetings I (and many others) have attended for years? I did not draw on the pedagogical theory I studied or my legal skills in doing it, but it seems it may have been more pedagogically useful for the law students I taught than any of my other exercises. What other tools from activism should I draw on in the classroom, and how can I give appropriate credit to the communities—often communities of trans people of color without law degrees—that have developed these tools, rather than claiming them as my own as a white trans law professor? And why is it that so many of my colleagues seem to find this extraordinarily easy and basic step for reducing harm to trans students so very praiseworthy, yet still unworthy of replication? What would need to shift to produce more widespread adoption of better practices?

**What’s a pie stand, really?**

The Lawyering unit on facts is short, but powerful. The case we used when I was there was fairly mundane: NYU loaned a very expensive lamp once owned by a famous judge to the Nevins Museum. The Nevins Museum returned it to the law school, using ACE shipping. When the lamp got back in NYU’s hands, it was broken. The basic legal question was whether the museum or the shipping company was liable for the damage.

The first day of the unit, we do an exercise where half the students leave the classroom and the others watch a video. The video is clear and short. The students pay attention. Very little happens in the video—someone walks up the steps to the law school with a box and trips, then stands up and continues on his way. After the video is over, the students who have been waiting in the hall come in and interview the “witnesses.” Invariably, as many versions of events emerge as there are students. The guy was wearing a delivery uniform; no, he was wearing jeans and a T-shirt; no, it was khakis and a button down. The box was large and unmarked; no, it was small and labeled; actually, there was no box at all. When the person with the box tripped there was a loud crash; no, it was silent; no, there was a slight tinkling sound; no, there was a distinct thump; actually, he never tripped at all. And so on. We watch the video all together again, but people still see it somewhat differently.

We talk about flaws in our perception and memory, and the ways that questioning can impact the ways we remember. Then, I teach them how to write an affidavit using fairly conventional techniques, but there’s something almost titillating to me about teaching students that none of us have any clue what’s going on at any given moment, and then telling them to write some version of what went on in neat numbered paragraphs anyway. The tension is too strong to smooth over completely, which I think is perfect. Teaching a skill while destabilizing the assumptions underlying it seems at least a little queer to me.

For the first two years I taught, we followed this exercise with another in which a few students conducted an in-depth interview with Robin Sanders, a former Nevins Museum employee, while other students watched. The person they interviewed didn’t pack the lamp, but he was there when his coworker Jerome packed the lamp. My favorite part of this exercise was quite selfish: Lawyering professors played the role of the witness for different classes, and I love role-playing.

The day of the interview my first year, I review the role memo carefully before I visit my colleague Kevin’s class. With gusto, I greet the students in Kevin’s class as Robin Sanders. They ask me a series of questions. The subject of the interview isn’t exactly scintillating, although I try to work in a little
personality. My answers tend to be along the lines of: Yes, Jerome used bubble wrap. Yes, he used tissue paper too. Yeah, the box seemed sturdy as far as I could tell, I mean I’m not a cardboard expert or anything. The only particularly interesting wrinkle the students may discover is that Jerome was upset at the time he packed the box because he just found out his wife wanted to separate from him.

The students ask me how I know Jerome. I answer according to the role memo and say he was a coworker and one of my closest friends at the Museum—I didn’t really know anyone when I moved to central Jersey for my fellowship at the museum, and he took me around to some local pie stands.

Afterward, Kevin invites me to break role and asks the students if they have any more questions for me. One of the students immediately demands, “What is a pie stand a euphemism for?” A few students divulge that they are absolutely convinced I was having an affair with Jerome. They are sure that pie stand is a reference to something gay and quite possibly filthy.

None of this was in the role memo.

I immediately feel my gay male cred both validated and called into question. Pie stand...pie stand...are they right? Is it a euphemism? Am I so out of it that I’m not aware of the latest euphemisms having to do with queer hookups? Does pie refer to a particular orifice or combination of orifices? Could pie stands be about rimming? And what is the significance of the wordstand? Does it refer to sex standing up? A place for quick, casual service? Is this something I’ve missed (or been left out from) because I’m a trans queer man, or because I’m getting older and don’t get around as much as I used to, or because I’m more oblivious than I thought?

Also, how did the students know I was queer? Was I being too visible? Implying sexual innuendo where none was supposed to exist? I feel both thrilled and guilty.

With an effort, I rein myself in a bit from these erotic and insecure imaginings. I raise my hands defensively. “It’s not a euphemism for anything, as far as I know! I mean I just meant it’s a place where people buy pies to eat.” My cheeks burn as I wonder what sexual innuendo I might inadvertently have made with that statement.

“Oh come on,” insists a student, who Kevin later tells me is an out gay man.

“If you thought I was having an affair with Jerome, why didn’t you ask me about it?” I counter.

“That would be rude!” cries another student.

Kevin takes control of the class again. I excuse myself.

Then in my class, Kevin plays Robin. Instead of mentioning pie stands, he says that he and Jerome watch sports together. I find it hard not to roll my eyes at this move; he’s changing the facts to sound more normatively masculine and hetero. In the debrief, I quickly discover that my students also read illicit sexuality into this mundane scenario—but with Kevin as Robin they are convinced that he was having an affair with Jerome’s wife, rather than with Jerome. Was it just the modification of pie stand to sports that tipped the balance in the student’s reading of the situation? Or could the students read my queerness and Kevin’s straightness? Why are they imagining sex when we’re talking about a broken lamp? Why are they so eager to bring it up when speaking with us as students addressing professors, but so reluctant to bring it up as lawyers addressing witnesses?
Another professor, Aaron, found that his students never imagined illicit sex when the client or witness was a man, but that time and again they suspected it when the client or witness was a woman. He raised the sexism involved in their interpretation with them, and mused with us about how the students could believe we were coming up with such salacious scenarios.

How do all of these gendered readings of fake witnesses’ imaginary sex lives inform legal writing? And why are we, as Lawyering professors, so leery of talking about sex and stereotypes in the classroom? If the faculty consistently strips sex from the lives of the characters we create, the students seem inconsistently intent on reading it back in. What openings for more generative dialogue did we miss?

Concluding?

The writing I have done here violates most of the cardinal rules of legal writing that I teach my students.

“Avoid the first person,” I say. “It isn’t about you. It’s not the judge’s role to care about your individual opinions, feelings, or experiences. It doesn’t serve your client to insert yourself explicitly into the writing. Make it about your client. Make it about the facts. Make it about the law. Make it about how the judge can be a hero here, standing up for whatever principle would best serve your client’s interests (not that you want to say that explicitly). Before you turn in your brief, find all of your uses of a first person pronoun and get rid of them, unless you have a good reason to do otherwise.”

But, while it can be damaging to focus solely on our own experiences rather than the needs and perspectives of others, our personal experiences are an important part of what we have to offer one another, and grounding our observations in our personal experiences can resist impulses to universalize what may not be universal.

“Include a citation for every single assertion you make.” I say. “In fact, if you have any sentence in your argument without a citation to authority or the record, triple-check that you don’t need one. Because you probably do.”

But, while we always build on the work of others and acknowledging the contributions of others can be an ethical and even radical practice, a culture of relying heavily on authority, especially legal authority, can reinforce conservative resistance to change—which is in fact part of the point of our legal system.

“It is risky,” I say, “to ask a judge a question. Who knows how she will answer it? Instead, just give the judge your answer. Stick to declarative sentences.”

But, while using a question to cloak an answer can be a trap for both asker and asked, genuine questions can generate far more meaningful learning and change than endless declarations, in part because of the risk involved in not knowing what the answers will be. Asking genuine questions is one of the key pedagogical strategies the Lawyering program taught me to use, an approach that impresses me and that I still struggle to employ to its greatest potential. As another Lawyering professor, Hannah Roman, wrote in response to this piece, “it is also risky to ask a student a question, because the answer will almost inevitably deliver an opportunity to challenge and interrogate assumptions and biases and structural inequalities, an opportunity for which we may not feel equipped, in the moment or at all . . . One can’t make the whole course about left politics, white supremacy, and heterosexism, and raising these questions can make a person—even a professor (particularly a non-tenured professor in a fellowship position)—feel vulnerable and exposed. But the opportunity to queer Lawyering lies in taking
that risk. If we ask the hard questions, we have to be ready to deal with the answers students give, to follow through with more questions." Alternatively, we have to be willing to ask the questions even without being ready to deal with the answers, and to follow through with more questions anyway.

Given the value of asking genuine, hard questions, I will resist the temptation to tie up this conclusion with easy answers. Instead, I will try to build on what I’ve learned to open up yet more inquiries. I learned, for example, that inquiring about preferred names and pronouns retains transformative potential that some find threatening, that we cannot fully banish the erotic from the classroom any more than we can fully banish stereotypes, and that we can interrogate but never neatly resolve tensions that matter in the classroom.

I wonder now what legal writing could look like if it were taught by, for, and to queers who are too queer for law school—people who haven’t finished high school, who are in prisons and hospitals, or who could go to law school but don’t want to because they know law school isn’t the way to overthrow white supremacy, capitalism, heteropatriarchy, ableism, and a coercive gender binary system? How could those queers’ legal tactics and savvy, used to survive and resist injustice, destabilize not only the ways professors and law students think of legal writing, but also the whole legal and academic system those of us in law schools both hold up and depend on? What can we make of the potential for certain techniques and approaches of the Lawyering program, like questioning, considering multiple meanings of language, and confronting how little we know about what we think we perceive, to contribute to—even queer—forms of queer knowledge and struggle?

Dean Spade has written and spoken about trans politics as a politics of impossibility (“Normal Life”). As trans people, we are constantly told that we cannot, do not, and must not exist. We are constantly told that the world cannot change in the ways we dream. And yet, impossibly, we exist, we dream, and we make change.

If it is impossible to teach people to write effectively for a deeply biased and hierarchical legal system in subversive and liberatory ways, then how can we do it anyway, or what might we want to do instead? What can we create together, out of these impossibilities?

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Notes

1 Like many people, I had taught informally for many years through holding trainings and workshops, developing popular education materials, mentoring interns, and working with clients one-on-one. These types of teaching, of course, do not have the same status as full-time faculty appointments, but can be at least as powerful and transformative for those involved.

2 In past years, an interracial gay couple experiencing housing discrimination appeared in one of the simulations.

3 I included a short piece written by Dean Spade (“Some Very Basic Tips”).
Spade gives an example of the problems this particular practice can pose ("Be Professional!") 73.

bell hooks has problematized the attempt to exile eros from the classroom (hooks 191).

Works Cited


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