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FINISHING THE JOB OF LEGAL EDUCATION REFORM

Mary Beth Beazley*  

After many years of committee reports, meetings, and notice and comment cycles, the new American Bar Association ("ABA") Standards are finally being phased in.1 The new Standards require that students receive six credit hours of experiential education (beyond credits that fulfill other requirements), that law schools ensure some degree of formative assessment, and that law schools articulate educational outcomes and take steps toward meeting these outcomes.2 These educational reforms make perfect sense based on the evolving demands of the profession, the demographic shifts in the student body, and the developing scholarship of teaching and learning.

As with many of the changes to the Standards, the recent reforms impose more requirements related to teaching, essentially calling for faculty to spend more time with students and to do more

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* Professor of Law at the Moritz College of Law, The Ohio State University. Thanks to Chris Coughlin for inviting me to the Symposium, and to Madison Benedict and the Wake Forest students who did a great job running it. Thanks also to Eric Spose and Wake Forest Law Review editors, and to my colleagues who gave me wise counsel, including Craig Smith, Monte Smith, Anne Ralph, Laura Williams, Katherine Kelly, and Debby Merritt.

1. The current set of Standards was extensively reviewed by the Council of the Section of Legal Education and Admissions to the Bar, first from 1996 to 2000, then again from 2003 to 2006, and finally in 2008. ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. 2015-2016, at vii (AM. BAR ASS'N 2015). The Standards were approved in their current form in June 2014 by the Council and approved by the House of Delegates two months later. Id. Separately, the Rules were evaluated by the Rules Revision Committee, first from 2004 to 2006, and were thoroughly reviewed again from 2008 to 2014 before their adoption by the House of Delegates. Id.

2. Standard 301 provides that a law school "shall establish . . . learning outcomes" designed to "prepare[] its students . . . for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession." Id. § 301, at 15. Standard 302 provides some specifics on "minimum" outcomes that law schools "shall establish." Id. § 302. Standard 303(a)(3) provides that "[a] law school shall offer a curriculum that requires each student to satisfactorily complete at least . . . one or more experiential course(s) totaling at least six credit hours." Id. § 303(a)(3), at 16. Standard 314 requires that law schools "utilize both formative and summative assessment methods in its curriculum." Id. § 314, at 23.
to prepare law school graduates for legal practice.\(^3\) I fear, however, that many law schools will react to these changes in the same way that they have reacted to past changes: by doing their best to maintain the status quo for the "Brahmins,"\(^4\) that is, the subset of tenure-level faculty who (a) teach Langdell’s curriculum and (b) resist any hint of change in their teaching or scholarship (except, perhaps, to reduce their teaching hours). Unless reforms shift the behavior of the Brahmins, we can’t hope for meaningful change, and the new Standards will merely increase the balkanization of the curriculum. The Brahmins will cling to the old ways of doing things, while they push the new teaching requirements onto the laps of the skills faculty who don’t have the job security to say no or the power to spread the reforms beyond their own classrooms.

I cannot define the Brahmins any better than Kent Syverud did in 2002, when he described their stranglehold on legal education and their resistance to change:

[The Brahmins] are paid the best; they have job security; they control most key decisions involving curriculum; they rarely change what they teach or how they teach it; they largely teach through a modified Socratic lecture and a single final examination; they value published legal research, especially to the extent it will be respected by peers at Harvard, Yale, Stanford, and Chicago; they like teaching really good students (like the ones on the law review) but they abhor grading and, except in seminars, rarely evaluate and correct written work. Many of them are nice as individuals, but as a group it is a different matter; they become “The Faculty” (capital T, capital F), as in the sentence “The Faculty will never agree to requiring THAT new course in the curriculum.”\(^5\)

Of course, not all tenured faculty are Brahmins in Syverud’s sense of the word. Too many Brahmins, however, are in positions of control—either as deans or as thought leaders—and they are fierce protectors of the status quo. The Brahmins successfully protested, for example, when the ABA proposed standards\(^6\) that could have eliminated tenure requirements for all faculty. I well remember the Association of American Law Schools (“AALS”) session on the topic that was filled with protesting tenured and tenure-track faculty who

3. For examples, see supra note 2.
5. Id. at 14.
6. For four proposed alternatives, only two of which were brought forward for comment, see ABA, STANDARDS REVIEW COMMITTEE MEETING AGENDA JULY 12–13, 2013, at 4–7 (2013), http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july_2013_meeting/201307_src_meeting_materials.authcheckdam.pdf.
vehemently explained why the job security of tenure was both necessary and important—for them.

And I have other memories. I have memories of Brahmins patiently explaining to me why tenure is not appropriate for legal writing or other skills faculty, carefully drawing arbitrary lines to separate our teaching and our scholarship from that of “the academy.” The Brahmins do not realize that the more they seek to narrow the definition of tenure, the more they lay the groundwork for its demise. I am reminded of the words of Edmund Burke, protesting the attacks on American freedom from British Parliament during the American Revolution: “To prove that the Americans ought not to be free, we are obliged to depreciate the value of freedom itself.” Likewise, if tenure is not needed for full-time faculty who teach ABA-mandated courses, why is it needed for those who teach the nonmandated curriculum?

I rise not to end tenure but to extend it, for the good of law faculty and of legal education. Extending tenure to legal writing and other skills faculty will help to advance the goals of education reform in a variety of ways. First, equalizing the power of skills faculty will allow law schools to get the full benefit of their teaching and scholarship, a benefit that is currently blunted by ignorance and bias. Second, fair treatment of skills faculty will advance the values of equality, diversity, and inclusion: law students will benefit if more faculty of color embrace skills teaching (which they currently avoid due to its stigma). Finally, fair treatment of skills faculty will advance and improve the teaching of practice-related skills, increasing the vitality of law schools by making legal education more relevant to the practice of law.


8. I understand that many tenured faculty teach courses required within their own law schools, but the ABA mandates very few specific courses, and legal writing is the only subject area that is mandated both in the first year and in the upper level. See infra Subpart I.A.

9. I will often refer to “skills faculty” in this Essay. I mean to include legal writing faculty, faculty who teach in clinics, academic support faculty, teaching librarians, and others who hold full-time academic jobs that require direct (as opposed to vicarious) teaching of students. These faculty may go by myriad titles in the already-balkanized faculties in law schools across the United States. I note that I will often focus on legal writing faculty for the obvious reason that I am most familiar with the contributions made and the issues faced by these faculty. But I fully recognize that many of my statements about legal writing faculty are equally true of other skills faculty, and I do not mean to exclude them.
The Brahmins must recognize that legal education is changing and that they can't stop those changes by "insourcing" reform to low-status, full- and part-time faculty. When the ABA first broached the need for law schools to articulate educational outcomes—i.e., to actually articulate what they were trying to teach—the Brahmins also protested. Many claimed that their law schools had "unique" educational missions that would be hampered by "overregulation" from the ABA. But the ABA must focus on the needs of the profession, and it has a fiduciary obligation to ensure that law schools are preparing their students to enter the practice of law.

Certainly, not all law schools need to teach an identical curriculum. Law schools can offer a variety of courses, and they can offer courses that prepare students to practice law in particular ways or in particular areas of law. Likewise, they can offer courses that would prepare their students to be law professors or to use their law degrees to pursue nonlegal careers. However, if there are any law schools that are not preparing their students to enter the practice of law, they need to speak up so their accreditation can be revoked.11

Consistent with the new ABA Standards, forward-looking law schools must embrace experiential learning techniques, educational outcomes, and formative assessment methods. It is ludicrous to adopt the use of these methods throughout the law school curriculum and then restrict to low-status positions those faculty with expertise in these methods.

All full-time faculty deserve the protections of tenure, regardless of their method of teaching or the subject area of their courses. Law schools that have denied tenure opportunities to skills

10. I use the term "insource" rather than "outsource" because outsourcing implies that the work will be done outside the law school. Insourcing is a more appropriate term because many law schools have brought in low-status, full-time employees to fulfill the ABA's teaching requirements.

11. As we know, most law faculty come from the top-ranked schools in the country. Certainly, however, most of the graduates of these elite schools become lawyers. Thus, even these top-ranked schools must ensure that their curriculums will prepare their students to enter legal practice.

12. Admittedly, the new Standards specifically do not require that these methods be used in every course. Standard 314 requires that a law school "shall use" both formative and summative assessment "in its curriculum." ABA STANDARDS \& RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. 2015–2016 § 314, at 23 (AM. BAR ASS'N 2015). Although Interpretation 314-1 indicates that multiple assessment methods need not be used "in any particular course," id., the language in 314 certainly does not imply that the assessment be limited to certain types of courses. Further, Standard 301(b) provides that a law school "shall establish and publish learning outcomes designed to achieve" the educational objectives of its "program of legal education" as described in Standard 301(a). Id. § 301(a), at 15.
finishing legal education reform

Faculty have used a variety of justifications, with many deans claiming a need for "flexibility."13 Flexibility, of course, is a byword for employers who resist regulation, and deans are no different. The word typically signals a desire for an at-will workforce, rather than one protected by unions, fair pay laws, or other standards. Tenure guarantees many employment protections, but it does not guarantee any particular salary, nor does it guarantee employment for life.14 Too many deans, however, decry tenure as a mandate that requires them to keep "deadwood" faculty on the job. This mischaracterization of tenure becomes a tool to create new categories of faculty who are labeled as "undeserving" of tenure, even when those faculty are an integral part of a law school's educational program. In this way, deans divide the faculty into factions, leading the Brahmins to see "tenure for all" as a danger to their well-being.

Significant faculty divisions began to emerge during the 1980s, when law schools started to create full-time dedicated legal writing positions.15 Many legal writing faculty began their careers in ad hoc positions, with unclear expectations and workloads. As the requirements of those positions came into focus, however, it became clear that legal writing faculty were similarly situated to others on the faculty: they were tasked with teaching law students a course that prepared students for the practice of law; they performed service as appropriate; and they produced scholarship as a way to develop the theory and practice of their field, to explore its limits, and to communicate their discoveries to others. As I can attest from personal experience and from the experiences of colleagues around the country, many legal writing faculty were acting like their other faculty colleagues, regardless of their job titles or job security.

The ABA recognized the value that these legal writing faculty were providing, and in 1983 it incorporated the standard requiring a "rigorous" writing experience in the first year.16 The ABA has also

13. See Memorandum from Richard K. Neumann, Jr., Professor of Law, Maurice A. Dean Sch. of Law at Hofstra Univ. & J. Lyn Entrikin, Professor of Law, William H. Bowen Sch. of Law, Univ. Ark. at Little Rock, to Council of the ABA Section of Legal Educ. & Admissions to the Bar 18 (Jan. 30, 2014) [hereinafter Neumann & Entrikin Memorandum], http://www.alwd.org/wp-content/uploads/2014/02/Standard-405-Neumann-Entrikin.pdf (discussing the ways in which tenure does not interfere with a dean's "flexibility").
14. Id. at 2, 6–8.
recognized the value provided by other skills faculty, mandating "substantial" opportunities for clinical courses, and a "reasonable opportunity" for appropriate academic support. Further, Standard 316 makes apparent how important it is for law schools to prepare students for the bar exam; it articulates complex methods for determining whether a law school's bar passage rate is "sufficient" to meet the Standards.

Taken together, these changes show a significant shift from the purely academic, PhD-like focus of legal education, to a perspective that encourages—indeed, it mandates—preparation for legal practice. But as this shift has occurred, too many Brahmins have tried to maintain an out-of-balance focus on scholarship and push the new teaching requirements onto new, low-status (often female) faculty. Scholarship was the focus throughout the boom times in legal education, as law schools used prestige and publication to chase U.S. News status, reducing teaching hours for the Brahmins in hopes of increased scholarly output. Even during this time of market correction, the practice-related ABA requirements—the teaching of writing, the formative assessment, the clinics, the outcomes-focused teaching, and the experiential opportunities—have too often been cabined in courses taught by low-caste faculty, while the Brahmins go on with their Socratic lectures and their theoretical scholarship as if nothing had changed at all.

(2007) (“Historically, the ABA Standards on teaching legal writing were more aspirational than mandatory, leaving the schools with broad discretion in how to meet the stated goals. For example, in 1973, the Standards only required law schools to ‘offer ... training in professional skills, such as counseling, the drafting of legal documents and materials, and trial and appellate advocacy.’ By 1983 that requirement had changed to a requirement that law schools ‘shall ... offer to all law students at least one rigorous writing experience.’” (footnotes omitted)).

18. Id. § 309(b), at 21.
19. Id. § 316, at 24–25. On March 25 of the year of this publication, the ABA Council on Legal Education submitted for notice and comment a revised, much more streamlined version of Standard 316, requiring that “[a]t least 75 percent of a law school’s graduates in a calendar year who sat for a bar examination must have passed a bar examination administered within two years of their date of graduation.” Memorandum from Hon. Rebecca White Berch, Council Chairperson & Barry A. Currier, Managing Dir. of Accreditation & Legal Educ., to Interested Persons & Entities 6 (Mar. 25, 2016), http://www.americanbar.org/groups/legal_education/resources/notice_and_comment.html.
20. See Erwin Chemerinsky, Why Not Clinical Education? 16 CLINICAL L. REV. 35, 40 (2009) (noting how colleagues at one law school rejected ideas to create clinical opportunities for their students and observing that these faculty “far preferred to hire more faculty who would do scholarship that would enhance the school’s academic reputation rather than [to hire] clinical faculty”).
It is time to strike a new balance between teaching and scholarship in legal education. This new balance does not require law schools to abandon their scholarly focus and concentrate solely on skills. The scholarly enterprise is, and should be, vital to the future of legal education and legal practice. Instead, law schools must make fundamental changes in how they value the teaching and scholarship of all full-time faculty who prepare their students for legal practice.

True legal education reform must re-form both the teaching and the scholarly missions of the law school by engaging all full-time faculty in both. Unless the ABA finishes the job of reform by mandating equal treatment for all full-time faculty, educational reform will be piecemeal and scattershot, with token courses meant to dot the i’s and cross the t’s being taught by low-caste faculty who don’t have the power to take the next steps in educational reform. Legal education will continue to be a segregated system, a system that stifles scholarly voices that might generate new knowledge about teaching, practice, or legal policy.

This Essay will first describe the current ABA Standards on status, particularly as they relate to legal writing faculty, explaining how these Standards contradict the ABA’s diversity and inclusion standards and result in a segregated underclass in the legal academy; this underclass inhibits not only gender, class, and racial inclusion but also student learning. Second, this Essay will identify the formal and informal barriers to academic freedom for legal writing faculty. Third, this Essay will explain how “disrespected” skills scholarship underlies the current reforms, and how this scholarship is already expanding its focus to generate knowledge about other issues of legal practice and legal theory. Finally, this Essay will discuss next steps that the law schools, the ABA, and the AALS can take to ensure the continued viability of law schools by embracing current and future reforms.

I. PREACHING VS. PRACTICE: THE IMPACT OF RULES AND REGULATIONS IN LEGAL EDUCATION

Law schools are governed by two organizations, one professional (the ABA) and one academic (the AALS). The ABA is the accrediting body, and it issues Standards for Legal Education that law schools must meet to be accredited. The ABA sends a team of evaluators on a “site visit” to each accredited law school every

21. ABA Standards & Rules of Procedure for Approval of Law Schs. 2015-2016, at v (noting that since 1952, the United States Department of Education has granted law school accrediting authority to the ABA’s Council of the Section of Legal Education and Admissions to the Bar, and that “[t]he Standards contain the requirements a law school must meet to obtain and retain ABA approval”).
seventh year to ensure that the law school is meeting these standards.\textsuperscript{22}

Although the AALS is not an accrediting body, it is the main professional organization for law schools. The AALS counts 179 of America’s 200 or so law schools as members and states that its mission is “to uphold and advance excellence in legal education,” and that it “promotes the core values of excellence in teaching and scholarship, academic freedom, and diversity, including diversity of backgrounds and viewpoints.”\textsuperscript{23} The AALS has bylaws that it encourages member schools to meet,\textsuperscript{24} and it participates in ABA site visits by designating one team member as the AALS representative.\textsuperscript{25} In addition to any ABA duties, that team member evaluates whether the law school is measuring up to the AALS “core values” in its teaching, scholarship, and service.

Both of these organizations say that they place a high value on equality and diversity. ABA Standard 205(b) provides that “[a] law school shall foster and maintain equality of opportunity for students, faculty, and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability.”\textsuperscript{26} Standard 206(b) goes even further, requiring law schools to demonstrate by “concrete action [their]
commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity."  

Similarly, the AALS Bylaws provide, in a section entitled "Diversity: Nondiscrimination and Affirmative Action," that "[a] member school shall provide equality of opportunity in legal education for all persons, including faculty and employees[,] with respect to hiring, continuation, promotion and tenure."  

The ABA Standards also require that law schools protect the academic freedom of their faculties. Likewise, the AALS Bylaws specify that it expects its members to "value" academic freedom. Of course, virtually every university includes academic freedom in its faculty rules or policies.

And yet, when it comes to academic freedom and equality of opportunity, some faculty are more equal than others. At most law schools in the United States, full-time legal writing faculty are excluded from many of the rights and privileges accorded to full-time faculty who teach contracts, constitutional law, torts, or other subjects. They are usually excluded from the tenure track, employed on some other kind of contract that may have to be individually negotiated. Likewise, they may have no voting rights or, at best, limited rights. They may not be expected to produce scholarship; if they are allowed to do so, they may not be eligible for scholarship support, such as summer grants or money to pay

27. Id. § 206(b), at 12.  
28. ASS’N OF AM. L. SCHS., supra note 24, § 6-3(a), at 59.  
30. ASS’N OF AM. L. SCHS., supra note 24, § 6-1(b)(2), at 58 ("The Association values and expects its member schools to value . . . scholarship, academic freedom, and diversity of viewpoints.").  
31. See, e.g., Georgetown University Faculty Handbook, Geo. U. 1 (Aug. 14, 2015, 1:20 PM), https://georgetown.app.box.com/s/tnko6e76d6yp1xsdrie6wntea78xl5ol ("To . . . fulfill the University’s mission, faculty must be guaranteed the academic freedom and the resources enabling them to shape the character and intellect of our students, to break new ground in research, and to render service of the greatest value to the public as well as the University.").  
32. The allusion, of course, is to GEORGE ORWELL, ANIMAL FARM 78 ("All animals are equal but some animals are more equal than others.").  
34. Id. at 83 (reporting that forty law schools deny voting rights to legal writing faculty, and that ten of these schools deny legal writing faculty the right to attend faculty meetings; seventy-nine schools provide limited voting rights).
student research assistants. Finally, as will be discussed in the next Part, even if they are on a tenure track or in some other employment situation that allows or expects publication, they may be actively discouraged from producing scholarship related to the field of legal writing, as defined by whoever is doing the judging.

The current Standards and Bylaws, and the ways in which they are implemented, contradict the principles that the ABA and the AALS say that they stand for. Further, when it comes to legal writing faculty, these standards have resulted in a “pink and white ghetto” that inhibits effective teaching, particularly as it relates to faculty diversity.

A. Important Courses, Unimportant Faculty: Legal Writing and ABA Standards

The vast majority of legal writing faculty are not in tenure-level jobs. In the 2014 annual survey of legal writing faculty, sponsored by the Association of Legal Writing Directors (“ALWD”) and the Legal Writing Institute (“LWI”), only ten percent of respondent law schools reported that their legal writing courses were taught exclusively by tenure-track faculty; eighty-two percent of the respondents reported that some or all of their legal writing faculty were on some sort of long- or short-term contract. In some ways, it is surprising that any legal writing faculty have been granted traditional tenure. For despite their supposed support for equality and academic freedom, the ABA and the AALS are, respectively, openly hostile and virtually silent as to the status of legal writing faculty.

The ABA sends conflicting messages about the importance of legal writing, valuing the teaching of legal writing much more highly than it values its teachers. The effective teaching of legal writing is apparently vital in law school, for “rigorous” legal writing teaching is required both in the first year and beyond the first year. Further, legal writing has been singled out in the recent revisions to Standard 302 that require law schools to articulate learning outcomes. For the most part, law schools are given only general guidance as to what subject areas to provide outcomes for; Standard 302(a) says, somewhat generally, that a law school must have learning outcomes that include “competency” in “[k]nowledge

35. Id. at 78, 106 (reporting at least forty-five schools whose legal writing faculty are ineligible for summer research grants).

36. These two organizations are the two major organizations providing professional development for legal writing faculty.

37. ALWD/LWI 2014 SURVEY, supra note 33, at 5–6.


39. Id. § 302, at 15.
and understanding of substantive and procedural law.” Standard 302(b), however, specifies that law schools must articulate learning outcomes for the pillars of the legal writing course: “[l]egal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context.”

The ABA also gives legal writing special attention when it comes to academic rigor. Standard 301(a) requires that “a law school shall maintain a rigorous program of legal education.” Further, Standard 303(a)(2) provides that law schools must provide “one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised.” The faculty who are supervising these “experiences” have a lot to do. The “rigor” of a writing experience, unlike the rest of the “rigorous” curriculum, is closely defined by the ABA. Although “one writing experience” seems to indicate that a single draft of a single assignment might fill the bill, Interpretation 303-2 says otherwise: “Factors to be considered in evaluating the rigor of a writing experience include the number and nature of writing projects assigned to students, the form and extent of individualized assessment of a student’s written products, and the number of drafts that a student must produce for any writing experience.” Thus, it appears that by writing “experience,” the ABA has something quite specific in mind. The faculty member must design an “experience” that includes a “number of drafts” and “individualized assessment.” And, of course, each law student must be provided a second, upper-level, faculty-supervised writing “experience” that also includes a “number of drafts” and “individualized assessment.”

No other subject area gets this much specific guidance in the Standards, nor is any other subject required to be taught in the first year and in the upper level. So the ABA says that teaching legal

40. Id. § 302(a).
41. Id. § 302(b).
42. Id. § 301(a). The word “rigorous” was originally applied only to legal writing, see Chestek, supra note 16, but in a recent revision, the word was eliminated in the legal writing standard and applied to the entire program of legal education in Standard 301(a). ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. 2015–2016, § 301(a), at 15. The term is not defined in the Standards or Interpretations except as it relates to legal writing; Interpretation 303-2 describes how to evaluate the rigor of a legal writing experience. Id. at 17.
44. See supra note 42.
46. I do not mean to imply that the Standards don’t require a thorough legal education; however, the Standards allow the schools to determine what to
writing is important. Surprisingly, however, the people who teach it are apparently far less important.

The ABA Standards spell out exactly how law schools can discriminate against those who teach legal writing. ABA Standard 405(b) requires, somewhat vaguely, that law schools must have an "announced policy" regarding academic freedom and tenure, and identifies a sample policy, which is attached in the first appendix to the Standards and is described as "an example [that] is not obligatory."47 That sample statement on academic freedom notes that its text "follows the '1940 Statement of Principles on Academic Freedom and Tenure' of the American Association of University Professors."48

The American Association of University Professors' ("AAUP") statement provides that after a probationary period that should not exceed seven years after "appointment to the rank of full-time instructor or a higher rank," teachers "should have permanent or continuous tenure," with termination allowed only "for adequate cause," age, or for "extraordinary ... financial exigencies."49 In a footnote defining "full-time instructor," the AAUP notes that "[t]he concept of 'rank of full-time instructor or a higher rank' is intended to include any person who teaches a full-time load regardless of the teacher's specific title."50 Thus, the ABA citation to the AAUP standards seems to indicate that it endorses access to tenure for all full-time faculty, regardless of title or subject area. The ABA has, unfortunately, contradicted that implicit endorsement.

In practice, Standard 405(b) has been understood to mean that all or most full-time faculty should be eligible for tenure. The ABA teach with very few exceptions. The Standards provide that schools must teach a two-credit course in professional responsibility. Id. § 303(a)(1), at 16. They imply that law schools should teach civil and/or criminal procedure. Id. § 303-2(a), at 15 (requiring that learning outcomes include "[k]nowledge and understanding of substantive and procedural law" (emphasis added)). Further, the Standards have for several years encouraged clinical teaching. Id. § 303(a)(3), (b)(1), at 16 (requiring that law schools provide "substantial opportunities" for "law clinics or field placement(s)"). For further discussion on first year requirements, see Melissa H. Weresh, Fostering A Respect for Our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum, 21 TOURO L. REV. 427, 434 (2005) ("Standard 302(a)(1) undoubtedly requires some baseline of standard 1L classes, traditionally including a generous dose of Torts, Contracts and Property; however, the only explicit designation is that for legal writing.").

47. ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. 2015–2016 § 405(b), at 29.
48. Id. app. at 189.
50. Id. at 6 n.5.
has signaled agreement with that understanding by specifying which faculty are not required to be made eligible for that status. Standard 405(c) provides that a law school may award "clinical faculty members" a status that is "reasonably similar to tenure."51 Interpretation 405-6 defines "reasonably similar to tenure" as a series of long-term contracts of at least five years in duration that are "presumptively renewable or [that have some] other arrangement sufficient to ensure academic freedom."52 Neither the Standards nor the interpretations define what kind of "other arrangements" might be sufficient to ensure academic freedom.

Legal writing faculty fare even worse under the ABA Standards. Standard 405(d) provides that:

[a] law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 303(a)(2), and (2) safeguard academic freedom.53

This language creates a catch-22 for legal writing faculty who seek to improve status conditions at their own school. Unless they wish to prove a loss of academic freedom (a difficult task), they must either leave their jobs (to show that the job conditions were not sufficient to "retain" them), or argue that they themselves are not "well qualified" in legal writing instruction.

Surprisingly, the AALS has tacitly endorsed this unequal treatment. As with the ABA Standards, the AALS Bylaws single out legal writing as a subject area that is necessary to the law school curriculum. Section 6-7 of the AALS Bylaws provides general guidance on the importance of having a good law school curriculum; the only subject area mentioned by name, however, is legal writing: "[a] member school shall offer courses in a wide variety of fields often enough to afford students a meaningful opportunity for study and shall assure that every student receives significant instruction in legal writing and research."54

And other provisions seem to indicate that legal writing faculty should be treated as equals. The AALS does not merely recommend the AAUP statement on academic freedom. Bylaw Section 6-6(d) provides: "A faculty member shall have academic freedom and tenure in accordance with the principles of the American Association

51. ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. 2015–2016 § 405(c), at 29.
52. Id. § 405-6, at 29–30.
53. Id. § 405(d), at 29.
54. ASS'N OF AM. L. SCHS., supra note 24, § 6-7(d), at 62.
of University Professors.” As noted above, the AAUP does not make distinctions among types of full-time faculty. Likewise, at first glance, the AALS Bylaws do not seem to distinguish between full-time legal writing faculty and full-time faculty who teach other subjects.

AALS Bylaw Section 6-1, which articulates AALS “core values,” provides that

> the Association values and expects its member schools to value: (i) a faculty composed primarily of full-time teachers/scholars who constitute a self-governing intellectual community engaged in the creation and dissemination of knowledge about law, legal processes, and legal systems, and who are devoted to fostering justice and public service in the legal community.

Section 6-4(a) defines “full-time faculty member” as meaning “a faculty member who devotes substantially the entire time to the responsibilities of teacher, scholar, and educator.” Section 4.2 of the Executive Committee Regulations, however, notes:

> For purposes of this chapter [governing academic freedom and tenure], ‘faculty member’ means a professional who is or was tenured, on the tenure track, or, although not on the tenure track, engaged in teaching or scholarship, including work in a clinical or research and writing program at a member school.

Thus, the AALS Bylaws not only indicate that legal writing faculty should have the protections of tenure, but also simultaneously hollow out this mandate by recognizing that clinical and legal writing faculty are possibly “not on the tenure track.”

To sum up, the language of the AALS Bylaws and Regulations indicates that full-time legal writing faculty of all statuses are included in its definition of full-time faculty, and that therefore full-time legal writing faculty “shall” have academic freedom and tenure. According to the AALS Bylaws, then, law schools are not in compliance with AALS standards if they hire full-time faculty who do not have permanent or continuous tenure after the expiration of a probationary period. These faculty should be able to be terminated only for adequate cause, age, or for extraordinary financial exigencies. Yet I know of no record of any instance in which the AALS has denied or rescinded membership of a law school due to the lack of tenure for its legal writing faculty or even after

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55. Id. § 6-6(d), at 61 (emphasis added).
56. Id. § 6-1(b)(i), at 58.
57. Id. § 6-4(a), at 59.
58. ASS’N OF AM. L. SCHS., Executive Committee Regulations, supra note 25, § 4.2, at 79.
legal writing faculty have been terminated without cause. This is not to say that anyone has challenged AALS membership on this basis; rather, the AALS, like the ABA, has demonstrated a remarkable lack of curiosity about the treatment of legal writing faculty.

B. Demographics of Legal Writing Faculty: A Pink and White Ghetto

The demographics of legal writing faculty have been profoundly affected by the ABA and AALS standards and the way in which they have been applied. Legal writing is a "pink ghetto"; perhaps more significantly, it is also almost entirely white. For almost twenty years, ALWD and the LWI have collaborated on a survey that usually has a response rate of over 90% of accredited law schools. Tellingly, for the last five years, the ALWD/LWI survey has reported nearly the same statistics about the demographics of legal writing faculty: full time legal writing faculty are about 72% female and only 28% male. During that same time period, about 87.9% of full-time legal writing faculty were identified as "Caucasian." By contrast, an AALS survey reported that only 72% of full-time faculty were identified as white in 2009, the last year for which data is available. More recent ABA statistics identify 20% of law faculty as nonwhite.

59. See, e.g., Peter Brandon Bayer, A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics, 39 DUQ. L. REV. 329, 329 (2001) ("I was understandably dumbfounded when, on April 7, 2000, the Dean (of one year) summoned me and two other writing professors into his office to announce bluntly that he had unilaterally decided to overhaul the legal writing program and that our contracts would not be renewed.").

60. E.g., Jo Anne Durako, Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing, 50 J. LEGAL EDUC. 562, 563 (2000) ("The 1996 Report of the American Bar Association's Commission on Women in the Profession urged law schools to 'maintain employment environments that are free of both actionable discrimination and subtle barriers to equal opportunity that operate to create a "pink ghetto" for women faculty.'" (quoting COMM'N ON WOMEN IN THE PROFESSION, AM. BAR ASS'N, ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION 4 (1996))).

61. ALWD/LWI 2014 SURVEY, supra note 33, at 68 tbl.71(b).

62. Id. A note accompanying the data admits that five percent fewer schools reported the racial makeup of their legal writing faculties, but says that "[o]ne thing is clear: the profession has been and continues to be overwhelmingly Caucasian, regardless of the racial classifications in the missing data." Id.


64. Lucille A. Jewel, Oil and Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies, 31 COLUM. J. GENDER & L. 111, 119
Many scholars have addressed the issue of legal writing as "women's work." The disparate percentages of women in these low-paying, low-status jobs is a problem by its mere existence; res ipsa loquitur. It cannot be true that women are attracted to legal writing because women like lower-paying jobs. Nor does legal writing accommodate traditional gender roles by allowing women more "flexibility" to fulfill home duties; if anything, legal writing's high number of student-contact hours makes teaching legal writing a less flexible job than teaching contracts or torts. Women are more likely to teach legal writing for the myriad reasons that women always dominate the lower-paying, lower-prestige positions in any field, for the same reasons that higher-prestige positions in any field become lower-prestige positions if "too many" women occupy them. As Richard Neumann observed in 2000, "as soon as [legal writing] became large enough to be considered an underclass, it was stereotyped as female—a situation that continues to this day."
Perhaps it is a chicken-and-egg question to ask whether more women end up in fields with less prestige, or whether fields have less prestige because more women are in them. The “repeatedly validated” Implicit Association Test has consistently reflected that “most people harbor unconscious biases in a variety of areas, including race, gender, and disability.” Yet somehow, law deans seem to presume that they are immune from this bias, implying that it is merely a coincidence that an ABA-required course taught primarily by female faculty is also the course with the least prestige.

To base the lack of prestige on the substance of the course is not accurate. As Deborah Merritt noted in a recent blog post, skills faculty teach “the heart” of lawyering; Professor Merritt questions the attitude of doctrinal law faculty who “persist in thinking that legal writing and clinical professors do work that is less intellectually challenging or valuable.” One criticism of legal writing has been that it is “just” grammar, which is at best imprecise. Legal writing is not focused on grammar any more than tax law is focused on math. The prestige of courses is often an arbitrary matter of luck and power.

Legal writing should not necessarily have more prestige than other courses; however, it is contrary to reason that a mandatory course deemed vital by the bench and bar should have less prestige. The titles of articles that address these issues reveal a growing awareness of the problem, and a growing realization that the problem is not going away. In 1997, Maureen Arrigo noted that “in the culture of the law school, many doctrinal [law] faculty view teaching legal writing as beneath their dignity—in a sense, degrading,” in her article entitled *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*. In 2001, Kathryn Stanchi and Jan Levine expressed their astonishment that they found more sexism in legal education than they had found in law practice in their article entitled *Gender and Legal Writing: Law*.


74. Mary Beth Beazley, “*Riddikulus*!": Tenure-Track Legal-Writing Faculty and the Boggart in the Wardrobe,” *Scribes J. LEGAL WRITING* 79, 81 (2000).

And in 2015, the introduction to a symposium on discrimination in legal education titled *The More Things Change . . .: Exploring Solutions to Persisting Discrimination in Legal Academia*, Professor Melissa Hart observes that “[s]kills teachers tend to be paid less, have less job security, and have lower status within their institutions. Given that women are over-represented in skills teaching positions and under-represented among tenured and tenure-track faculty, this two-track system significantly exacerbates gender inequality in law schools.”

The segregation of legal writing positions as undervalued “women’s work” does more than hurt the careers of the women and men who take those positions. First, when we undervalue any position, we lose the contributions of those who decide not to join the field because of its low value and of those who enter the field but who leave because they cannot afford the financial or psychological costs. Second, and perhaps most importantly, we discourage people of color from entering or staying in the field.

With the current status situation, it is not surprising that faculty of color avoid legal writing positions; one imagines that such discrimination would be particularly off-putting for these faculty. Professor Teri McMurtry-Chubb has argued:

> [L]egal writing occupies a marginalized space within the legal academy. Professors of color, particularly women of color, already occupy a marginalized space within the academy. The convergence of both marginalizations makes the field of legal writing, in its current configuration, bad ground for women of color to “invest their resources of education, intelligence, time and talents so as to produce a fruitful yield.”

Professor Lorraine K. Bannai discusses women of color who teach legal writing, describing them appropriately as “challenged times three.” She notes that women of color in legal writing face particularly daunting challenges:

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76. Stanchi & Levine, *supra* note 15, at 4 (“[D]isparate treatment of faculty based on gender is most obvious in law schools when one looks at the faculty teaching legal writing, which is the fundamental skill most important to the training of future lawyers and judges.”).

77. Melissa Hart, *The More Things Change . . .: Exploring Solutions to Persisting Discrimination in Legal Academia*, 31 COLUM. J. GENDER & L. 1, 2 (2015) (I note that Professor Hart is *not* a legal writing faculty member); see also Kristen K. Tiscione & Amy Vorenberg, *Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty*, 31 COLUM. J. GENDER & L. 47, 49 (2015) (“[T]he perception that teaching legal research and writing is unintellectual ‘women’s work’ continues as part of the social fabric of law schools.” (footnote omitted)).

I...know (1) that untenured women of color who teach Legal Writing face additional challenges because of their lower status in the academic hierarchy; (2) that those additional challenges are often invisible to, or ignored by, others, even those who might be allies on issues of race and gender; and (3) that their lack of status can demean and silence them, as well as prevent their institutions from benefiting from all they can contribute as scholars, teachers, and colleagues.79

Professor Lucy Jewel has argued that faculty of color “are making the rational decision to reject skills teaching jobs in favor of tenure-line positions. Being familiar with second-class treatment, there is little incentive for a teacher of color to experience further unequal treatment within a law school.”80 Professor Jewel also addresses issues of class, in addition to race and sex, and argues that the “[skills/doctrine] dichotomy...reinforces harmful race, class, and gender hierarchies in the legal academy and...produces an elitist knowledge hierarchy that prevents students from obtaining a holistic legal education.”81

Racial diversity is important for every subject area, but it may be even more important in legal writing. Recognizing faculty of color as excellent legal writers (through their roles as legal writing faculty) can provide disconfirming evidence against any bias about the writing skills of lawyers of color; this technique will be counter-effective, however, if these faculty have lower status.82 Further, legal writing faculty of color can bring the usual benefits of diversity to the legal writing curriculum. Several years ago, I attended a meeting of a newly formed diversity committee within one of the major legal writing organizations. I expected the discussion to focus on status and how it created entry barriers to faculty of color. Instead, the committee—dominated by legal writing faculty of color—began to discuss how to address legal writing issues relevant to our students of color. I was abashed that I had not anticipated that this idea would be on the agenda, but the meeting served to reinforce to me the benefits of diversity in every subject area.

As Professor McMurtry-Chubb has argued, the close instruction that legal research and writing (“LRW”) faculty provide makes it

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80. Jewel, supra note 64, at 122.
81. Id. at 112.
82. See, e.g., Arin N. Reeves, Yellow Paper Series: Written in Black and White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills, NEXTIONS (2014), http://www.nextions.com/wp-content/files-mf/144682647201404114WritteninBlackandWhiteYPS.pdf (building on a finding in a previous study that “supervising lawyers are more likely than not to perceive African American lawyers as having subpar writing skills as compared to their Caucasian counterparts”).
even more important that these positions are staffed by a diverse faculty of equal status:

If LRW programs continue to be structured in a manner that makes them the less desirable choice in the academy for people of color, students will lose access to these diverse perspectives—these different ways of knowing and experiencing the world. Without knowledge of these experiences, students will absorb the process by which legal institutions protect white privilege and power without consciousness of this process as such.83

Professor McMurtry-Chubb also observes that “[t]he absence of people of color from LRW also imposes unique harms on law students,” because without faculty of color in this important course, “the process of teaching students how to ‘think like lawyers’ within... a structure already historically organized around the analytical processes of elite white male judges, leads directly to the replication of a racist and elitist legal structure.”84

In summary, the ABA Standards require law schools to take “concrete steps” to promote gender and racial equality. The ABA also requires that legal writing be taught in the first year and again after the first year. It has recently updated the Standards in ways that will incorporate at every law school educational theories and practices pioneered in legal education by many legal writing faculty. And yet, this same set of standards also spells out exactly how law schools can provide substandard jobs to legal writing faculty, resulting in a faculty underclass that is mostly white and mostly women.

The AALS is complacent about this treatment and is therefore complicit. The AALS requires that its member law schools have tenure policies consistent with the AAUP’s statement on academic freedom and tenure.85 That statement indicates that all full-time faculty—regardless of their titles—should be eligible for tenure after a probationary period.86 The AALS’s own Bylaws indicate that legal writing faculty are “full-time” faculty.87 Yet when the AALS participates in site visits, it makes no special effort to determine whether legal writing faculty are equal members of their faculties or are required or encouraged to be “teachers/scholars,” and it keeps as

83. McMurtry-Chubb, supra note 78, at 55.
84. Id. at 54.
85. ASS’N OF AM. L. SCHS., supra note 24, § 6-6(d).
86. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, supra note 49.
87. See supra notes 54–55 and accompanying text.
members law schools who discriminate against legal writing faculty.88

If the ABA truly values legal education and wishes to reform it, then the ABA must value all faculty. The proposed reforms all relate to skills teaching; they will be ineffective if legal writing faculty and other skills faculty do not have equal status. Faculty who are not eligible for tenure are not full participants on the faculty committees and in the faculty meetings where curricular decisions are hammered out. They may hesitate to speak up, feeling that their status brands them as "inferior" to the Brahmins; even if they do speak up, their lack of equal power inhibits their ability to push curricular changes. Further, even those legal writing faculty who have voting rights are often not allowed to vote on the hiring decisions that have a significant impact on a law school's curriculum.89

If the ABA wants to change the status quo in legal education, it must change the status quo for legal educators. If the ABA Standards regulating status remain unchanged, faculties will resist curricular reform, or isolate it within courses taught by low-caste faculty, retaining the Brahmins' "right" to do things the old way. For reformers to achieve their full goals, they must equalize power on law faculties by equalizing status.

II. FORMAL AND INFORMAL BARRIERS TO ACADEMIC FREEDOM FOR LEGAL WRITING FACULTY

When I counsel younger legal writing faculty who have one of the rare tenure-level positions, one of the first questions I ask is, "Are you allowed to write about legal writing?" Many legal writing faculty have been told explicitly that they should not write about legal writing,90 or that they should wait until after tenure to do so.

88. See supra notes 58–64 and accompanying text. To be fair, if the AALS were to ban all law schools that discriminate against legal writing faculty, its membership would be small indeed.

89. See, e.g., Susan P. Liemer, The Hierarchy of Law School Faculty Meetings: Who Votes?, 73 UMKC L. Rev. 351, 365–66 (2004) ("The faculty are the people who ought to decide educational matters—from the setting of the curriculum to the hiring and tenuring of professors—because they have the disciplinary training and knowledge to make informed decisions in those areas." (quoting Joan Wallach Scott, The Critical State of Shared Governance, ACADEME, July–Aug. 2002, at 41, 42)).

90. See, e.g., Jan M. Levine & Kathryn M. Stanchi, Women, Writing & Wages: Breaking the Last Taboo, 7 WM. & MARY J. WOMEN & L. 551, 559 (2001) (noting that many legal writing faculty "were not even permitted to produce articles about legal writing in their quest for tenure" (citing Jan M. Levine, Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs, 45 J. LEGAL EDUC. 530, 541 (1995) (describing the bias against legal writing scholarship as a "self-fulfilling prophecy").)
Others have been given broad hints; they do not need to be told twice. While my faculty granted me tenure based on legal writing scholarship, not all legal writing faculty are so fortunate. A study conducted in 2005 revealed that seventy-five percent of scholarship produced by legal writing faculty was focused on nonlegal writing topics.

Certainly, some legal writing faculty have scholarly interests other than legal writing, just as some torts professors have scholarly interests other than torts. When legal writing faculty are discouraged from writing in their teaching area, though, the field suffers in at least two ways. First, legal writing is a young field; it needs substantive scholarship to help increase and generate knowledge about the theory and practice of legal writing, and the ways in which each impact legal education, law, and public policy. Second, legal writing faculty who are told not to write about legal writing learn that the field is not respected or secure, and they are discouraged from continuing to teach in the field. When young scholars leave legal writing for more secure or more respected positions, legal writing loses expertise that is crucial to our law students, and thus to the future of the legal profession.

The roots of the bias against legal writing scholarship are hard to trace, but bias may have resulted from the reality that some early legal writing scholarship was focused on pedagogy or, to be more precise, on andragogy (adult learning theory). For many years, legal writing faculty did not stay on the job long enough to even consider writing: many jobs had two-year caps that forced faculty to

91. Even among my own faculty, it was not a universal attitude. When I relied on an appellate advocacy textbook as a tenure piece, one faculty member (now retired) suggested that no book about how to write an appellate brief could be considered scholarship and agreed that it would be better if I got future topics approved in advance. Interestingly, several years later when I relied on articles about ballot design and government communication as promotion pieces, one of my faculty advocates worried that some would think those articles were not focused enough on legal writing. These articles had grown directly out of legal writing teaching and scholarship; fortunately, their focus was apparently not an issue, and I was promoted.

92. Terrill Pollman & Linda H. Edwards, Scholarship by Legal Writing Professors: New Voices in the Legal Academy, 11 LEGAL WRITING 3, 10 (2005) ("Approximately 75% of the law review articles legal writing professors have published are about topics in areas other than legal writing, while only approximately 25% are about legal writing topics. Even using the broad definition of legal writing scholarship described below, most of what legal writing professors have published in the traditional venues for legal scholarship is outside the field.” (footnote omitted)).

93. See, e.g., Anthony S. Niedwiecki, Lawyers and Learning: A Metacognitive Approach to Legal Education, 13 WIDENER L. REV. 33, 47 n.71 (2006) (citing MALCOLM KNOWLES, THE ADULT LEARNER: A NEGLECTED SPECIES 54 (4th ed. 1998) ("The concept of andragogy is defined as the 'art and science of helping adults learn,' and was meant to be an alternative to pedagogy.").
move on just when they were getting their feet under them. As Michael Smith observes, “Until an academic subject is professionalized, that is, until an academic subject is undertaken by people with the experience, time, and resources to explore its intellectual boundaries, the growth of its doctrine will be slow.”

The caps on legal writing teaching, of course, signaled a widely-held attitude that expertise was not needed to teach legal writing, that we were just cleaning up the punctuation of the fully-realized thoughts that students had formed in their other courses. As Dean Erwin Chemerinsky observed in 2009, casebook faculty “assume” that full-time faculty are needed to teach “contracts and constitutional law,” and this assumption “would seem even more warranted for teaching of skills.”

As the caps disappeared and faculty stayed longer in legal writing positions, they discovered that they were teaching thinking, not grammar, and that their new field needed a scholarly foundation. That need is true of many new fields, but the subject matter in many of those fields can be taught with established teaching methods. Legal writing was different. New legal writing faculty, many of whom had never taken a real course in the subject themselves, needed to know not only what to teach, but how to teach it. So legal writing faculty wrote short, to-the-point, “how I did it” pieces. These pieces were tremendously useful to faculty around the country struggling with the new legal writing courses, but they did


95. See generally Mary Beth Beazley, Better Writing, Better Thinking: Using Legal Writing Pedagogy in the “Casebook” Classroom (Without Grading Papers), 10 Legal Writing 23, 48 (2004) (describing the discredited “instrumental” theory of writing, which assumes that “all of the thinking takes place before writing begins, and [that] the writer uses the written word merely to record or transcribe those thoughts”); Rideout & Ramsfield, supra note 73, at 42.

96. Chemerinsky, supra note 20, at 39. Dean Chemerinsky discussed an experience at a law school where he had served on the faculty; the faculty was discussing a proposal to replace the students who were teaching legal writing with full-time faculty. Dean Chemerinsky noted that “[m]any faculty members asked for proof that a professor can do a better job of teaching legal writing than law students” can, further noting that faculty just “assum[e]” that professors will do a better job than students at “teaching contracts or constitutional law” and observing that this assumption “would seem even more warranted for teaching of skills.” Id.

97. E.g., Beazley, supra note 95, at 31 (“One reason that Legal Writing faculty have been forced to become pedagogical innovators is that . . . . [m]any of us had graduated from law schools where there was no formal legal writing instruction, or only a student-taught program, and so we did not even have valid notes that we could look back on. . . . [W]e were on our own, and we had to figure it out.” (footnotes omitted)).
not match traditional criteria for "acceptable" scholarship. Legal writing faculties were not doing case analysis in their articles. Their scholarship was more "meta": they were writing about how to teach someone else how to do case analysis.

So, some of the negative attitude against legal writing scholarship may have come from these nontraditional, early days pieces that many legal writing faculty—including myself—wrote. As will be explained below, legal writing scholarship has rapidly evolved; unfortunately, the attitude against it has not.

Legal writing scholars, like feminist scholars and critical race scholars before them, are too often told that their scholarship is not "legitimate," and that we should write about something else. Indeed, just this year, in an article describing methods for moving legal writing faculty to the tenure track, the otherwise sympathetic author suggested that legal writing faculty seeking to move to the tenure track should "publish . . . provocative articles" that would "[i]deally," be focused on subjects relating to legal doctrine, "rather than about teaching or legal writing." On the other hand, I know of at least one legal writing scholar who received tenure on the basis of provocative articles about the status of legal writing faculty, an experience one of his colleagues described as "postmodern."

The push for scholarship is part of the modern era in legal education, which began when Christopher Columbus Langdell instituted a series of changes in how law is taught and how law schools are structured. The Langdellian movement sought to distance legal education from the trade school model and align it

98. E.g., Smith, supra note 94, at 24 ("Most torts and constitutional law professors, for example, do not write on how to teach torts or constitutional law. They write about the substance of their respective subjects. . . . Legal writing professionals, by contrast, have tended to write not about the substantive nature of legal writing and legal analysis, but about how to best teach these subjects. This disparity, this deviation from the norm in the legal academy, allows the perception that legal writing lacks enough substance to engage its own scholars.").


102. Conversation with Professor Jan Levine, sometime in the twentieth century. I recount these details from memory, so please forgive any inaccuracies.
with more intellectual scholarly fields. Law study was seen as scientific, theoretical, and scholarly. As a result, law schools began to seek faculty members who were more like the PhD-holding faculties in other departments. Many of these faculty saw (and still see) their main goal as generating knowledge about the theories behind legal doctrine and many spent (and still spend) much of their time teaching their students about legal theory rather than about legal practice. Theory and theoretical knowledge have been prized far above practical knowledge, with some arguing that too much time in practice could hurt one's chances for admission into “the academy.”

The hierarchies in place at most law schools now reflect this bifurcated view. Those faculty who teach theoretical subjects are prized, and they are most likely to hold the highest-paying tenure-track jobs that are the plums of the legal academy. These faculty have ample time for scholarship if they implement the traditional teaching methods in these courses: a series of lecture and discussion classes with only one examination at the end of the semester, or a seminar course focused on an area of scholarly interest.

Legal writing faculty, on the other hand, usually have less time for scholarship due to the high number of student contact hours that their courses require. It is not unusual for a legal writing course


104. E.g., Chemerinsky, supra note 20, at 39. Dean Chemerinsky also discusses faculty colleagues who rejected a proposal to hire clinical faculty by arguing that the “preeminent purpose of the law school” is not “training lawyers” and that the law school is not a “trade school.” Id. at 40.

105. See, e.g., Lisa Eichorn, Writing in the Legal Academy: A Dangerous Supplement?, 40 ARIZ. L. REV. 105, 114–15 (1998); Michael Z. Green, “Just Another Little Black Boy from the South Side of Chicago”: Overcoming Obstacles and Breaking Down Barriers to Improve Diversity in the Law Professoriate, 31 COLUM. J. GENDER & L. 135, 145 (2015) (“[B]ecause I had practiced law for five years by this time, I was informally told there was some concern that I was not committed to full-time doctrinal teaching and might need to pursue the route of clinical or legal writing teaching, given the amount of practice experience I had already obtained.”).

106. E.g., Syverud, supra note 4, at 14.

107. Nevertheless, most law schools also award research money to these faculty in the summer to encourage them to produce the theoretical scholarship that is published in the student-edited law reviews at high-ranked schools. See, e.g., Michael C. Blumm, Tribute, The Bow-Tie Era of Lewis and Clark Law School: Dean Jim Huffman, 1993–2006, 37 ENVTL. L., at v, vi (2007) (“Huffman dramatically expanded summer research grants for faculty as well as research assistant positions for students. The result was an unprecedented outpouring of scholarship . . . .”).

108. See McGinley, supra note 68, at 128–35 (describing the demands of legal writing faculty). And summer does not always provide research time. Clinical faculty may have clients whose cases continued beyond the end of April. Academic support faculty may be providing guidance while graduates
to require five to ten teacher work-hours of individual formative assessment per student, per semester. This individual work comes in the form of individual critiques on student papers, individual conferences, and individual performances and critiques (such as oral arguments). Thus, because a forty-student load is typical for legal writing faculty, each hour of individual assessment is the equivalent of one week of full-time work. Accordingly, depending on course structure and required assignments, a modern legal writing teacher may spend the equivalent of five to ten weeks of the semester just on individual assessment. This time, of course, does not include time spent preparing for classes, time spent teaching, time spent developing problem ideas, time spent preparing to critique, or time spent on other common faculty requirements, such as committee work, letters of recommendation, or, of course, scholarship and service.

The heavy teaching requirements in legal writing create a second catch-22 for legal writing faculty. At many law schools, tenure-level faculty are expected to devote as much as half of their time to scholarship, with the rest to be divided between teaching and service. On the other hand, especially due to the necessary student contact hours previously mentioned, legal writing teaching jobs may require faculty to spend more than half of their time on teaching alone. When law schools use the heavy teaching load as a reason to deny these faculty tenure-level positions (based on their perceived inability to produce “enough” scholarship), they are sending the unspoken message that spending time preparing students to enter legal practice is not as valuable as time spent publishing articles.

study for the bar. All skills faculty who are on nine-month contracts may be seeking remunerative employment for the summer to make up for their lower pay. And these faculty members may not be eligible for summer research money. See ASSOCIATION OF LEGAL WRITING DIRECTORS & LEGAL WRITING INSTITUTE, supra note 33, at 78 tbl.76.

109. See John D. Copeland & John W. Murry, Jr., Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance, 61 Mo. L. REV. 233, 241–43 (1996) (discussing how scholarship is the most important aspect of faculty evaluation and noting that teaching effectiveness is second and public service a distant third).

110. See Adam Todd, Neither Dead nor Dangerous: Postmodernism and the Teaching of Legal Writing, 58 BAYLOR L. REV. 893, 943 (2006) (“Scholarship is the area that many law faculties indicate is important for advancement in the profession and is used to justify a lower status for legal writing professionals in the academy. Paradoxically, legal writing professionals are simultaneously not given institutional support, time, space, and encouragement to perform writing which is so highly valued. It is paradoxical and ironic that those members of the legal academy paid and trained to teach writing are implicitly discouraged from the act of writing.” (footnote omitted)).
Time spent on effective teaching of courses that fulfill ABA
requirements should be considered to be time well spent.
Interestingly, many law schools change teaching and scholarship
expectations for associate deans and other faculty administrators,
recognizing that the workload of an administrator is incompatible
with normal expectations of teaching and scholarship. These
schools implicitly value administrative work as the monetary equal
of scholarly work; apparently, these schools also value time spent on
administrative work as superior to time spent on effective teaching
of courses that fulfill ABA requirements.

The teaching of legal writing is vital to the success of legal
education, and thus of the legal profession.\textsuperscript{111} Skills education is
more likely to be \textit{direct} education; that is, the faculty provide direct
formative feedback to their students. The students perform
lawyering tasks, and the faculty then diagnose specific problems
that each student has. Direct education is contrasted with the
\textit{vicarious} education of the Socratic classroom. The Socratic method
presumes that those not participating in Socratic dialogues will
participate vicariously, silently compare their own thought
processes to the teacher-student conversation, self-diagnose their
problems, and be able to fix those problems.\textsuperscript{112} The direct teaching
that legal writing faculty provide is every bit as valuable to the
academy, and the legal profession, as time spent producing
scholarship.

Legal writing teaching will thrive when its faculty have the
academic freedom to pursue their scholarly interests, as well as
support and incentives to produce scholarship. Most casebook
faculty are spurred to publish by the rewards of promotion and
tenure; they get financial support from their law schools in the form
of high salaries, summer grants, and occasional course load

\textsuperscript{111} A recent survey of over 300 attorneys, commissioned by LexisNexis,
reported that "[a]pproximately two-thirds of litigation attorneys deem Writing
and Drafting Skills to be highly important skills among newer associates, but
particularly when it comes to Drafting Pleadings, Motions, and Discovery
Documents." \textsc{LexisNexis, White Paper: Hiring Partners Reveal New
Attorney Readiness for Real World Practice} 5 (2015),

\textsuperscript{112} Michael Hunter Schwartz, \textit{Teaching Law by Design: How Learning
Theory and Instructional Design Can Inform and Reform Law Teaching}, 38 S.D.
L. REV. 347, 351 (2001) ("Vicarious instruction assumes some sort of rebound
learning effect . . . . [It] presupposes that the nonselected students know to play
along, answering the queries in their heads and learning to think like lawyers
by experiencing vicariously what the speaking student actually experiences.");
see also Linda H. Edwards, \textit{The Trouble with Categories: What Theory Can
Teach Us About the Doctrine-Skills Divide}, 64 J. LEGAL EDUC. 181, 220 (2014)
("The teaching of legal analysis in a large 'doctrinal' classroom is often
haphazard and does not offer sustained, individual practice or individual
accountability for mastery of the skill.").
reductions; they are also allowed to write about the law-related topic of their choice. Legal writing faculty should have the same support and incentives. Admittedly, the high teaching loads may require a different balance between scholarship and teaching, but law schools that have made appropriate adjustments for faculty administrators can certainly do so for legal writing faculty.

In 1995, Jill Ramsfield and Christopher Rideout eloquently described the potential of legal writing scholarship and illustrated the harms caused by limits on that scholarship:

[Legal writing scholars] are scholars of a new discipline. Our work, so carefully cut out for us by our predecessors, continues. . . . We do not yet know the depth of our discipline, nor have we fully articulated its breadth. We own a rare moment in scholarship, a moment of discovery and careful preservation, a moment of intellectual adventure. As we develop our discipline, we can work together to chart its magnificent terrain and preserve its natural beauty.113

There is no reason to think that legal writing faculty will not continue—or increase—their scholarly productivity if given appropriate support for their scholarship. For legal writing scholarship to reach its true potential, however, and for it to provide its true benefits, arbitrary limits on its development must cease, and legal writing faculty must receive the full academic freedom to which they are entitled.

III. THE EVOLUTION OF LEGAL WRITING SCHOLARSHIP AND ITS IMPACT ON LEGAL EDUCATION AND LEGAL PRACTICE

Thankfully, many legal writing faculty have ignored the conventional wisdom and have chosen to write about pedagogy, about legal writing, or about legal writing pedagogy. They have done so for a variety of reasons, from having a supportive faculty, to not being “limited” by the possibility of a tenure vote, to not giving a damn.114 Whatever the motivation, much legal writing scholarship has helped to lay the foundation for the vibrant teaching of legal writing that is going on in law schools today. Further, many of


114. See, e.g., Beazley, supra note 95, at 36–37. In that article, I note that the intrinsic reward of legal writing scholarship for overburdened legal writing faculty who “grew hungry not just for sleep, but for knowledge about useful pedagogy . . . was the joy of having a more successful semester, of seeing our students’ writing improve, of having better papers to read on those long nights. We published not to meet tenure requirements, but because we wanted to share our triumphs with others who we knew were in the same boat.” Id.
these same articles have also laid a foundation for the new ABA Standards. Finally, and perhaps most importantly, legal writing scholars are fulfilling a role common to all kinds of scholars: they are following circuitous routes and developing new paths to knowledge, knowledge that will affect not only legal education but also legal practice and legal policy. As Kent Syverud observed in 2004, "The scholarship of legal writing and the theory of legal writing have . . . come a long way indeed."

The full-time faculty who have been teaching legal writing over the past thirty-five years have contributed greatly to its development, starting with the "how to" pedagogy pieces described above and moving to theoretical and doctrinal scholarship about legal writing, exploring its substance and broadening its horizons.

One of the first legal writing faculty to articulate the theoretical foundations of legal writing scholarship was Teresa Godwin Phelps, in her 1986 article, *The New Legal Rhetoric*. In that piece, Professor Phelps argued, somewhat radically for the time, that "[w]riting is a disciplined creative activity that can be analyzed and described; writing can be taught." In 1999, Professor Linda Berger continued the exploration of New Legal Rhetoric, arguing that "New Rhetoric promises teachers and students a powerful alternative for embarking on legal discourse, a disorienting and open-ended back-and-forth exploration that can help law students develop the habits of mature legal readers and writers."

This Essay is far too short to provide a complete history of the evolution of legal writing scholarship. Thankfully, others have done so. In 2004, Michael Smith analyzed several different types of existing and emerging legal writing scholarship. Professor Smith identified five subcategories of legal writing scholarship: Scholarship on Program Design and the Administration of Legal Writing Programs; on Legal Writing Pedagogy; on Legal Writing as a Profession; on Legal Writing Scholarship; and, finally, on the Substance of Legal Writing. His article focused on this fifth type, noting that one of its benefits was that its audience reached beyond

115. Kent Syverud, *Better Writing, Better Thinking: Concluding Thoughts*, 10 LEGAL WRITING 83, 84 (2004) ("[E]arly in my career, the notion that there was a theory underlying my work in teaching writing was not just ‘invisible,’ it was unthinkable.").


117. Id. at 1096 (emphasis omitted).


120. Id. at 5–8.
legal writing faculty to include "all people who engage in legal writing as part of their profession such as lawyers, judges, law students, and legal scholars." \(^1\)\(^2\)\(^1\)

In 2005, Linda Edwards and Terrill Pollman compiled a comprehensive bibliography of scholarship by legal writing faculty to accompany their article analyzing the boundaries—and vistas—of legal writing scholarship. \(^1\)\(^2\)\(^2\) They identified four categories of "appropriate" topics for legal writing scholarship: "[L]egal writing topics include those related to (1) the substance or doctrine legal writing professors teach; (2) the theories underlying that substance; (3) the pedagogy used to teach that substance; and (4) the institutional choices that affect that teaching." \(^1\)\(^2\)\(^3\) Five years later, Pollman and Edwards joined with Professor Berger to explore new trends in legal writing scholarship and to recommend a focus on rhetoric, broadly defined, noting that "[t]he study and practice of 'law as rhetoric' is a thread that can run through the fabric of a professional life, weaving together the legal writing professor's work in scholarship, teaching, and professional service." \(^1\)\(^2\)\(^4\)

Like many other areas of intellectual inquiry, legal writing scholarship is interdisciplinary, drawing insights from a host of other fields. Legal writing scholars have explored the relationships between legal writing and cognitive sciences, \(^1\)\(^2\)\(^5\) behavioral economics, \(^1\)\(^2\)\(^6\) document design, \(^1\)\(^2\)\(^7\) and universal design. \(^1\)\(^2\)\(^8\) As Professors Berger, Edwards, and Pollman have observed, articles

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121. Id. at 8.
122. Pollman & Edwards, supra note 92, at 59–212 (listing a "selected" bibliography of works by legal writing faculty).
123. Id. at 19.
126. See, e.g., Mary Beth Beazley, Ballot Design as Fail-Safe: An Ounce of Rotation Is Worth a Pound of Litigation, 12 ELECTION L.J. 18, 29 (2013) ("[B]ehavioral economics also offers new justifications for changing ballot ordering laws.").
128. See, e.g., Jennifer Jolly-Ryan, Bridging the Law School Learning Gap Through Universal Design, 28 TOURO L. REV. 1393, 1396 (2012) ("The result of Universal Design of instruction in the law school classroom will be a better learning environment for all students and an energized, creative professor who adds new dimensions to teaching the law.").
about the teaching of legal writing can "draw not only on composition and literary theory but also on linguistics, classical and contemporary rhetoric, and critical theory, including feminist theory."¹²⁹ Both legal writing theory and pedagogy theory benefit from the insights of psychology. Robin Wellford-Slocum has observed that psychology helps us understand "how people think, learn, communicate, solve problems, and interact with one another."¹³⁰ That field of study is of obvious interest to legal writing faculty, whose scholarship advances the understanding of how best to teach this new subject, and of how lawyers should use legal writing to communicate with judges, opposing counsel, and their clients in a way that would help these various audiences learn, solve problems, and interact with one another.

Of course, like all areas of intellectual inquiry, legal writing scholarship is not moving in a linear way, and it would be illogical to chart only one path for its development. Two areas of growth, however, are particularly noteworthy in the context of the future of legal writing faculty and their scholarship. First, pedagogy-focused legal writing scholarship has traced—and led—the recent reforms in legal education. (Thus, it is particularly ironic that the ABA reforms leave legal writing faculty in their low-caste status, even as the Standards enshrine many teaching methods developed and championed by legal writing scholars.) Second, current legal writing scholarship is building on its pedagogical foundations to reach out into areas relevant to legal practice and legal policy. When law schools discourage legal writing scholarship, they limit the development of knowledge about legal education, legal practice, and legal policy.

A. How Legal Writing Scholarship Has Provided an Infrastructure for Legal Education Reform¹³¹

Legal writing scholarship that explores how law students learn about legal writing also reveals how law students learn in every other course in the law school. Legal writing faculty are teaching "thinking in concrete,"¹³² so scholarship about how to improve that

¹³¹. This Subpart cites numerous pedagogy articles; to the best of this author's knowledge, the authors of these pieces (or at least one of the authors, for coauthored pieces) are legal writing faculty or were teaching legal writing at the time the cited article was published.
¹³². See Susan L. DeJarnatt, In re MacCrate: Using Consumer Bankruptcy as a Context for Learning in Advanced Legal Writing, 50 J. LEGAL EDUC. 50, 53 (2000) ("As Joseph Kimble succinctly and eloquently has said, 'W'riting is
teaching generates knowledge about how any law professor can help law students learn how to think like lawyers.

Legal writing scholarship is particularly relevant to the recent reforms in legal education. As noted at the outset of this Essay, the ABA has recently amended its standards for legal education to require law schools to articulate outcomes, to include experiential learning, and to include formative assessment. Legal writing scholars have written significant pieces in step with, or ahead of, the reforms in each of these areas.

In the area of outcomes, Susan Hanley Duncan has written one of the more widely cited articles addressing the potential impact of outcome measures being added to legal education standards. She noted the emphasis on learning outcomes in two watershed books, *Educating Lawyers* (also known as the "Carnegie Report") and *Best Practices for Legal Education*, both published in 2007. That same year, of course, legal writing faculty member Susan Thrower was talking about identifying "learning goals" when designing skills exercises for writing across the curriculum projects. In 2012, Deborah Maranville and others analyzed how outcome-focused education in an engineering school could inform legal education.

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135. Duncan, supra note 134.

136. SULLIVAN ET AL., supra note 134.

137. STUCKEY & OTHERS, supra note 134.

138. Susan E. Thrower, *Teaching Legal Writing Through Subject-Matter Specialties: A Reconception of Writing Across the Curriculum*, 13 LEGAL WRITING 3, 4 (2007) ("Exporting doctrine into the legal writing classroom is an innovative way to achieve writing-across-the-curriculum goals to enhance and increase student learning of skills, particularly the skill of writing.").
paying “particular attention” to self-assessment skills that the ABA has identified as significant.\footnote{139. Deborah Maranville et al., Lessons for Legal Education from the Engineering Profession’s Experience with Outcomes-Based Accreditation, 38 WM. MITCHELL L. REV. 1017, 1019 (2012).}

But even back in the twentieth century, legal writing faculty were focusing on the purpose of their various teaching methods, asking about “learning goals,” “teaching goals,” and “pedagogical goals.”\footnote{140. E.g., Maria Perez Crist, Technology in the LRW Curriculum—High Tech, Low Tech, or No Tech, 5 LEGAL WRITING 93, 97–98 (1999) (“Whether one approaches the LRW class as an opportunity to teach practical skills or to develop legal cognitive skills, or both, the influence of technology on those pedagogical goals is inescapable.” (footnote omitted)); Elizabeth L. Inglehart et al., From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom, 9 LEGAL WRITING 185, 187–88 (2003) (“The documented pedagogical benefits that flow from cooperative and collaborative learning directly coincide with our legal writing teaching goals.”); Katrina June Lee et al., A New Era: Integrating Today’s “Next Gen” Research Tools Ravel and Casetext in the Law School Classroom, 41 RUTGERS COMPUTER & TECH. L.J. 31, 33 (2015) (“Making the latest next gen research tools a part of the skills classroom agenda advances current pedagogical goals.” (footnote omitted)); Sophie Sparrow, Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism, 13 LEGAL WRITING 113, 136 (2007) (“[Legal writing faculty] identify the many learning goals involved in composing or drafting a legal document, from large-scale organizing to analyzing and synthesizing statutes, regulations, and cases, applying and distinguishing facts, using precise language, and citing authorities accurately.” (footnote omitted)).} As Lorraine Bannai and others noted in 1999, in an article on designing effective legal writing assignments, “[a]ssignments are not there simply as work for the students.”\footnote{141. Lorraine Bannai et al., Sailing Through Designing Memo Assignments, 5 LEGAL WRITING 193, 198 (1999).} Rather, assignments need to be carefully designed and sequenced so that they provide a vehicle through which students can learn the foundation skills in legal research, analysis, and writing. The key, of course, is for legal writing faculty to plan ahead and think through exactly what it is that they want to teach.\footnote{142. RALPH L. BRILL ET AL., SOURCEBOOK ON LEGAL WRITING PROGRAMS 13 (1997); Bannai et al., supra note 141, at 198–99 (footnotes omitted); Gail A. Kintzer et al., Rule-Based Legal Writing Problems: A Pedagogical Approach, 3 LEGAL WRITING 144, 145, 161 (1997); Helene S. Shapo & Mary S. Lawrence, Designing the First Writing Assignment, 5 PERSPECTIVES 94, 94–95 (1997).}

Legal writing faculty have also contributed meaningful scholarship to the area of experiential learning, particularly that based on simulations of legal practice. As the Carnegie Report notes, “The pedagogies of legal writing instruction bring together content knowledge and practical skill in very close interaction.”\footnote{143. SULLIVAN ET AL., supra note 134, at 110.} In 2004, Kathryn Stanchi noted that the typical legal writing course
"employs a pedagogy focused on experiential, cooperative learning. It is a course based on simulation and problem solving and involves a high degree of interaction between professor and student." Long before that, however, legal writing faculty were examining the best ways that simulation could be used in the legal writing course. In 1994, Professors Rideout and Ramsfield noted that most law students "do not explore problem-solving in an environment that simulates either law practice or rigorous legal scholarship," and recommended that "legal writing professors and other faculty should... creat[e] assignments that... simulate real practice." In 1999, Debra Harris and Susan Susman noted that "legal writing teachers increasingly recognize the value of lawyering simulations in legal writing instruction." In 2001, Marie Monahan was recommending that legal writing students conduct simulated depositions as a way of developing the facts for a writing assignment. In 2005, Jane Gionfriddo described how simulations help advance the learning goals in the legal writing course by helping students understand why effective legal writing is so vital.

More recently, Nantiya Ruan traced the development of legal writing teaching from the 1920s onward, noting that current reformers emphasize both experiential learning and professional values and that "third wave [legal writing] teachers simulate 'real world' fact patterns to provide students with meaning and context." Likewise, Sherri Lee Keene argued that "[g]uided legal writing experiences... afford writers meaningful opportunities to integrate theory and practice by using their knowledge of law to

145. Rideout & Ramsfield, supra note 73, at 37.
146. Id. at 82.
147. Debra Harris & Susan D. Susman, Toward a More Perfect Union: Using Lawyering Pedagogy to Enhance Legal Writing Courses, 49 J. LEGAL EDUC. 185, 186 (1999).
149. Jane Kent Gionfriddo, The "Reasonable Zone of Right Answers": Analytical Feedback on Student Writing, 40 GONZ. L. REV. 427, 430–31 (2005) ("To provide students with an intimate sense of this audience's needs, legal writing classes require students to work on simulated problems as if they were practicing attorneys."). Gionfriddo also noted that teachers of courses focused on legal doctrine usually did not use simulations in their teaching. Id. at 432 n.17.
identify and solve a range of discrete legal problems while acting in the attorney role.”

Finally, legal writing faculty have long used formative assessment as their signature teaching method. Much of their early scholarship, in particular, was devoted to articulating best practices for formative assessment, whether or not the authors used that term. In 1998, Steven Johansen explained how “assessment” differs from “ranking,” in language that many would recognize as the distinction between formative and summative assessment. In 2002, Kristin Gerdy discussed how to advance learning outcomes by developing “valid” assessment tasks, and in 2012 Anthony Niedwiecki discussed using formative assessment “to better prepare students for the practice of law . . . in lawyering skills courses and clinics.”

More importantly for purposes of reform in legal education, much of the pedagogy scholarship has shown what law faculty can accomplish beyond the skills curriculum. Carrie Sperling and Susan Shapcott, for example, have analyzed mindset theory—a noted subgenre of educational psychology—and shown how law students affected by a fixed mindset can improve their learning if they move to a growth mindset. This scholarship (and its broad application) is particularly significant in these days of low enrollment and new standards for bar passage rates. Law faculty and the ABA have

151. Sherri Lee Keene, One Small Step for Legal Writing, One Giant Leap for Legal Education: Making the Case for More Writing Opportunities in the “Practice-Ready” Law School Curriculum, 65 MERCER L. REV. 467, 480 (2014).

152. See Carol McCrehan Parker, The Signature Pedagogy of Legal Writing, 16 LEGAL WRITING 463, 466 (2010) (“The hallmarks of the signature pedagogy of legal writing are authentic tasks of an appropriate level of difficulty, undertaken within a collaborative setting guided by a more advanced learner, by way of an iterative process that includes frequent feedback and revision.”).

153. See, e.g., Mary Kate Kearney & Mary Beth Beazley, Teaching Students How to “Think Like Lawyers”: Integrating Socratic Method with the Writing Process, 64 TEMP. L. REV. 885, 897 (1991) (“Students depend on their teacher’s responses so that they may assess their own understanding of the substantive material and assess how competently they have communicated that material to a reader.”).


each begun to recognize that law students benefit when faculty in all law courses implement the best pedagogy theories.

B. The Impact of Pedagogy Scholarship on Legal Practice and Legal Policy

Pedagogy scholarship has undoubtedly advanced the effective teaching of legal writing. As we have seen, it has also provided a foundation for the current reforms in legal education. We do not yet know what impact legal writing scholarship can have if legal writing faculty are allowed to pursue their scholarly interests with the same freedom enjoyed by other faculty. Even now, however, legal writing faculty have built on pedagogy scholarship to write articles that advance knowledge about legal practice and legal policy.

To date, legal writing scholarship has generated at least four (often overlapping) subgenres: legal reading, legal rhetoric, document design, and narrative reasoning. These subgenres have laid the foundation for the expansion of legal writing scholarship from the classroom to the courtroom to the legislature and beyond.

The pedagogy scholarship that asked students to consider the needs of their “reader” led to further exploration of the act of reading. Legal writing scholars now explore the impact of digital reading on the practice of law and on how consumers read contracts and other documents. When we consider how many

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158. See, e.g., Elizabeth Fajans & Mary R. Falk, Against the Tyranny of Paraphrase: Talking Back to Texts, 78 CORNELL L. REV. 163, 201–04 (1993) (describing a teaching process focusing on the quality of students’ reading, in which students keep a reading journal and log reactions and questions to the cases they read, instead of asking students to paraphrase cases).

159. Berger, supra note 118, at 155–57; Phelps, supra note 116, at 1094–95.


161. See Ruth Anne Robbins, Harry Potter, Ruby Slippers, and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey, 29 SEATTLE U. L. REV. 767, 771–72 (2006) (“We implicitly acknowledge that narrative is far more significant in law than merely one delivery method of human communication.”); Kathryn M. Stanchi, Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices, 103 DICK. L. REV. 7, 30–31 (1998) (“Inherent in teaching the application of law is the teaching of... how to use the reasoning in judicial opinions to determine which facts from the client’s story are outcome determinative.”).

162. E.g., Ellie Margolis, Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century, 12 LEGAL COMM. & RHETORIC 1, 1–2 (2015) (“[D]espite widespread recognition that technology has changed the way that lawyers work, little scholarly attention has been given to whether these changes have affected the form and substance of legal analysis.”).

163. E.g., Mary Beth Beazley, Hiding in Plain Sight: “Conspicuous Type” Standards in Mandated Communication Statutes, 40 J. LEGIS. 1, 30 (2014)
legal issues require deciding whether a party had "knowledge," and how often that knowledge will have been gained by reading, we can imagine the potential impact of the scholarship by legal writing faculty with expertise in legal reading.

And the teachers who told their students to remember logos, ethos, and pathos now explore scores of rhetorical issues in their scholarship. A bibliography published in 2006 highlights numerous articles that explain "how rhetoric theory applies to the discipline of legal writing." In other pieces, legal writing scholars explore the use of rhetoric in parenthetical case descriptions, the relationship between rhetoric and e-mail, the relationship between rhetoric and cameras in the United States Supreme Court, and rhetorical themes in personal injury cases.

Likewise, the legal writing teachers who exhorted their brief-writing students to help their readers by using more white space and exploiting positions of emphasis became scholars who were able to advise lawyers to design legal briefs more effectively and to

(observing that "[p]sychologists, linguists, and information designers" have been among those who have studied reader behaviors).


165. Michael D. Murray, For the Love of Parentheticals: The Story of Parenthetical Usage in Synthesis, Rhetoric, Economics, and Narrative Reasoning, 38 U. DAYTON L. REV. 175, 183 (2012) ("The use of parentheticals in explanatory synthesis is a device of modern legal rhetoric that constructs knowledge and understanding of the role of precedents on the legal issue, persuading the audience as to the correctness or superiority of the attorney's knowledge and understanding of how the law works, and seeking to motivate the audience to act in the rhetorical situation of the discourse.").


167. Lisa T. McElroy, Cameras at the Supreme Court: A Rhetorical Analysis, 2012 BYU L. REV. 1837, 1869 (2012) (noting the possibility of changing the "rhetoric around the Court from mythicism to realism, from majesty and aristocracy to democracy").

168. Lori A. Roberts, Rhetoric, Reality, and the Wrongful Abrogation of the Collateral Source Rule in Personal Injury Cases, 31 REV. LITIG. 99, 103 (2012) ("[H]ighlighting evidence of the rhetorical themes of labeling the plaintiff's medical bills as illusory or the plaintiff's recovery as a windfall to demonstrate that this pronounced strategy is commonly embedded in appellate court opinions.").

169. Derek H. Kiernan-Johnson, Telling Through Type: Typography and Narrative in Legal Briefs, 7 J. ASS'N LEGAL WRITING DIRECTORS 87, 89 (2010) (exploring a "content-driven, context-specific way that typography might be used in legal briefs: to reinforce, complement, and independently create narrative meaning"); see Robbins, supra note 127, at 115-18, 124.
advise legislatures to be aware of positions of emphasis at the ballot box. And legal writing faculty who learned about teaching storytelling as it related to the statement of facts are now writing about narrative reasoning in complaints and providing sophisticated analyses of myth, rhetoric, and storytelling in briefs and court opinions.

If legal writing faculty are allowed the academic freedom to pursue the scholarship of their choice, both legal education and the legal profession will reap the benefits. Even with the current limits, the impact of this field has been astounding. Ending the limits will help not only legal writing faculty, but also the theory and practice of law.

IV. NEXT STEPS FOR LAW FACULTIES, THE ABA, AND THE AALS

Law schools, the AALS, and by extension the members of the ABA, have long benefitted from the teaching and scholarship of legal writing faculty members. To further promote this teaching and scholarship, and as a matter of equity, law schools should stop limiting legal writing scholarship and start promoting the equal treatment of legal writing faculty. Of course, there are also selfish reasons for the ABA and law schools to take steps to promote equality: as noted earlier, law schools risk becoming irrelevant if they insist on clinging to the old ways of doing things, taking only the most minimal steps to comply with educational reforms.

170. *Beazley,* supra note 126, at 22–23 (arguing that when governments design ballots, they should “take into account the way that human beings actually vote in order to fairly distribute the predictable benefits and burdens of ballot position”).

171. *E.g.*, Elizabeth Fajans & Mary R. Falk, *Untold Stories: Restoring Narrative to Pleading Practice,* 15 LEGAL WRITING 3, 3 (2009) (noting that, “over the centuries” the “narrative aspect of complaint . . . has been eclipsed by the several instrumental functions” of pleading); Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard,* 26 YALE J.L. & HUMANITIES 1, 2 (2014) (arguing that “greater awareness of narrative theory and greater reliance on narrative techniques can help litigants and judges understand and comply with” the new plausibility standard of *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009)).

Like it or not, market forces are already demanding changes to legal practice, and many of the firms that didn't accommodate those demands are now disappearing. Law schools that don't adapt may meet the same fate. Keeping up with changes in legal practice is particularly important in light of changes to laws governing legal practice, and in light of concerns about student preparedness and bar passage rates. The Department of Education could rescind the ABA's control over law school accreditation if it comes to understand that the ABA is unable to promote practice-focused teaching or to address concerns about diversity and inclusion. Likewise, state bar associations could decide that they do not need to require graduation from an ABA-accredited law school as a condition for taking a state bar exam.

As noted above, most law faculties currently employ legal writing faculty (and other full-time skills faculty) in low-caste positions. To equalize treatment of these faculty, law schools must address inequities in voting rights, in support for scholarship, and, most significantly, in status and salary. To facilitate change, the ABA and the AALS can and should form committees to identify best practices for the transition to unitary faculties.

Addressing the voting rights issues is a first, cost-free step. Law schools should grant voting rights to nontenure-track legal writing faculty, and those rights should grant the vote on all matters except promotion and tenure. There is no reason to exclude nontenured skills faculty from voting on hiring matters; they are as knowledgeable about faculty qualifications and law school needs as anyone on the faculty. Limiting them from voting on hiring

173. It is likely that few law schools will close outright, but some may merge, and many others will become leaner. See Deborah J. Merritt, Will the Competition Close?, LAW SCH. CAFE (Dec. 29, 2013), http://www.lawschoolcafe.org/2013/12/29/will-the-competition-close/. For example, in 2015 two Minnesota Law Schools merged to form the Mitchell Hamline School of Law. About, MITCHELL HAMLINe SCH. L., http://mitchellhamline.edu/about/, (last visited Apr. 27, 2016).

174. E.g., Myles V. Lynk, Implications of the UK Legal Services Act 2007 for US Law Practice and Legal Ethics, 23 PROF. LAW. 26, 28 (2015) (discussing, among other things, Britain's Legal Services Act of 2007, which "established a national body, the Legal Services Board, independent of the courts and the bar, to exercise regulatory oversight of the profession and of the approved regulators that directly regulate the practice of law in England and Wales").

175. E.g., the regulations governing Title IX of the Civil Rights Act state at 34 C.F.R. § 106.51 ("Employment") that a recipient of federal financial assistance "shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify . . . or employees in any way which could adversely affect any . . . employee's employment opportunities or status because of sex." I am grateful for conference presentations by Lyn Entrikin, who first brought these Department of Education regulations to my attention.
prevents them from full participation in some of the most important decisions that law faculties make.\footnote{176 See, e.g., Patricia A. Wilson, Recreating the Law School to Increase Minority Participation: The Conceptual Law School, 16 TEX. WESLEYAN L. REV. 577, 583 (2010) (describing faculty hiring as a "major decision" that reflects a school's "mission").}

Second, law schools should provide appropriate scholarly support to their skills faculty. This support can come in the form of research support, summer grants, mentoring, and course reductions. Scholarly support can give skills faculty an opportunity to demonstrate that they are able to produce scholarship when they receive the same treatment as those who teach casebook courses.

Finally, law schools must end discrimination as to status and salary. Law schools that decide to end their discrimination against skills faculty could begin by hiring all future full-time skills faculty on the tenure track. They can and should, however, begin immediately to follow best practices for those faculty on 405(c) contracts.\footnote{177 Best Practices for Protecting Security of Position for 405(c) Faculty, LEGAL WRITING INST., http://www.lwionline.org/uploads/FileUpload/BestPractices.pdf (last visited Apr. 18, 2016).}

Remedying the situation for current nontenure track faculty presents a different set of challenges. The Brahmins may protest that moving contract faculty to the tenure track is inappropriate because the law schools did not follow their usual "standards"—of vetting previous scholarship or academic credentials, for example—when hiring contract faculty. Those standards, however, are typically used as predictors; they need not and should not be requirements in the presence of quality of current performance.\footnote{178 Richard E. Redding, "Where Did You Go to Law School?" Gatekeeping for the Professoriate and Its Implications for Legal Education, 53 J. LEGAL EDUC. 594, 608, 609 (2003) (lamenting the "erroneous assumption" that all graduates of elite schools "are more promising than graduates of lower-ranked schools" and observing that "the heavy emphasis on where a candidate attended law school may mean that some candidates without stellar law school records but with strong research training, a track record in publications, or important legal practice or teaching experience get overlooked. The exclusion of potentially excellent teachers and scholars from the legal academy limits the possibilities—both for the academy and for individual careers.... Actual performance in scholarship and teaching, rather than potential performance, should be the coin of the realm"); see also Nancy B. Rapoport, Is "Thinking Like a Lawyer" Really What We Want to Teach? 1 J. ASS'N LEGAL WRITING DIRECTORS 91, 97 n.22 (2002) ("What I will never understand is why law schools focus so much attention on the grades of a lateral hire, rather than on her demonstrated ability to teach (evaluations) and research (publication record)").}

Law schools hire faculty who performed well in law school or who graduated from prestigious schools (or both) because they believe that these credentials are markers that indicate that faculty will be good teachers and scholars. If the legal writing faculty are
teaching and producing scholarship at the same level as a school’s tenure-level faculty, the performance of these faculty should be more significant than the predictors.

If, however, the legal writing faculty are not good teachers, the law school should deal with them as it should deal with any faculty, including tenure-level faculty, who are not good teachers. If legal writing faculty are good teachers but are not producing scholarship, or are producing non scholarly articles, the faculty could take a variety of steps to determine a future course of action. At some schools, legal writing faculty on a contract have been given two options: (1) the legal writing faculty member remains in the current nontenure-level position, but with no expectation of scholarship or (2) the legal writing faculty member receives scholarly support for a set period of time, with the opportunity to meet clear scholarly expectations in order to move to a tenure-level position.

Law schools should be explicit and fair when articulating scholarly expectations of tenure-level legal writing faculty. Certainly, law schools can and should expect high-quality scholarship from legal writing faculty. Quantity, however, may be an issue, due to the high number of student contact hours in legal writing courses. A law school might consider extending the tenure clock for legal writing faculty, perhaps by asking what it would do if it moved a non tenured faculty member into an administrative position while that person was on the tenure clock. What would the

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179. Law schools considering legal writing faculty scholarship should take care to avoid bias against legal writing “topics,” as discussed above. See generally Pollman & Edwards, supra note 92, at 35–53 (addressing the myths that legal writing topics do not count as scholarship and that legal writing faculty are not qualified to evaluate legal writing scholarship).

180. Some law schools may believe that tenure positions require a certain salary. Indeed, most legal writing faculty are underpaid, and a move to the tenure-level should improve their salaries. See Christopher, supra note 101, at 65. But tenure itself does not require a particular salary. See Neumann & Entrikin Memorandum, supra note 13, at 6–8. I know at one school, the faculty voted not to replace a retiring faculty member, using the freed-up salary funds to equalize the salaries of its tenure-level legal writing faculty.

181. Growth mindset theory indicates that weak teachers can become better teachers with appropriate effort and guidance. Most universities now host some sort of teaching effectiveness center that could engage with underperforming teachers of legal writing or casebook courses. As noted earlier, of course, tenure does not prevent termination for failure to perform mandatory duties. See Neumann & Entrikin Memorandum, supra note 13, at 11 (citing cases in which courts allowed termination of tenured faculty for bad teaching, and noting that “every university has the power to fire tenured faculty who do their jobs badly”).

182. To determine appropriate scholarly standards, law schools could look to other schools of similar rank where legal writing faculty have received tenure.
scholarly expectation be? How might the timetable change? What support would be given to that faculty member?183

Many voices have called for equal treatment of all full-time faculty.184 Professor Deborah Merritt has called for a unitary tenure track in her presentation and in her article for this very Symposium.185 Likewise, at the AALS annual meeting in January of 2015, several speakers addressed gender-related employment issues in legal writing and other areas of legal education. The resulting symposium included several articles that called for equal treatment of legal writing faculty.186 Two months later, in March of 2015, the Board of Directors of the LWI adopted a “Policy Statement on Full Citizenship for Law Faculty”:

The Legal Writing Institute is committed to a policy of full citizenship for all 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.187

The statement was also adopted by the Boards of Directors of the ALWD and the Society of American Law Teachers (“SALT”).

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183. Any law school facing dilemmas regarding how to move contract faculty to the tenure track could contact the current president of either the Legal Writing Institute or the Association of Legal Writing Directors. Help is available to determine stringent, but appropriate, standards for such a transfer.

184. E.g., Bayer, supra note 59, at 360; Durako, supra note 60, at 575–76; Jewel, supra note 64, at 133 (“Placing skills on the same level as doctrine will also halt the reproduction of a legal culture that reinforces existing power relations.”); Stanchi & Levine, supra note 15, at 20 (“General language addressing the rights and privileges of law professors should be applied to all full-time faculty, regardless of the courses they teach.”); Stanchi, supra note 144, at 487.

185. Deborah Jones Merritt, Hippocrates and Socrates: Professional Obligations to Educate the Next Generation, 51 WAKE FOREST L. REV 403, 416 (2016) (“Those 'other members of the faculty' should enjoy the same status and pay as professors who teach primarily appellate doctrine. Our caste system, which distinguishes tenured faculty from clinical or writing professors, harms the latter professors and perpetuates a false dichotomy in legal education.”).

186. For examples of articles from that symposium, see generally Christopher, supra note 101; Hart, supra note 77; Jewel, supra note 64; Tiscione & Vorenberg, supra note 77.

Two other groups in legal education, of course, are not on board: the ABA and the AALS. As noted above, they have indicated explicitly and implicitly that they are willing to administer a legal education system in which a required subject area, explicitly identified as one of the most significant, is taught by a large underclass made up almost entirely of women, and almost entirely devoid of faculty of color.

Each of these organizations is fettered in different ways. The AALS does not have the power to force changes, because its bylaws are more suggestions than mandates. Further, a law school might be willing to sacrifice membership in AALS since students need not attend an AALS member school to take the bar exam. The ABA is fettered in a different way: first, its consent decree prevents it from inquiring into faculty salaries. Second, its educational leadership—in the form of the National Council and the Committee on Legal Education and Admissions to the Bar (the “Council”)—tends to be dominated by law school deans. At the very least, deans have a conflict of interest in recommending changes in status: they know that if they have to move legal writing faculty to the

188. The AALS Bylaws provide a surprising amount of latitude. Article 2, section 2 indicates that the organization gets to decide whether formal compliance with the Bylaws is sufficient to allow membership, or whether failure to comply with the Bylaws dooms membership:

In determining whether a school fulfills and can continue to fulfill the obligations of membership, the controlling issue is the overall quality of the school measured against the standards of quality articulated in the Requirements of Article 6. The statements of Approved Association Policy and the Regulations are designed to provide guidance in making this assessment. They are not meant to be taken as implying that formal compliance with their specific terms is necessarily equivalent to satisfaction of the qualitative requirements, or that departure from any of their specific terms is automatically demonstrative of qualitative failure.

ASS'N OF AM. L. SCHS., supra note 24, §2-2, at 50.

189. United States v. Am. Bar Ass'n, 934 F. Supp. 435, 436 (D.D.C. 1996) (“The ABA is enjoined and restrained from adopting or enforcing any Standard, Interpretation or Rule, or taking any action that has the purpose or effect of imposing requirements as to . . . base salary, stipends, fringe benefits, or other compensation . . . [and] collecting from or disseminating to any law school data concerning compensation paid or to be paid to deans, administrators, faculty, librarians, or other employees.”). Note that the decree allows collection of such data “upon receipt of a complaint concerning discrimination,” as long as it does not compare levels of compensation from one school to those of another school. Id.

190. See also Brent E. Newton, The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure, 64 S.C. L. REV. 55, 68–69 (2012) (noting the conflict of interest and recommending that dean domination end and that the Council should be controlled by members of the bench and bar).
tenure track, salaries may have to go up, and it will be more difficult to meet budgets. The ABA and the AALS should each form committees to consider how best to adjust the balance between scholarship and teaching and to advance the equal treatment of full-time faculties at law schools. The committees should include some deans, but should include practitioners from a variety of fields and legal writing and skills faculty—both those with tenure and those without. Perhaps these committees could seek out consultation from members of SALT, an entity that includes faculty members of all categories. These committees could consider a variety of options.

An ABA committee could consider how accreditation standards could be changed. For example, one proposal that was brought before the Council without success would have required each law

191. Of course, one way to equalize salaries would be for some faculty salaries to go down to allow the salaries of skills faculty to go up. As Richard Neumann and others have noted, tenure does not require any particular salary. It would not be surprising, however, to find that certain faculty statuses are tied to certain minimum salaries at individual schools or universities. See Neumann & Entrikin Memorandum, supra note 13, at 7 (“Because tenure doesn’t protect salary, it does not, isolated from other factors, raise the cost of education to any significant degree. To bring compensation in line with value, a school can legally reduce the salary of any unproductive faculty member, tenured or not.”).

192. If flexibility is so important, it is interesting that the flexibility is needed only in legal writing and other skills courses. Of course, the reality is that deans might be glad to have more nontenure-track positions; casebook faculty should recognize that their tacit approval of the status quo may open the door to the elimination of tenure in the future.

193. Throughout this Essay, I have focused on status issues as they relate to “full-time” faculty. I agree that it is appropriate not to make tenure available to adjunct faculty. Some of my legal writing colleagues may fear that if the ABA passes a rule requiring equality for full-time faculty, deans will respond by turning legal writing positions into adjunct positions. Such a move would be exceedingly foolish. If deans must save money by reassigning some courses to adjuncts, they should make their decisions based on the number of student contact hours—including formative assessment hours—that the teacher provides. As indicated previously, full-time legal writing faculty typically spend one-third to one-half of their semesters providing individual formative feedback to their students. See supra, Part II. I surmise that clinical courses also require high numbers of student contact hours. Accordingly, skills courses should be the last courses that are taught by adjuncts. When drafting new rules, the ABA might take care to use language that signals its preferences for full-time faculty in skills courses, just as it has done in reference to first-year courses. See ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. 2015–2016 § 403, at 28 (Am. Bar Ass’n 2015) (“The full-time faculty shall teach substantially all of the first one-third of each student’s coursework.”).

194. SALT might be able to provide support in other ways. For example, it could identify schools that have unitary faculty and champion their existence. Schools that treat their faculty equally should get some recognition for going beyond the discriminatory guidelines of the ABA.
school to have equal status for all of its full-time faculty. A law school could be made up entirely of contract-level faculty, but it could not discriminate between and among full-time faculty based on their subject area or teaching method. A standard of this type would allow different types of law schools to flourish without victimizing a subgroup within any particular school.

The ABA might also create a separate committee, with a higher number of practitioners, to consider fundraising methods that would help law schools to equalize the salaries of their faculties. Practitioners constantly ask for more skills training; they might be in the best position to help advance this goal. The ABA has a fiduciary obligation to promote the goals of the legal profession; surely those goals include fair treatment of the faculty who are teaching this most important skill for the practice-ready lawyer.

Optimal student-teacher ratios may make teaching legal writing more expensive than a lecture course, but it is far less expensive to teach law students how to write while they are in law school than it is to teach lawyers how to write while they are in practice. I do many, many Continuing Legal Education ("CLE") seminars on legal writing, but CLEs are best used for illustrating writing principles for lawyers and perhaps reminding them of principles previously learned (or of how new principles relate to those old ones). A focused, multistep process is needed to teach someone how to become a legal writer:

1. a teacher must introduce and explain the rhetorical contexts in which lawyers write, including requirements peculiar to each;
2. the student must produce a written product within an understood rhetorical context;
3. the teacher must review the product, diagnose any problems, and articulate those problems to the student;
4. the teacher must explain to the student, as needed, how to solve the specific problems in the student's writing;
5. the student must revise the writing, attempting to fix the problems; and
6. the teacher must re-review the writing to verify that the student has understood the lesson.195

195. Of course, this list does not even include the writing problems of students who have sub-standard foundational writing skills. Legal writing courses are focused on analytical method, but as many legal writing faculty can tell you, formative feedback often includes feedback on foundational writing skills.
This sequence is time-consuming for both student and teacher, and it would be a very expensive proposition for a practicing lawyer to take this kind of time away from billable hours to go through this process.

Law students are paying high tuition to attend law school; they deserve to receive one-on-one formative assessment, diagnosis, and feedback along with appropriate classroom teaching. Law firms that help fund full-time tenure-line positions in legal writing would help their own bottom lines by enabling more law students to take not only better first-year writing courses, but also more sophisticated upper-level courses. Further, more tenure-line positions in legal writing could promote more scholarship about how to teach legal writing more effectively and how to produce it more efficiently in legal practice.

The ABA, of course, has more power to force change than the AALS does. An AALS committee, however, could consider how the AALS representative on site teams can advance the core values of gender equality, diversity, and inclusion on law faculties. For example, they could examine the variety of statuses on a law faculty and consider whether they result in a disparate impact on women or minority faculty, or result in lack of inclusion or occupational segregation.

As noted above, the AALS Bylaws provide that the AALS expects its members to “value” a “Core Value” of “a faculty composed primarily of full-time teachers/scholars.” The AALS regulations define faculty specifically to include legal writing faculty. Accordingly, AALS site visit representatives should examine whether all full-time faculty are similarly encouraged to do scholarship, and whether academic freedom is limited as to subject matter or in other ways. Certainly the language “a faculty composed primarily of full-time teachers/scholars” should not be interpreted to mean that the Brahmins are the scholars while other, low-caste faculty are the teachers.

As indicated above, the bias against legal writing and its faculty has a significant impact on full-time women faculty at law schools. Accordingly, when fighting this discrimination, it may also be appropriate to explore methods used to combat the wage gap. For example, on January 29, 2016, the Equal Employment Opportunity

196. See also Chemerinsky, supra note 20, at 41 (discussing new ways to fund law school clinics).
197. ASS’N OF AM. L. SCHS., supra note 24, § 6-1(b), at 58.
199. As noted in note 100, supra, and in accompanying text, scholars in new fields often face limits on academic freedom; an AALS representative would be the perfect person to examine whether such limits exist at member schools.
Commission, in partnership with the Department of Labor, announced a proposal to collect annual summary pay data by gender, race, and ethnicity; the data would be collected from businesses with 100 or more employees. The proposal was announced on the seventh anniversary of the signing of the Lilly Ledbetter Fair Pay Act.\(^2\)

Admittedly, the ABA is not allowed to inquire into salary data, but the AALS does not have this restriction. Although the AALS might ask for specific salary data, a more reasonable request would be to ask for salary averages and gender data for each of the various categories of full-time faculty at a law school. This data would include the salary averages not only for each level of tenure-track faculty, but also for the various categories of clinical, academic support, legal writing, and other skills faculty who teach at the law school. Further, it would be useful and appropriate to ask for the averages of all full-time women and all full-time men within each category. The most telling statistic, perhaps, would be the average for all full-time women separately from those of all full-time men. At many schools, the high percentage of women in low-caste jobs could drag down the average salary for all full-time women faculty.

It is hollow to claim that providing equal treatment to legal writing faculty will hurt legal education. Law schools should consider the message they send with their treatment of low-caste faculty. As Sue Liemer and Hollee Temple have noted, “[i]t seems hypocritical . . . for law schools to teach courses on employment discrimination while rationalizing their own employment discrimination as a great money saver.”\(^2\)\(^0\)\(^1\) In 2005, Professor Ann McGinley analyzed the treatment of legal writing faculty from a Title VII perspective, and concluded that law schools could be legally liable for employment discrimination.\(^2\)\(^0\)\(^2\) She recommended that law schools should work to equalize the positions of contract and tenure-track faculty, noting that doing so “permits law schools to fulfill their responsibility to their employees, their students, lawyers and the community at large to create legal and ethical egalitarian models of employment within the law schools.”\(^2\)\(^0\)\(^3\)

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\(^2\)\(^0\). Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113 (proposed Feb. 1, 2016).


\(^2\)\(^0\)\(^2\). Ann C. McGinley, *Discrimination in Our Midst: Law Schools’ Potential Liability for Employment Practices*, 14 UCLA WOMEN’S L.J. 1, 6 (2005). Admittedly, the ABA might be able to “solve” this discrimination problem by encouraging men and people of color to take second-class jobs. A more appropriate solution, of course, is for it to mandate equal treatment.

\(^2\)\(^0\)\(^3\). Id. at 56.
Law schools hurt legal education by allowing this inequitable treatment to continue in the professional schools that should lead the way in championing equality and inclusion. It is time for this treatment to end and for law schools to ensure their continuing relevance and vitality.

CONCLUSION

When I agreed to join this Symposium, I did not expect to spend this much time focused on the status of legal writing faculty. Frankly, I am tired of writing about legal writing status; I would rather be writing about legal writing teaching methods, about how consumers read and use legal documents, or about the impact of the digital revolution on the practice of law. I keep coming back to status, however, because I am even more tired of the financial and professional shackles that legal writing faculty must bear in order to do their jobs. I have been teaching legal writing almost continuously, in one form or another, since 1982. Many of those who taught legal writing in the early 1980s left the field in disgust or were forced out by capped contracts. Those who stayed, even in the face of low status and low salaries, are now starting to retire. I find it disheartening that these faculty, who taught side-by-side with faculty colleagues teaching torts and contracts, faced an unequal salary throughout their careers and now must face a retirement that is just as unequal. This mistreatment must stop.

It is time for the legal academy to practice what it preaches, and give equal treatment to the full-time faculty who devote their careers to preparing law students to enter the practice of law.

The ABA Standards for Legal Education are at best a paradox, and at worst a paradigm of hypocrisy. The ABA, the AALS, and the practicing bar have indicated that the effective teaching of legal

204. See generally Beazley, supra note 126; Beazley, supra note 95; Kearney & Beazley, supra note 153.

205. I was a teaching assistant during the 1982–83 academic year. I taught legal writing full-time from 1983–86 (as an instructor and a co-director); in 1987–88 I was an adjunct professor; I have taught legal writing full-time since the 1988–89 academic year, first as a Director of Legal Writing, then as an Associate Professor of Law, and currently as a Professor of Law.

206. See generally Martha Chamallas, Ledbetter, Gender Equity and Institutional Context, 70 OHIO ST. L.J. 1037, 1043–44 (2009) (noting the estimate that “an initial pay disparity of $5000 between two employees at the start [of] their career will balloon into a $360,000 disparity at retirement age”). For more examples, see JESSICA ARONS, CENTER FOR AMERICAN PROGRESS, LIFETIME LOSSES: THE CAREER WAGE GAP 2 (2008), https://cdn.americanprogress.org/wp-content/uploads/issues/2008/pdf/equal_pay.pdf (estimating $434,000 as the median amount a full-time female worker loses in wages over a forty year period as a result of the gender wage gap); LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 1 (2003).
writing is crucial, and that gender equality and diversity are “core values”207 that law schools must “take concrete action” to promote.208 Yet, these same ABA Standards lay out precisely the ways in which law schools can discriminate against legal writing faculty, and the AALS is complicit in their enforcement.

The legal academy and the practicing bar are fortunate that many legal writing faculty have ignored or worked around the limits they face, for legal writing scholarship is now bearing fruit in at least three useful ways. First, of course, legal writing faculty have developed a robust pedagogy for the developing field of legal writing. Second, their pedagogy scholarship—and the teaching-focused scholarship that has branched off from it—has laid a significant part of the foundation for the current reforms to legal education. Finally, pedagogy scholarship has also laid the foundation for legal writing scholars to expand their academic contributions in ways that can spur reforms not only in legal education, but also in the practice of law and in public policy.

The ABA and the AALS have allowed a mostly white, mostly female underclass to flourish in the legal academy. As law schools implement new teaching methods and educational theories, they should finally give equal treatment to faculty who have pioneered those reforms, and recognize that it is just as valid to adjust scholarship expectations for the sake of teaching demands as it is for the sake of the demands of law school administration. And it is in their own best interest for the ABA and the AALS to take the lead in promoting these changes. If the ABA cannot use the accreditation process to protect academic freedom, diversity, and inclusion, perhaps it is time for the Department of Education to take back its authority to control law school accreditation.

Continuing to balkanize the law school curriculum sends a signal to the practicing bar that the Brahmins exist more to serve their own interests than to educate future lawyers. Embracing tenure reform will improve the chances of success for the new ABA curriculum standards, will prevent legal education from becoming an anachronism, and will ensure that law schools remain relevant to the practicing bar.

207. See About, supra note 23.
