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# WHO NEXT, THE JANITORS?\*

## A SOCIO-FEMINIST CRITIQUE OF THE STATUS HIERARCHY OF LAW PROFESSORS

Kathryn M. Stanchi\*\*

### I. INTRODUCTION

This paper is an invitation to those in the legal academy who self-identify as egalitarian, as feminist, or as otherwise committed to equality in the law and the legal profession. The essay asks feminists and egalitarians to notice and resist the institutionalized and illegitimate status hierarchy operating in American law schools. Like any status hierarchy, its boundaries are well defined and well enforced. Additionally, and perhaps not surprising to feminists, this hierarchy is gendered, with the lowest rank overwhelmingly composed of women and the highest rank overwhelmingly composed of men. The players in this status hierarchy are the faculties and administrations of American law schools. At the top are the tenured “doctrinal” professors, roughly 70 percent of whom are male; at the bottom are legal writing professors, roughly 70 percent of whom are female.<sup>1</sup>

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\* The title of this essay derives from a comment made by a law school dean at a meeting of the American Bar Association Council on Legal Education, during a hearing in which the Council was urged to require law schools to treat legal writing professors as professionals. E-mail from Jan M. Levine, Temple University School of Law, to Kathryn M. Stanchi (Oct. 15, 1997) (on file with author). The comment was probably a reference to the work of Duncan Kennedy, whose suggestion regarding the rotation of labor within law schools is well known. DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 79 (1983). By repeating this statement, I do not mean in any way to disparage the jobs of janitors. Rather, I use this quote primarily to reveal to those who consider themselves above such a sentiment the reality of the classism and elitism that underlies the treatment of legal writing professors by American law schools.

\*\* Associate Professor of Law, Temple University Beasley School of Law. The author wishes to thank Sue Liemer for organizing the Association of American Law Schools’ panel that gave rise to this Symposium, and Nancy Levit and the University of Missouri-Kansas City Law Review, who did a tremendous amount of work organizing the Symposium. The author also thanks Jan Levine for recommending her for the panel and for his steadfast support of the legal writing profession. Sandra Di Iorio provided excellent research assistance for the piece. This essay is dedicated to my father, Ed Stanchi. I wish I could send him a reprint.

<sup>1</sup> Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 326, 347 (2000). The legal writing percentage is an amalgam of several statistics. ASSN. OF LEGAL WRITING DIRECTORS/LEGAL WRITING INST. 2003 SURVEY RESULTS, 2, 37 (2003) available at [http://www.alwd.org/alwdResources/surveys/2003survey/PDFfiles/2003surveyresults\\_alwd.pdf](http://www.alwd.org/alwdResources/surveys/2003survey/PDFfiles/2003surveyresults_alwd.pdf) (last visited Sept. 9, 2004) [hereinafter *ALWD Survey*] (indicating that 75 percent of those completing the *ALWD Survey*, which includes legal writing directors and teachers in a program without directors, are women; full time legal writing professionals are 67 percent female; part-time legal writing professionals are 71 percent female). The statistic seems to hover fairly consistently around 70 percent, and given the statistics on new legal writing hires, is not likely to change radically. *Id.* at 42 (indicating that in 2003, new legal writing professor hires were 67 percent female). However, the recent drop below 70 percent is quite interesting, especially because it correlates with an increase in salary and status for the profession. As more males enter the legal

This institutionalized status system is based on elitism and gender discrimination. It reflects a rigid and empty adherence to a set of artificial and contrived rules of prestige and rank that are unjustifiable and enforced by power and dominance rather than reason. Even more troubling is the way that the hierarchy is gender segregated, with women at the bottom and men at the top. Anytime a substantial cluster of women hold low-pay, low-status jobs, feminist and humanist alarms should ring.<sup>2</sup> They should be ringing now.

Part II of this essay begins by defining two basic theories to help describe and explain the legal academy's status hierarchy—social inequality theory and feminist theory. These two theories are certainly not mutually exclusive: status hierarchies that function within particular institutions will reflect the prejudice of the larger society, including its sexism. Both social inequality and feminist theory are useful here because the treatment of legal writing professors reveals a place where social dynamics of hierarchy and power intersect with gender. The treatment of legal writing is a story about gender discrimination, but it is not solely about gender. The story also tells of the human propensity to create subjective and artificial hierarchies, in which some people are elevated at the expense of others.

In Part III, the essay uses inequality and feminist theories to show the legal academy's gendered hierarchy is illegitimate and therefore inconsistent with notions of fairness and equality. The essay seeks to convince feminists and other fair-minded academics that their own principles require them to reject and resist this discriminatory treatment. Among other things, Part III explains that the legal academy has created, and continues to support, a whole cadre of underpaid lawyers who are mostly women. This alone should be a problem for feminists and egalitarians.

Part III also discusses the substantial non-economic mistreatment, such as disenfranchisement, segregation, and interference with academic freedom. These non-economic abuses clearly show the power dynamic substituting for rationality in the academic hierarchy. As with most illegitimate status hierarchies, the treatment of legal writing is marked by tautological arguments that "bootstrap" the position of the "haves" over the position of the "have-nots" so that membership in the lower status group presumptively means less pay, less security and less everything. Moreover, because women comprise the majority of the legal writing underclass, the non-economic disparagements to which legal writing professors are frequently subjected reveal a disturbing underlying

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writing profession, the salary and status seem to increase. See Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L. J. 3, 27 n.3 (2001) (stating that legal writing faculty is 73% women based on 2001 ALWD Survey) [hereinafter *Gender and Legal Writing*]. Legal writing teachers are not the only law teachers at or near the bottom of the hierarchy of the legal academy, but according to a recent study, the bottom of the hierarchy is disproportionately occupied by women. Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law School Professors*, 73 UMKC L. REV. 293, 295; see generally Neumann, *supra*.

<sup>2</sup> See Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997).

presumption about the way women can be treated within the confines of predominantly male institutions.

In Part IV, the essay explores affirmative reasons why law professors should support equal treatment for legal writing professors. The pedagogy of legal writing is, in many ways, more humanist than traditional law pedagogy. For many years, legal scholars have questioned the teaching methodologies that dominate most American law schools. Legal writing represents a sound alternative pedagogy because it is cooperative, less combative and hierarchical, and directly focused on the human context and consequences of legal problems. Echoing many feminist critiques of the legal academy, Part IV goes on to ask why there must be only one model of law professor and suggests that feminist theory supports the idea of multiple models of excellence in the law professorate, including one that focuses primarily on teaching, mentoring and training future lawyers.

In sum, this essay asks feminist and egalitarian law professors and deans to be honest and to look carefully at the situations in their own law schools and at their participation (active or passive) in the status hierarchy that keeps a majority of women lawyers in the law school in a subordinate position. It urges law professors who write about the damage of hierarchy and discrimination in other contexts to look, to notice and to fight the inequality in their own backyards.

In the end, like many status hierarchies, the one examined here is damaging and counter-productive. It damages the integrity and legitimacy of law schools and professors because it stands in stark contrast to the educational mission of fairness and non-discrimination. It hurts the whole law school community by wasting talent, breeding resentment among colleagues, and alienating people from their community. It makes law professors look dishonest and hypocritical to students, to practitioners and to those outside the profession. It reinforces stereotypical images of women to male and female students. It is, in sum, a situation that egalitarian law professors, if they practice what they preach, must notice, criticize and resist. This essay is a call to professors to take those steps.

## II. STATUS INEQUALITY AND FEMINISM

The legal writing profession is a place where the complexities of institutionalized inequality, economics and gender bias intersect. Therefore, social stratification theory and feminist theory can provide a framework for analyzing the status hierarchy of law faculties. By using these theories as a framework, I do not mean to suggest that the hierarchy of law faculties fits precisely into either theory. Rather, I use these theories to demonstrate the commonalities between the treatment of legal writing and the type of social stratification that exists elsewhere in society. This comparison is meant to expose the mistreatment of legal writing as a form of illegitimate and unfounded stratification. Feminist theory provides the missing piece of the analysis by demonstrating that gender discrimination is at the heart of this hierarchy in which women overwhelmingly populate the lower echelons.

## A. Social Stratification

In social theory, institutionalized inequality refers to “structured inequality between *categories* of individuals that are systematically created, reproduced, [and] legitimated by sets of ideas.”<sup>3</sup> Although the source of institutionalized inequality can vary, due to its categorical nature it is often thought to be the result of structural systems or conditions, such as discrimination, as opposed to “inevitable personal differences between individuals.”<sup>4</sup> Social stratifications are less legitimate to the extent that they rely on contrived or artificial criteria to support themselves, and to the extent that they block access not only to social rewards, but to opportunities for securing those social rewards.<sup>5</sup>

“Class” is a type of social inequality that is usually thought to be primarily economic, but the concept is ultimately difficult to define.<sup>6</sup> This paper will try to be quite careful in its use of the concept of “class,” but because there are facets of the academic hierarchy that implicate “class” in the Marxist sense, it is worth briefly defining. In the traditional Marxist view, “class” is a rather specialized term referring to an economic phenomenon and defined by an individual’s ownership or control (or lack thereof) in the system of production.<sup>7</sup> Class is relational and the relationship is defined by conflict: workers are members of the working class because of their relationship to capital and capitalists.<sup>8</sup> Moreover, the relationship is one of exploitation: capitalists exploit the labor of the working class.<sup>9</sup> Although some sociologists perceive class to be purely economic, others view it as multidimensional and include in the concept of class other variables such as prestige or education.<sup>10</sup>

Status is a concept related to, but also different from, the concept of class.<sup>11</sup> Status inequality is multi-dimensional.<sup>12</sup> It refers to a ranking or hierarchy based

<sup>3</sup> CHARLES E. HURST, *SOCIAL INEQUALITY: FORMS, CAUSES, CONSEQUENCES* 3 (4th ed., Allyn & Bacon 2001) (emphasis added).

<sup>4</sup> *Id.* at 4.

<sup>5</sup> David B. Grusky, *The Contours of Social Stratification*, in *SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE* 3, 17 (David B. Grusky ed., 1994).

<sup>6</sup> Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 817 (2003) (“asking ‘[w]hat is the meaning of ‘class’?’ feels . . . like falling off a cliff.”); see also PAUL FUSSELL, *CLASS: A GUIDE THROUGH THE AMERICAN STATUS SYSTEM* 24 (1983) (“Nobody knows for sure what the word *class* means.”).

<sup>7</sup> HURST, *supra* note 3, at 14; see also Karl Marx, *Alienation and Social Classes*, in *SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE* 65 (David B. Grusky ed., 1994) [hereinafter *Alienation*].

<sup>8</sup> Marx, *Alienation*, *supra* note 7, at 65-69; Karl Marx, *Classes in Capitalism and Pre-Capitalism*, in *SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE* 69 (David B. Grusky ed., 1994) [hereinafter *Classes*]; HURST, *supra* note 3, at 14-15; Mahoney, *supra* note 6, at 818.

<sup>9</sup> Marx, *Alienation*, *supra* note 7, at 65-69; Marx, *Classes*, *supra* note 8, at 69-75; HURST, *supra* note 3, at 14; Mahoney, *supra* note 6, at 818.

<sup>10</sup> HURST, *supra* note 3, at 14-15; Mahoney, *supra* note 6, at 818-19 (noting, however, that neo-Marxists have a somewhat more flexible view of class).

<sup>11</sup> HURST, *supra* note 3, at 35; Mahoney, *supra* note 6, at 818.

on some characteristic that has subjectively been assigned social importance.<sup>13</sup> Status inequality is most closely associated with social theorist Max Weber, for whom status was determined by “specific, positive or negative social estimation of honor.”<sup>14</sup> Thus, categories of individuals are either given or not given market opportunities, life chances and symbolic rewards, such as homage and respect, based on their possession, or lack of possession, of some characteristics considered by the community to be worthy of respect.<sup>15</sup> Unlike Marxist classes, which are based on largely objective economic criteria, status is purely subjective and can be based on highly arbitrary, artificial and unstable criteria.<sup>16</sup> Because they are subjective and contrived, the criteria are changeable and may differ over time or between cultures. As Paul Fussell wryly noted, “[t]he things that conferred [status] in the 1930s—white linen golf knickers, chrome cocktail shakers, vests with white piping—are, to put it mildly, unlikely to do so today.”<sup>17</sup>

Status hierarchies are typical of societies dominated by tradition or convention.<sup>18</sup> They are phenomena of power.<sup>19</sup> These hierarchies have a number of characteristics, all of which are designed to maintain the status and power of the higher ranked group. First, the higher ranked groups tend toward “closure”; that is, they are exclusive.<sup>20</sup> The higher status groups try to maintain “purity” and distance themselves socially from the lower status groups.<sup>21</sup> Exclusion is one of the primary methods “by which those in powerful status groups” maintain power and keep others from gaining power.<sup>22</sup> In fact, “the distinguishing feature of exclusionary closure is the attempt by one group to secure for itself a privileged position at the expense of some other group through a process of subordination.”<sup>23</sup> Another method of “closure” is the stigmatization or belittling of the lower status group.<sup>24</sup> It is emblematic of categorical or collectivist status hierarchies “that subordination is experienced through a myriad of direct personal degradations and affronts to human dignity, encouraged by the submersion of the

<sup>12</sup> HURST, *supra* note 3, at 35.

<sup>13</sup> Max Weber, *Class, Status, Party*, in SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE 113, 117-18 (David B. Grusky ed., 1994); HURST, *supra* note 3 at 35; FUSSELL, *supra* note 6, at 24.

<sup>14</sup> Weber, *supra* note 13, at 117; HURST, *supra* note 3, at 35-36; FUSSELL, *supra* note 6, at 24.

<sup>15</sup> HURST, *supra* note 3, at 36.

<sup>16</sup> *Id.*

<sup>17</sup> FUSSELL, *supra* note 6, at 18.

<sup>18</sup> HURST, *supra*, note 3, at 37. The analogy to the legal profession—a profession dominated by rules and conventions—is apparent.

<sup>19</sup> Anthony Giddens, *The Class Structure of the Advanced Societies*, in SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE 131, 133 (David B. Grusky ed., 1994).

<sup>20</sup> Max Weber, *Open and Closed Relationships*, in SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE 126, 126-28 (David B. Grusky ed., 1994); HURST, *supra* note 3, at 37.

<sup>21</sup> Weber, *supra* note 20, at 126-28; HURST, *supra* note 3, at 37.

<sup>22</sup> HURST, *supra* note 3, at 37.

<sup>23</sup> Frank Parkin, *Marxism and Class Theory: A Bourgeois Critique*, in SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE 141, 144 (David B. Grusky ed., 1994).

<sup>24</sup> HURST, *supra* note 3, at 44.

individual into the stereotype of his 'membership' group."<sup>25</sup> Thus, the maintenance of status hierarchies depends on the identification of membership groups or ranks by certain signs, "caste marks" or stigmata.<sup>26</sup> Finally, higher status groups tend to monopolize economic opportunity and acquisition.<sup>27</sup>

A characteristic of status hierarchies is that they attempt to legitimate themselves by passing themselves off as meritocracies. The process of legitimizing the hierarchy occurs in part through the trading of what Pierre Bourdieu referred to as "cultural capital"—those characteristics chosen for honor in status hierarchies.<sup>28</sup> Status hierarchies legitimate themselves by "trading" more obviously subjective cultural capital for characteristics that look more "objectively" like merit.<sup>29</sup> So, for example, a family name can be "traded" for a law degree from Harvard. In this way, the hierarchical process is

so seamless and unobtrusive that the sources of individual dispositions are concealed from view, and the "superior" tastes and privileged outcomes of socioeconomic elites are therefore misperceived (and legitimated) as the product of individual merit or worthiness.<sup>30</sup>

In this way, status can be exploited so that social rewards and opportunities are distributed by virtue of position, as opposed to skill or other merit-based criteria.<sup>31</sup>

Credentialism is a method of exclusionary closure that allows status hierarchies to appear meritocratic.<sup>32</sup> Credentialism is the inflated use of certain credentials for the purpose of restricting entry into a position to enhance its market value and monopolize social rewards.<sup>33</sup> While there may be nothing wrong with distribution of social rewards through a legitimate meritocracy, credentialism is a symptom of an illegitimate hierarchy because the importance

<sup>25</sup> Parkin, *supra* note 23, at 151-52.

<sup>26</sup> FUSSELL, *supra* note 6, at 32-33 (describing the differences between social classes in terms of "distinct stigmata," "signs" and "caste marks").

<sup>27</sup> Weber, *supra* note 20, at 128-29; HURST, *supra* note 3, at 37.

<sup>28</sup> HURST, *supra* note 3, at 42.

<sup>29</sup> *Id.* Duncan Kennedy made a similar point in his critique of legal education. KENNEDY, *supra* note \*, at 36-38, 50 ("[T]he class/sex/race system gets hold of people long before the professional one, and creates them in such a way that they will, with some legitimating exceptions, appear to deserve on professional grounds the position that is in fact based on other things.").

<sup>30</sup> Grusky, *supra* note 5, at 20. For example, Bourdieu described the phenomenon in which the cultural capital of higher education is used to systematically "bootstrap" the position of the higher classes, and allow status to pass for individual merit. Higher education helps legitimate the position of the upper ranks "because, on the surface, it appears that the inequality is largely the result of individual performance in a meritocratic, open educational system." HURST, *supra* note 3, at 42.

<sup>31</sup> Erik Olin Wright, *A General Framework for the Analysis of Class Structure*, in *SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE* 98, 104 (David B. Grusky ed., 1994) (discussing Roemer's elaboration of Marxist theory).

<sup>32</sup> Parkin, *supra* note 23, at 145.

<sup>33</sup> *Id.* at 147.

of certain credentials is either inflated or contrived and used solely to simplify and legitimate the exclusionary process. Hierarchical systems relying on credentialism construct the higher status jobs as more complex and requiring enhanced credentials, without offering any evidence of a link between credentials and performance of the job.<sup>34</sup> Job performance and other merit-based criteria thus become subordinate to the subjectively chosen “credential,” and those without the credential are presumptively excluded from opportunities at the higher ranked job, while simultaneously the elite are protected from “the hazards of the marketplace.”<sup>35</sup>

What is wrong with status hierarchies? Functionalists might argue that most status hierarchies are meritocratic in the sense that rank or prestige equate with the importance or skill level of a particular position and the scarcity of talented people with which to fill these positions.<sup>36</sup> Even those who might defend some status hierarchies, however, agree that they are less legitimate to the extent that they block the opportunity to secure certain rewards on the basis of membership in a particular group.<sup>37</sup> A hierarchy that blocks opportunity is non-meritocratic because it is not a real competition—only a select few are permitted to “compete” for certain rewards. Moreover, the legitimacy of the hierarchy is even more suspect when membership in a particular group, as opposed to merit-based factors, is the criterion that dictates access to opportunities. When a status hierarchy exhibits this kind of collectivist exclusion, careful examination is critical to determine whether the evaluation of the higher status position as essential and highly skilled is accurate, as opposed to a mere reflection of power differentials.<sup>38</sup> This examination is especially important when a status hierarchy (e.g., of occupation) mirrors a discriminatory inequality of society at large, such as when a particular low-status position is filled with those already marginalized in society as a whole.

### B. Feminist Theory

Patriarchy is a type of illegitimate social hierarchy based on gender.<sup>39</sup> Patriarchy is defined by a set of interrelations among men that allow men to dominate women and monopolize benefits and rewards by, among other things,

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<sup>34</sup> *Id.* at 148.

<sup>35</sup> *Id.* at 148-49.

<sup>36</sup> Kingsley Davis & Wilbert E. Moore, *Some Principles of Stratification*, in SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE 39, 39-40 (David B. Grusky ed., 1994).

<sup>37</sup> Grusky, *supra* note 5, at 17.

<sup>38</sup> Melvin M. Tumin, *Some Principles of Stratification: A Critical Analysis*, in SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE 47, 47 (David B. Grusky ed., 1994).

<sup>39</sup> Heidi Hartmann, *The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, in SOCIAL STRATIFICATION: CLASS, RACE, AND GENDER IN SOCIOLOGICAL PERSPECTIVE 570, 570 (David B. Grusky ed., 1994).



controlling women's labor.<sup>40</sup> Within patriarchy, for example, there is a strict division of labor based on sex, in which women do the services that "exonerate men" from unpleasant tasks of low prestige and low social reward.<sup>41</sup> The labor done by women (so-called "women's work") is devalued, disparaged, and underpaid, because it is done by women, and at the same time women are pushed into work that is devalued, disparaged and underpaid (the work then becomes "women's work"). This process aids in the perpetuation of male dominance by ensuring a sexually segregated hierarchy, and, as a result, women's economic dependence on men.

Feminist theory posits that the social relations that create the concept "women's work," as well as the processes by which women are pushed into work that is accorded the lowest prestige and reward, are intentional and highly efficient—in Catharine MacKinnon's words, "metaphysically nearly perfect."<sup>42</sup> That women are continually pushed to the bottom of the social hierarchy is neither coincidence nor a by-product of "women's essential nature."<sup>43</sup> Rather, the system of patriarchy is set up so that women are channeled into work of low social reward, and whatever work women find themselves doing is presumptively categorized as unimportant and unskilled, and therefore appropriately unrewarded.<sup>44</sup> As MacKinnon noted: "so long as women are excluded from socially powerful activity, whatever activity women do will reinforce their powerlessness, because women are doing it; and so long as women are doing activities considered socially valueless, women will be valued only for the ways they can be used."<sup>45</sup>

This circular dynamic in which (i) what women do is assigned low value because women do it and (ii) women are channeled into positions of low value because those positions are "women's work," is a paradigmatic example of the "bootstrapping" nature of illegitimate status hierarchies. The construction of low wage and low prestige "women's work" is not based on "objective" merit, but rather, is a complex process that involves the interplay of a number of factors, all of which, at their core, reflect male dominance.<sup>46</sup> Under patriarchy, men get first choice of jobs over women, and men can and will choose the more advantageous

<sup>40</sup> *Id.*; see also JOAN WILLIAMS, UNBENDING GENDER 32-33 (2000) (describing the phenomenon of male "ownership" of female labor).

<sup>41</sup> Hartman, *supra* note 39, at 570-71.

<sup>42</sup> CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 116 (1989).

<sup>43</sup> See generally *id.* at 125, 159, 161-63, 167.

<sup>44</sup> *Id.* at 223.

<sup>45</sup> *Id.* at 80.

<sup>46</sup> WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB 37-82 (Barbara F. Reskin & Heidi I. Hartmann eds., 1986) [hereinafter WOMEN'S WORK]; Myra H. Strober, *Toward a General Theory of Occupational Sex Segregation: The Case of Public School Teaching*, in SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES 144, 146-47 (Barbara F. Reskin ed., 1984); Karen Oppenheim Mason, *Commentary: Strober's Theory of Occupational Sex Segregation*, in SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, AND REMEDIES 157, 164-65 (Barbara F. Reskin ed., 1984); Tumin, *supra* note 38, at 47-54.

positions.<sup>47</sup> Furthermore, mostly men do the hiring and will hire men into the more advantageous positions, in part to maintain male privilege and women's economic and social dependence on men.<sup>48</sup> Thus, despite the common misconception that women freely "choose" lesser jobs, men's behavior and choices are central to the construction of "women's work."<sup>49</sup>

Once a job becomes predominantly female, employers will keep the pay rate low and/or fail to increase wages at the same rate for other jobs, and strong market and social forces will work to maintain its gender assignment.<sup>50</sup> In part, this is accomplished by a version of "credentialism": once a job becomes "female," it is mythologized as easier, unskilled and worthless; similarly, once a job becomes "male" it is mythologized as difficult and highly skilled.<sup>51</sup> This is especially effective if the job can be constructed as "feminine"—such as any jobs smacking of nurturing or support.<sup>52</sup> Maleness, by contrast, is cultural capital that can be easily traded for characteristics that look "objectively" more like merit, and therefore can be translated into positions of high power and prestige.<sup>53</sup>

However, the same cycle can work to construct a low prestige, low wage cadre of women workers even when the work done is virtually identical.<sup>54</sup> Male workers have a strong interest in maintaining occupational segregation and in promoting the occupational mythology, because without these artificial buffers, male workers who demand higher wages would face competition from low wage (female) workers who would do the same jobs for less money.<sup>55</sup> Thus, male workers in the labor force seek to restrict low wage labor to a narrow market of poorly paid positions in which they have no interest.<sup>56</sup> The employers participate in this process, even though it conflicts with profit maximization, because of the desire to maintain male privilege, as well as the "taste" for discrimination and the strong pull of gender ideology.<sup>57</sup>

For feminists, a system of occupational sex segregation that is defended based on "objective" merit is suspect. Under patriarchy, "objective" merit is a

<sup>47</sup> As MacKinnon has argued in the context of women's segregation into low paying jobs: "no man would do that [low paying] job if he had a choice, and of course he has because he is a man, so he won't." MACKINNON, *supra* note 42, at 36.

<sup>48</sup> Strober, *supra* note 46, at 146-48; WOMEN'S WORK, *supra* note 46, at 38-41.

<sup>49</sup> Strober, *supra* note 46, at 146-47, 150. For feminists, the idea that women simply "choose" life paths of lesser financial and social rewards is a patriarchal myth that serves to obscure how gender discrimination severely limits the alternatives available to women. WILLIAMS, *supra* note 40, at 37-39.

<sup>50</sup> Strober, *supra* note 46, 149-50.

<sup>51</sup> *Id.* at 153.

<sup>52</sup> Mason, *supra* note 46, at 164-65; see also MACKINNON, *supra* note 42, at 109-10 (listing the stereotypes assigned to women).

<sup>53</sup> See MACKINNON, *supra* note 42, at 224-25.

<sup>54</sup> WOMEN'S WORK, *supra* note 46, at 49 (providing a narrative about a female welder).

<sup>55</sup> Strober, *supra* note 46, at 150; Mason, *supra* note 42, at 167.

<sup>56</sup> Mason, *supra* note 42, at 167.

<sup>57</sup> Strober, *supra* note 46, at 147-48; WOMEN'S WORK, *supra* note 46, at 44-45, 47-56; JOYCE P. JACOBSEN, *THE ECONOMICS OF GENDER* 323-27 (1994).

male construct—it is the male standard passing itself off as neutrality and value.<sup>58</sup> Thus, like other illegitimate status hierarchies, patriarchy creates and reproduces itself by passing itself off as a meritocracy. The reality is, however, that it is a system under which women rarely can ascend up the “meritocratic” ladder, because the system is set up to keep them from ascending.<sup>59</sup>

To fight the economic exploitation of women, feminism seeks, among other things, to revalue women’s contributions by “demonstrating the essentiality and value of women’s . . . functions.”<sup>60</sup> In the arena of women’s labor, women must “claim a fair share of social product” for their activities, especially those that patriarchy has rendered largely invisible, and from which men derive significant professional, social and personal benefits.<sup>61</sup>

### III. THE STRATIFICATION OF LAW SCHOOL FACULTIES

The stratification of American law school faculties is a patriarchal illegitimate status hierarchy. First of all, it is institutional and categorical. Subordination is based on category, with legal writing professors at the bottom and doctrinal faculty at the top (and several gradations in between). The categories are real and largely fixed.<sup>62</sup> They are based on a system of contrived and subjective criteria, and prestige and other rewards are awarded based on membership in the category, as opposed to “merit.” The position of the higher ranked group is “bootstrapped” by a number of methods, including credentialism, designed to keep the lower ranked groups in the lower ranks and to make that lower designation look as though it is based on objective merit.

The law school status hierarchy also exhibits all of the characteristics of a stratified society. Those who occupy the higher ranked doctrinal positions monopolize economic rewards. They tend toward closure and exclusion. Those in the lower ranked legal writing (and often clinical) positions have significantly restricted opportunities for social reward and occupational “life chances.” The lower ranked categories are marked or stigmatized in a number of ways, including by labeling and by degrading, belittling comments and behavior.

Finally, the legal academic hierarchy is clearly gender based and accomplishes a stark gender segregation and division of labor within the academy. Women dominate the lower ranked legal writing positions, and men dominate the highly ranked doctrinal positions. In this hierarchy, the relationship

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<sup>58</sup> MACKINNON, *supra* note 42, at 224; *see also* WOMEN’S WORK, *supra* note 46, at 38 (stating that sex roles are so ingrained that they are “referentially transparent”).

<sup>59</sup> MACKINNON, *supra* note 42, at 161-63, 167.

<sup>60</sup> *Id.* at 65-66 (discussing wages for housework movement).

<sup>61</sup> *Id.* at 66-67.

<sup>62</sup> In this way, it is not off the mark to refer to the legal academy as a “caste system.” *See, e.g.,* Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS’N. LEGAL WRITING DIRS. 12, 13 (2002) (describing seven “castes” in American law schools). Although Weber reserved the word “caste” primarily for status hierarchies based on ethnicity or race, the word generally refers to those status hierarchies in which the status conditions become a stable and legalized part of society. HURST, *supra* note 3, at 37-38.

between the categories (and sexes) is one of exploitation, with legal writing presumed to be uninteresting, unintellectual “women’s work” and doctrinal teaching presumed to be highly intellectual, challenging and, therefore, masculine.

### A. The Monopolization of Economic Rewards

Within the academic hierarchy, salary is dependent on one’s membership in a particular group, without regard to merit. Moreover, the status hierarchy is constructed to ensure that the group classifications remain highly stratified. The hierarchy is constructed so that it is impossible for the lower status legal writing professors to come close to “catching up” to the salaries of the doctrinal professors, regardless of productivity, experience, excellence in job performance, or seniority.

From a purely statistical perspective, legal writing professors are paid a fraction of what doctrinal professors make. This overwhelmingly female branch of the academy makes, on average, about \$30,000 less than an entry level assistant professor, about \$35,000 less than an associate professor, and about \$55,000 less than a full professor.<sup>63</sup> Even assuming that the legal writing professor receives 5 percent yearly increases, which many do not, it would take a legal writing professor twelve years to reach the salary of an entry level doctrinal professor, fourteen years to reach the salary of an associate professor, and nineteen years to reach the salary of a full professor.<sup>64</sup>

Of course, these calculations assume that the doctrinal professor salaries remain stable, which they would not. In reality, the doctrinal salaries would go up as well, so the legal writing professor really never reaches parity with her peers. Instead, she must wait twelve years to reach parity with the *newest* law faculty hires; the nineteen years reflects her achievement of what full professors were making when she was *hired*. Consider a legal writing professor hired in 1990. In 2002 (twelve years), she would be making what an assistant doctrinal professor was making *in 1990*. In 2009, she would finally be making what a full professor was making *in 1990*. With the system operating “normally,” therefore, she will never reach parity with those with whom she was hired and with those of equivalent seniority in the academy.

This pay differential is entirely based on membership in the group labeled “legal writing professors.”<sup>65</sup> No evaluation of merit occurs beyond the

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<sup>63</sup> Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. 551, 577 (2001) [hereinafter *Women, Writing & Wages*].

<sup>64</sup> *Id.* at 577-78.

<sup>65</sup> In the legal academy, where professorial academic freedom verges on sacrosanct, this kind of punitive treatment based solely on subject matter of expertise seems more than a little hypocritical. Graham Zellick, *The Ethical Law School*, 36 IND. L. REV. 747, 751 (2003) (stating that “academic freedom ranks as one of [law professors’] fundamental guiding values”); Jennifer Jolly-Ryan, *Coordinating a Legal Writing Program with the Help of a Course Webpage: Help for Reluctant Leaders and the Technologically-Challenged Professor*, 22 QUINNIPIAC L. REV. 479, 483 (2004) (“Academic freedom and the opportunity to develop individual teaching styles are imperative for

presumption of merit based on group membership. Much like in other institutionalized systems of dominance and discrimination, no external "objective" evidence of merit—teaching excellence, scholarship, years, or quality of law practice—can overcome the stigma of membership in the low status group.<sup>66</sup> Even the primary credentials that purportedly carry so much weight in the legal academy, prestige of law school and participation on the law review, cannot overcome the presumptive lower status of legal writing.<sup>67</sup> A legal writing professor who graduated from a top tier law school and served on the law review would still make less money (\$30,000 less) than a torts professor who went to a third tier law school and had no law review experience.<sup>68</sup>

Other "objective" merit criteria are similarly irrelevant to salary determination. For example, in a recent survey, my co-author Jan Levine and I demonstrated that legal writing professors' salaries were unaffected by two variables commonly used to calculate doctrinal salaries: years out of law school and years of teaching experience.<sup>69</sup> Both of these variables were of statistically low relevance in predicting legal writing salary levels.<sup>70</sup> That means, for example, that a 2000 law school graduate with two years of practice experience who teaches contracts will make \$25,000 more (at least) than a 1988 law school graduate with ten years of practice experience who teaches legal writing. This additional data puts in perspective the nineteen years necessary to reach the full professor level: that is nineteen years of *teaching seniority* alone.<sup>71</sup> Adding the number of years of practice experience makes the number of years to reach parity even higher.<sup>72</sup>

Both the structure and politics of the salary differential are directly related to gender. Most obviously, the significant salary differential creates a cadre of poorly paid women lawyers within the legal academy, and those women lawyers can never reach "equality" with their male counterparts in the higher ranked positions. This structure is a microcosm of male economic dominance in the legal academy that both reflects and creates anew the economic disparity

all professors . . . "); 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, 384 (2001) (characterizing academic freedom as "cherished").

<sup>66</sup> Bayer, *supra* note 65, at 353; Levine & Stanchi, *Women, Writing & Wages*, *supra* note 63, at 577.

<sup>67</sup> Of course, the relevance of these credentials to the performance of the job of law professor is dubious at best. The credentials certainly have never been shown to correlate to excellent performance as a law professor. Nevertheless, it is interesting to note that the illegitimate credentialism otherwise embraced by the hierarchy is abandoned when it would allow the opening of opportunity or reward to someone in the lower status group. This adds another layer to the illegitimacy of the hierarchy and reveals the true power dynamic at work. When even the illegitimate rules of the hierarchy fail to ensure that the hierarchy is maintained, those in the higher status positions refuse to apply the unfair rules and fall back on the presumptive inferiority of the debased group.

<sup>68</sup> Levine & Stanchi, *Women, Writing, and Wages*, *supra* note 63, at 577.

<sup>69</sup> *Id.* at 573-74.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 578; Stanchi & Levine, *Gender and Legal Writing*, *supra* note 1, at 10-12.

between men and women in American society at large. It also reproduces within the legal academy the damaging and discriminatory image of women as categorically unequal to men, as a category of persons less deserving of the financial rewards of the faculty position.

However, the salary differential for legal writing professors also reflects a value judgment about the nature and value of certain work, namely "women's work." Like the "women's work" phenomenon in other contexts, "whether women are steered into Legal Research and Writing because it is low status, or it is low status because it is done by women" is unclear.<sup>73</sup> What is clear is that the phenomenon is a circular, ongoing dynamic: as long as women do it, it will be devalued, and as long as it is devalued, it will be done by women.<sup>74</sup> In part, this is perpetuated by the process of mythologizing that often accompanies the construction of work as female: doctrinal teaching ("male") is mythologized as difficult and highly skilled; legal writing ("female") is mythologized as easy and requiring few skills.<sup>75</sup> Moreover, the low salaries are further justified by the characterization of legal writing as "feminine" care-taking work, much like nursing and elementary and secondary education.<sup>76</sup> Thus the legal academy repeats and reinforces a familiar pattern of occupational segregation by sex in which work done by women is worth little.<sup>77</sup>

## B. Exclusion and Closure

The salary differential, which creates the economic gender hierarchy, is enforced and maintained by methods typical of illegitimate status hierarchies, including contrived and easily manipulated criteria posing as merit, physical and social segregation and imposition of status markers. All of these methods succeed in branding legal writing as a "less than" category of law faculty, not worthy of the rewards of "real" law faculty. The gender composition of the two groups also has the troubling result of correlating the lower status with the gender female. The result is a clustering of women in positions of low social reward with purposefully limited access to the means of obtaining social rewards.

### 1. Bootstrapping and Credentialism

The law school faculty hierarchy bootstraps itself by a number of methods. One primary method is the somewhat mythical definition of the term "law

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<sup>73</sup> Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 354 (1996).

<sup>74</sup> See MACKINNON, *supra* note 42, at 80; Strober, *supra* note 46, at 146-47; Mason, *supra* note 46, at 169.

<sup>75</sup> See *supra* notes 50 to 59 and accompanying text.

<sup>76</sup> See Stanchi & Levine, *Gender and Legal Writing*, *supra* note 1, at 23; Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN'S L.J. 75, 75 (1997).

<sup>77</sup> Nancy Levit, *Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics*, 49 U. KAN. L. REV. 775, 775, 779, 785 (2001).

professor”—that is, someone who not only teaches doctrine, but who also performs certain defined “service” to the law school community, and publishes doctrinal or theoretical scholarship.<sup>78</sup> The definition should be carefully examined, because illegitimate hierarchies will often attempt to legitimate themselves by “attach[ing] to the positions [of high status] . . . highly morally-toned evaluations of [the positions’] importance to society.”<sup>79</sup>

Upon examination, the definition of “law professor” is clearly constructed to bootstrap the position into one of higher status within the academy. In some instances, the definition is not provably related to merit or job performance (as in the case of doctrinal teaching). But, more important, the hierarchy excludes most legal writing professors from any opportunity to satisfy the definition. In other words, the definition is used to make a discriminatory system seem meritocratic; the criteria that marks the higher ranks is contrived to make certain that the lower ranks will always seem less worthy. In reality, the lower ranks are not eligible to satisfy the definition because the definition is a skill.

First, legal writing professors, consistent with their title, do not teach primarily doctrine. In fact, many are not permitted by their law schools to teach so-called doctrinal courses.<sup>80</sup> Thus, the criteria “teaching doctrine” becomes a valuable piece of cultural capital that legal writing professors—a large cadre of women academics—are categorically excluded from possessing. Never questioned is why doctrine is so strictly bifurcated from lawyering and writing skills, or why doctrine should be so highly favored over lawyering skills or writing that it marks an essential component of what makes a law professor. It is simply seen as presumptively more meritorious, valued, and challenging. The gender segregation would seem to provide additional reasons for questioning the system. Why is the subject taught primarily by women considered easy and less valuable? Why are the subjects taught by men considered difficult and more valuable?

Those who dismiss teaching writing as easy or unintellectual never seem to answer these concerns. Nor do they seem to even try to explain why (much less provide any evidence that) teaching torts or criminal law to first year law students is so difficult that only the most erudite professor can accomplish it, and why teaching a writing assignment involving an issue of tort law is somehow a far lesser challenge.<sup>81</sup> Would a torts professor who taught torts through a series

<sup>78</sup> This is often referred to as the academic triad. See Robert J. Spitzer, *Tenure, Speech and the Jeffries Case: A Functional Analysis*, 15 PACE L. REV. 111, 123 (1994). I say “mythical” because doctrinal law professors who do all three of these things well (or at all) are rare. That there are only a handful of doctrinal professors who actually are succeeding in meeting this mythical norm is largely ignored, at the same time the norm is used to exploit and disparage clinical and legal writing faculty.

<sup>79</sup> Tumin, *supra* note 38, at 47.

<sup>80</sup> ALWD Survey, *supra* note 1, at 53 (Question 85, chart).

<sup>81</sup> See Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 148 (1997); Mary Beth Beazley, “Riddikulus!”: *Tenure-Track Legal-Writing Faculty and the Boggart in the Wardrobe*, 7 SCRIBES J. LEGAL WRITING 79, 79 (2000). Rather, those who dismiss legal writing as an academic interest rely on circular, unsupported observations, such as “writing is writing,” or define legal writing in a purposefully and

of torts-related writing assignments be less worthy of the higher rank than a doctrinal professor who relied on an end-of-semester examination? Also never questioned is the common statement of doctrinal teachers that they also do not teach primarily doctrine, but actually teach “thinking like a lawyer,” which sounds a lot like what legal writing and clinical professors do.<sup>82</sup> Why is this common pedagogical ground not a basis for equality? The answer is that to maintain a social hierarchy based on power, the criteria need only purport to substitute for merit—they do not *actually* need to rationally relate to merit.<sup>83</sup>

Legal writing professors also are penalized by the general devaluation of the art of teaching within the legal academy, which again is a reflection of the devaluation of what has come to be “women’s work” in society at large. Teaching excellence of any kind is not the most important part of the academic triad and is valued and rewarded significantly less than scholarly production. This redounds to the detriment of most legal writing professors because legal writing instruction requires a dedication to pedagogy and student-centered teaching.<sup>84</sup> This means that almost all legal writing professors will spend a great deal of time focused on their effectiveness as teachers, time that is largely uncompensated in the academy.

For legal writing professors, the performance of law school service is likewise an unattainable piece of cultural capital. Like with doctrinal teaching, the academic hierarchy holds up certain types of service as valuable cultural capital, necessary for status, and simultaneously prohibits legal writing professors from possessing it. Many legal writing professors are not even eligible to serve on any law school committees, and when they are allowed to serve, they are not eligible to participate in the more important or highly valued committees, such as faculty appointments.<sup>85</sup> This means that legal writing faculty are either not permitted to do service and then are penalized for not doing it, or are permitted only to do the service jobs that no other faculty wants to do because they are largely thankless and undervalued. In addition to casting serious doubt on the legitimacy of the law school faculty hierarchy, this double bind has created a somewhat bizarre situation. It has become a cause for legal writing professors to fight for the right to serve on law school committees—work that they will not be paid for and that most doctrinal faculty members find a nuisance—just so that they can have a chance at something resembling participation in their professional community. Given that most of the people

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unduly narrow way in order to bootstrap their own position (often without citing any of the legal writing pedagogical literature). These arguments, devoid of any semblance of logic and put forward without a shred of evidence, demonstrate that power has trumped reason in the debate over legal writing. Bayer, *supra* note 65, at 370, 392; *see also* Edwards, *supra* note 76, at 79-80.

<sup>82</sup> Melissa L. Breger et al., *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries, and Judges*, 55 S.C. L. REV. 303, 308 (2003) (“Doctrinal courses emphasize the ability to ‘think like a lawyer’ . . . ”); Barbara M. Anscher, *Turning Novices into Experts: Honing Skills for the Performance Test*, 24 HAMLIN L. REV. 224, 250 (2001) (stating that the primary goal of doctrinal courses is to teach students to think like lawyers).

<sup>83</sup> *See generally* Beazley, *supra* note 81.

<sup>84</sup> *See* Bayer, *supra* note 65, at 372-77.

<sup>85</sup> *ALWD Survey*, *supra* note 1, at 52-53 (Question 83); *see also* Bayer, *supra* note 65, at 359.



fighting for this dubious right are women, the situation calls to mind Catharine MacKinnon's poignant statement: "It makes you want to cry sometimes to know that it has had to be a mission for many women just to be permitted to do the work of this society, to have the dignity of doing jobs a lot of other people don't even want to do."<sup>86</sup>

Interestingly, the one aspect of law school service in which legal writing professors excel is one that is at the bottom of the service hierarchy: student mentoring and contact.<sup>87</sup> This is a corollary to the academy's devaluation of teaching excellence. Legal writing pedagogy, at its core, is student-centered; it requires frequent student-professor contact, both formal and informal.<sup>88</sup> Therefore, legal writing professors find themselves spending a tremendous amount of time teaching, mentoring and counseling law students about everything from writing to careers to law school experiences.<sup>89</sup> The legal academy, however, rarely "counts" this kind of service toward social rewards like merit-based raises or tenure.<sup>90</sup> Thus, the tautological circle is complete: valuable service is that which legal writing professors are ineligible to do, and what service legal writing professors can do is not valuable. Put another way, "women's work" is code for "work of no value" and "work of no value" is presumptively "women's work."

Finally, the most important, and complex, criterion—scholarship. Scholarship is an interesting criterion for a number of reasons. First of all, it is the primary measurement of law faculty rank; it is, as one scholar put it, "the coin of the realm."<sup>91</sup> Perhaps for this reason, it is the criterion often used to justify the lower legal writing salaries: legal writing professors do not publish so they should not be paid as much.<sup>92</sup> This may seem like a reasonable justification, until an examination of law school policies reveals both the categorical nature of the discrimination the justification so deftly masks, as well as the shameless bootstrapping that underlies it. The justification "you do not publish so we do not pay you as much" implies that law schools would welcome the scholarship of legal writing professors, that legal writing professors could change the unhappy reality of our own poor salaries, if only we would publish. The rhetoric is

<sup>86</sup> CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 35 (1987).

<sup>87</sup> Arrigo, *supra* note 81, at 162-63; Deborah L. Rhode, *Midcourse Corrections: Women in Legal Education*, 53 J. LEGAL EDUC. 475, 482 (2003) (referring to such work as academic "house-keeping"); Levit, *supra* note 77, at 784 (describing service activities such as student advising as "not much more" "than the academic equivalent of making coffee").

<sup>88</sup> See, e.g., Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719 (1997) [hereinafter *From Product to Process*].

<sup>89</sup> Arrigo, *supra*, note 81, at 162, 165; Farley, *supra* note 73, at 356; Ilyung Lee, *The Rookie Season*, 39 SANTA CLARA L. REV. 473, 487 (1999).

<sup>90</sup> Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1, 23 (1995); Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1183 (1988).

<sup>91</sup> Randal C. Picker, *Law and Economics: Intellectual Arbitrage*, 27 LOY. L.A. L. REV. 127, 127 (1993).

<sup>92</sup> Arrigo, *supra* note 81, at 167-68.

brilliant in how it implies that legal writing professors are to blame for their own poor salaries, when the reality is that law schools, by a number of methods, block legal writing professors from opportunities to publish.

The argument that legal writing professors can be paid less as a group because legal writing professors as a group do not publish is a categorical statement typical of group-based discrimination; it is also, like many categorical generalizations, demonstrably false.<sup>93</sup> The statement that “legal writing professors do not publish” does something very typical of group discrimination: it lumps all members of a group together, makes a categorical value judgment based on group membership, and makes no allowances for individual merit-based differences.<sup>94</sup> Consider the members of the doctrinal professorate who do not publish after their tenure piece (and they do, without question, exist in great numbers). Why should they be paid \$30,000 to \$50,000 more than a legal writing professor who does not publish? Perhaps more starkly, why should the doctrinal professor who does not publish be paid more than the legal writing professor who *does*? Yet, this is the inevitable result of a category-based hierarchy.

The more complex part of the picture, however, is that most law schools cinch the hierarchy by making publication highly valued cultural capital, while making it a “practical impossibility” for legal writing professors to publish.<sup>95</sup> In other words, having defined publication as the premier cultural capital, the higher ranked group then takes every step necessary to monopolize the opportunities to obtain it.<sup>96</sup> Once access to the commodity is monopolized by those in the higher ranked group, it can be used to demonstrate the “objective” inferiority of the lower ranks. For example, many law schools categorically bar legal writing professors from obtaining summer research stipends and student research assistants.<sup>97</sup> An overwhelming number of legal writing professors are

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<sup>93</sup> Legal writing professors do publish, even in the face of significant obstacles, and even though they are not rewarded either financially or otherwise. See, e.g., <http://www.legalwritingscholarship.org> (providing a bibliography of legal writing scholarship); see also Bayer, *supra* note 65, at 381-82.

<sup>94</sup> A similar logical flaw underlies the statement that legal writing professors have lesser credentials than doctrinal teachers. Even putting aside all the arguments that the alleged “credentials” are contrived, artificial criteria divorced from job performance, there is an obvious logic and equality problem with the categorical statement that one group, as a whole, has lesser credentials than another group.

<sup>95</sup> Arrigo, *supra* note 81, at 167. For a particularly poignant narrative about the difficulties of publishing while teaching legal writing, see Susan P. Liemer, *The Quest for Scholarship: The Legal Writing Professor's Paradox*, 80 OR. L. REV. 1007 (2001).

<sup>96</sup> Liemer, *supra* note 95, at 1022-23.

<sup>97</sup> ALWD Survey, *supra* note 1, at 49-50 (Questions 76, 80). In some cases, even those law schools that provide summer research stipends to legal writing professors offer lesser amounts to legal writing professors than to doctrinal faculty. *Id.* (Question 78). This situation has led the Association of Legal Writing Directors to create a fund for summer stipend “scholarships” for legal writing professors who cannot convince their law schools to support their writing. Liemer, *supra* note 95, at 1027.

categorically denied the primary incentive to publish: they are ineligible for tenure, no matter how much they write, and no matter what the quality.<sup>98</sup> How many doctrinal professors would publish if they were paid a fraction of their salaries, got no support and had no expectation of tenure? Many doctrinal professors do not publish even *with* all these perks. Yet, the failure of some legal writing professors to publish is held up as a failure of the writing profession as a whole and a rational justification for unequal treatment.

While criticizing and penalizing legal writing professors for not publishing, law schools also impose a workload on legal writing professors that is incompatible with scholarly production.<sup>99</sup> The average workload for legal writing professors requires the critiquing of ten to eleven papers by forty-four students—approximately 3000 pages of student writing—over the course of the academic year.<sup>100</sup> Legal writing professors generally spend about 100 hours in formal conference with students and about seventy hours preparing and teaching assignments.<sup>101</sup> One honest doctrinal professor who added just one paper assignment to her doctrinal class wrote the added burden “crushed” her with both emotional and time demands and made her feel “desperate” and “senselessly angry.”<sup>102</sup> With their time almost exclusively taken up with what Deborah Rhode has called “academic house-keeping,” legal writing professors have little time left to devote to the intense and creative scholarly research and writing process.<sup>103</sup> Yet most law school administrations usually make no allowance for the different burdens of legal writing teachers, and doctrinal professors and deans rarely acknowledge that a different burden exists.

The disparate distribution of teaching workloads in the legal academy reveal a quasi-Marxist and patriarchal exploitative dynamic. Legal writing professors bear a disproportionate amount of the legal academy’s teaching burden. Yet, legal writing professors are not paid for this disproportionate burden—like the operation of labor in the Marxist view, legal writing professors do not benefit financially from their work. Rather, the fruits of the labor of legal writing professors are ultimately enjoyed by the higher ranked doctrinal professors and law school administrations, who are “exonerated” from more intensive teaching and student advising roles because others are doing this devalued work. Those in the higher ranks realize the fruits of legal writing labor in the form of additional free time, as well as intellectual and psychological free space, which they can then devote to the more highly valued pursuit of

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<sup>98</sup> *ALWD Survey*, *supra* note 1, at 40 (Question 65).

<sup>99</sup> Liemer, *supra* note 95, 1015-17; Arrigo, *supra* note 81, at 167 (attributing this ‘bootstrapping’ method to “expectancy confirmation sequence,” a phenomenon by which a dominant class decide on the worth of a job, and then set up an environment that will confirm their decision).

<sup>100</sup> *ALWD Survey*, *supra* note 1, at 51 (Question 82).

<sup>101</sup> *Id.* at 52 (Question 82).

<sup>102</sup> LOUISE HARMON & DEBORAH W. POST, *CULTIVATING INTELLIGENCE: POWER, LAW, AND THE POLITICS OF TEACHING* 96-97 (1996).

<sup>103</sup> Deborah L. Rhode, *Taking Stock: Women of all Colors in Legal Education*, 53 *J. LEGAL EDUC.* 475, 482 (2003).

scholarship.<sup>104</sup> Thus, the labor of legal writing professors directly translates into financial reward for the higher ranks. Especially given the gender composition of legal writing, the analogy to “women’s work” is obvious.<sup>105</sup> Women’s work, by definition, is “support” work of low value and compensation—that which permits men the time and space to accomplish society’s more highly valued, and highly compensated, pursuits.<sup>106</sup>

Even those legal writing professors who do manage to write and publish find themselves at the mercy of yet another double bind. If they publish *about* legal writing or pedagogy, their area of expertise, the scholarship does not “count” at all or as much as traditional doctrinal scholarship, and it likely will not be eligible for the same rewards as other scholarship.<sup>107</sup> This struggle is similar to that faced by feminist legal scholars.<sup>108</sup>

## 2. Exclusion from Other Social Rewards and Imposition of Caste Markers

Maintained by credentialism, the legal academic hierarchy also perpetuates itself by excluding the lower ranks from rewards other than salary and by imposing on them obvious markers (or in Fussell’s word, stigmata) of lesser status.<sup>109</sup> Tenure, the quintessential social reward of the academy, and one closely related to economic compensation, is a reward from which the vast majority of legal writing professors are categorically excluded. Almost no legal writing professors are tenured, and most legal writing professors are not even eligible for tenure, regardless of their credentials, scholarly production or any

<sup>104</sup> Arrigo, *supra* note 82, at 176.

<sup>105</sup> Hartmann, *supra* note 39, at 571; WILLIAMS, *supra* note 40, at 33 (stating that when women choose to work at home, men receive “the clean clothes, meals, and child care required to support his ability to perform as an ideal worker.”).

<sup>106</sup> Note here that in yet another analogy to women’s work, the “support” aspect of legal writing teaching is what makes it so important for the higher ranked academic positions to fiercely protect their exclusive access to the highly valued cultural capital of scholarship—by giving legal writing professors no financial or career incentives to publish, by giving them an oppressive workload, and by devaluing their scholarship.

<sup>107</sup> See 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, 545 (1995); Beazley, *supra* note 81, at 84 (noting that some law schools had forced legal writing teachers to develop a doctrinal expertise by refusing to count legal writing scholarship toward tenure).

<sup>108</sup> Patricia Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 29-32 (1991); Levit, *supra* note 77, at 793, 795-800; A.B.A. COMM. ON WOMEN IN THE PROFESSION, *ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION* 31 (1996) (“Women faculty’s scholarship (particularly if labeled ‘feminist’) is discounted either because it is narrative or experientially-based, or because it involves ‘women’s topics,’ which are devalued no matter what methodology has been employed.”) [hereinafter *ELUSIVE EQUALITY*]; Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1363, 1372 (1992).

<sup>109</sup> See generally Fussell, *supra* note 6.

other merit based criteria.<sup>110</sup> Rather, the vast majority of legal writing professors in the United States are on one-year contracts, a highly vulnerable employment position, especially given the rate at which law school deans can change.<sup>111</sup> Membership in the group “legal writing professor” means exclusion from even the opportunity to obtain tenure. Exclusion from the opportunity to earn a social reward is emblematic of illegitimate status hierarchies; in the legal academic hierarchy, the exclusion from eligibility for tenure belies that merit is the source of social reward.

The exclusion from tenure means that legal writing professors have none of the protections of academic freedom afforded to doctrinal professors.<sup>112</sup> We can be fired if we anger the Dean or a particularly powerful faculty member, if we anger a well connected student, or if we fall victim to any of myriad other decanal or faculty whims. Our ability to speak out about our oppressive conditions is chilled by our precarious employment status, and so we cannot be said to have true freedom of speech, even in our own scholarship.<sup>113</sup> The vast majority of legal writing professors must continue to worry that speech and scholarship about controversial ideas of pedagogy and equality will detrimentally affect their careers. Such a situation is inimical to any meaningful concept of academic freedom.<sup>114</sup>

Legal writing professors also frequently are barred from attending, participating in or voting at faculty meetings. Although this has changed for the better, too often many legal writing professors are prohibited from attending faculty meetings at all.<sup>115</sup> About 10 percent of legal writing professors in American law schools are prohibited from attending faculty meetings. Of those legal writing professors who can attend faculty meetings, only about 20 percent can vote on all matters, and roughly 34 percent are entirely disenfranchised, with

<sup>110</sup> *ALWD Survey*, *supra* note 1, at 40 (Question 65). The *ALWD Survey* reports that only about 24% of legal writing professors are tenured or tenure-track, and the vast majority are working under one year contracts.

<sup>111</sup> *Id.* Legal writing is replete with stories of summary dismissals, which can be accomplished without any justification or cause, simply by non-renewal of a short term contract. Consider this testimony by a legal writing director who had taught and directed for ten years:

[O]n 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 . . . . The Dean announced to the faculty that my dismissal was in no fashion based on a lack of either capability or effectiveness. Rather . . . he decided to use adjunct instructors instead of hiring additional professional writing teachers. In that manner, without warning, without discussion with other concerned persons, without consulting experts, without regard for my years of service, without consideration of its probable effect on my decade-long career, and with neither expressions of gratitude nor a significant promise of support, I suddenly found myself out of my profession.

Bayer, *supra* note 65, at 329-30.

<sup>112</sup> Arrigo, *supra* note 81, at 168-70.

<sup>113</sup> Bayer, *supra* note 65, at 383-84.

<sup>114</sup> *Id.* at 383; *see also* Arrigo, *supra* note 81, at 168-70.

<sup>115</sup> *ALWD Survey*, *supra* note 1, at 53 (Question 84).

no voting rights whatsoever.<sup>116</sup> Participation in the law school community means access to and ability to comment on faculty and administrative decisions, and voting means the ability to register agreement or dissent. In other contexts, of course, these rights are, quite literally, fundamental, and at the core of what it means to be a full member of a society. Moreover, beyond the loss of power and voice, the inability to attend and participate in faculty governance has significant symbolic and emotional value as well.

The status hierarchy also imposes on legal writing professors other markers of low status. Like most status hierarchies, the law school stratification system is maintained and reinforced by separation and branding. Many of these “caste markers” are of such a petty quality that clearly their only purpose is to maintain the illegitimate status hierarchy—to keep the lower ranks in their place. The primary marker is title—a kind of branding typical of the most entrenched hierarchies. The law school hierarchy has fought to monopolize and keep exclusive the revered title of “professor” for its doctrinal faculty. The overwhelming majority of law schools refuse to give legal writing professors the unqualified title of professor, associate professor or assistant professor of law.<sup>117</sup> Instead, most legal writing professors are given either the lesser title of “lecturer” or “instructor” or are given the qualified title of “clinical” professor or professor “of legal writing.”<sup>118</sup> The clear purpose of this distinctive branding is to make obvious the separation between the higher and lower ranks of the hierarchy and to stigmatize the lesser group.

Legal writing faculty also are often physically segregated from the other, higher ranked faculty.<sup>119</sup> According to the most recent survey of the Association of Legal Writing Directors, many legal writing faculty have offices that are separate from the other faculty, with most reporting that their offices are smaller and in a “less desirable” location than the doctrinal faculty.<sup>120</sup> Other examples of physical segregation include prohibiting legal writing professors from attending faculty meetings, from parking in faculty parking areas, or from sitting with faculty at law school events such as graduation.<sup>121</sup> The physical segregation, as well as the other markers, accomplishes a fairly strong social segregation as well, which contributes to the perpetuation of the unfair hierarchy. Treating people badly is significantly easier when they are physically out of sight, and not “real” friends or colleagues.

By these methods, the legal academic hierarchy maintains the “purity” of the higher ranked professors and provides an obvious method of distancing the higher from the lower ranks.<sup>122</sup> These methods also support the hierarchy by openly stigmatizing and belittling the subordinated group. As Parkin stated,

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 41 (Question 68).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (Question 69).

<sup>120</sup> *ALWD Survey, supra* note 1, at 41 (Question 69).

<sup>121</sup> *Id.*

<sup>122</sup> *See supra* notes 78 to 121 (discussing methods of closure and exclusion).

hierarchy is served by a "myriad of direct personal degradations and affronts to human dignity."<sup>123</sup> The non-economic methods of exclusion and stigmatization are critical to the maintenance of the hierarchy because, as with credentialism, one method of closure or stigmatization can be used to justify others, in a parody of logic and merit. Thus, legal writing professors cannot be eligible for tenure, because that is reserved for professors of law. Legal writing professors cannot be professors of law because they are not eligible for tenure. Legal writing professors should not be permitted to vote or attend faculty meetings because they do not have job security or tenure. They cannot have job security or tenure because that reward is reserved for professors of law. The result is an endlessly self-justifying loop. The situation certainly begs the question of whether those who advance such arguments see the tautology and simply do not care, or whether they are so used to power that they do not see the tautology.

The categorical exclusion of legal writing faculty from the social rewards most closely associated with "real" faculty status also reveals that there lurks among many faculties a deep investment in the subordination of others. The petty quality of these degradations, as well as the tenacity with which law faculties cling to them, reveal a disturbing propensity in the legal academy to treat subordinates with disdain and disrespect. That the vast numbers of the subordinated status group are women also demonstrates the legal academy's comfort with women in subordinate and degraded positions. The segregation and "marking" of legal writing professors accomplishes a stark gender segregation in the legal academy, with women predominantly occupying the obviously "less than" category, and men predominantly occupying the obviously "more than" category. This situation is both demonstrative and reifying: the situation shows that the legal academy is comfortable with segregating and cementing women into a lower status, and that segregation simultaneously creates and reinforces the correlation of women with lower status.

### **C. The Feminization of Legal Writing: Exploiting the Discrimination of the Market**

That legal writing is both a stigmatized underclass and is composed of 70 percent women is no coincidence. Rather, the emergence of the legal writing underclass in law schools correlates chronologically with the influx of women into law schools, and into the legal profession, in the 1970s.<sup>124</sup> The timing and the market factors, coupled with other evidence, suggest that the feminization of legal writing occurred as a result of law schools' exploitation of the gender discrimination in the legal market.

The appearance of the status group of low pay legal writing professors in American law schools correlates to two historical events that occurred in the 1970s and 1980s: (i) the sharp growth in the number of students enrolled in law school classes and (ii) the influx of women into the law schools and the legal

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<sup>123</sup> Parkin, *supra* note 23, at 151.

<sup>124</sup> Stanchi & Levine, *Gender and Legal Writing*, *supra* note 1, at 7-8.

profession.<sup>125</sup> The earliest record of a legal writing program, from 1959, shows a field of male professors who commanded competitive salaries.<sup>126</sup> The sharp growth in the number of students posed a problem for these law professors.<sup>127</sup> Because legal writing is so student-centered and labor intensive, the increase in student enrollment made the class difficult and time-consuming to teach, and the mostly male professorate no longer wanted to take responsibility for it.<sup>128</sup> However, because of the concurrent influx of women into the legal profession, there appeared in the market a cadre of lawyers waiting to fill the legal writing niche.<sup>129</sup> This first wave of women lawyers was faced with significant hurdles to advancement within the legal profession because of gender discrimination in hiring, promotion, and salary.<sup>130</sup> Largely shut out of law practice because of discrimination, this first wave of women lawyers was ripe for exploitation.<sup>131</sup> Eventually, repeating a common pattern, the legal writing field became overwhelmingly female, and the salaries commanded by the new female faculty were not even close to competitive, either with other faculty salaries or with the law practice market.<sup>132</sup>

In addition to this telling (and gendered) evolution of the field, other evidence demonstrates that the feminization of legal writing was not mere happenstance, but that law schools purposefully sought out women lawyers who were disillusioned or otherwise badly treated by the legal marketplace.<sup>133</sup> One dean of a prominent American law school was open about his desire to hire women into low status positions when talking to a reporter about the newly created legal writing program at his law school.<sup>134</sup> In an article titled, *Tulane Taps 'Mommy-Track' for Legal Writing and Research Instructors*, a Dean is quoted as saying that the lawyers sought for the legal writing jobs would "typically be women who have taken leave of their employers in order to raise families."<sup>135</sup> The Dean explained that he had actively sought women for the

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<sup>125</sup> *Id.*

<sup>126</sup> Levine & Stanchi, *Women, Writing & Wages*, *supra* note 63, at 553 (citing Donald B. King, *A Survey Dealing with Legal Research and Writing Instructors*, 11 J. LEGAL EDUC. 406 (1959), which noted that the men teaching legal writing were paid salaries commensurate with "the local or regional salary paid by law firms for men of the same training and caliber.").

<sup>127</sup> *Id.* at 566.

<sup>128</sup> *Id.* at 566-67.

<sup>129</sup> *Id.* at 567-68.

<sup>130</sup> *Id.* at 568.

<sup>131</sup> Levine & Stanchi, *Women, Writing & Wages*, *supra* note 63, at 568-69.

<sup>132</sup> *Id.* at 569; *see also* Strober, *supra* note 46, at 151-53 (describing a similar process by which public school teaching became a low pay, female occupation); notes 47 to 57 and accompanying text.

<sup>133</sup> Larry Smith, *Tulane Taps 'Mommy-Track' for Legal Writing and Research Instructors*, 8 LAWYER HIRING AND TRAINING REPORT 13, 13 (Aug. 1991).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*; *see also* ELUSIVE EQUALITY, *supra* note 108, at 33 (stating that when a Dean at one law school "talked about hiring people to teach legal writing, he would say out loud, 'well we can get education for cheap because we can hire people on the mommy-track.'").



positions, by contacting “the major [city] firms, apprising them of the [new legal writing] program and requesting the names of any lawyers who have recently taken leaves of absence.”<sup>136</sup> Because Tulane did not want to pay for professional legal writing training, women on the “mommy-track” offered “a viable alternative” because the law school would only have to pay them “a few thousand dollars per school year.”<sup>137</sup>

The refreshingly open, if disturbing, statements by this dean echo the anecdotal evidence that abounds in the legal academy that women are tracked into legal writing positions because market discrimination will allow law schools to pay women less and because of the perceived “feminine” nature of legal writing, which of course is the primary reason it is devalued and undercompensated.<sup>138</sup> This evidence explodes the common defense that women’s “choices” drive the high numbers of women in this low paying, low prestige field.<sup>139</sup> As one legal writing director noted,

Once you get on the tenure track, as I have, deans and other professors are very likely to reveal to you their presumptions and biases about the gender makeup of the best candidates for certain kinds of positions in a law school . . . I have lost count of the number of times I’ve heard people say things like ‘[c]an’t we just find and hire a few bright women in town who have left practice to have babies?’<sup>140</sup>

Thus, the legal academic hierarchy is a form of illegitimate, non-meritocratic and sexist stratification. When doctrinal professors and law school deans benefit from this hierarchy, their benefits not only flow directly from sex discrimination, but also perpetuate it. Feminist and egalitarian principles demand that such a hierarchy be resisted.

<sup>136</sup> Smith, *supra* note 133, at 13.

<sup>137</sup> *Id.*

<sup>138</sup> Neumann, *supra* note 1, at 347.

<sup>139</sup> WILLIAMS, *supra* note 40, at 14-15, 37-39 (critiquing the choice rhetoric that dominates the discussion of why women leave market work to stay home with children). In an argument highly relevant to the legal writing field, Williams notes that the marginalization of women who do “women’s work” may reflect some choice, but it is choice made within the severe constraints of discrimination. *Id.* at 37. As Williams notes, “choice and discrimination are not mutually exclusive.” *Id.* When women have to choose between trying to be an ideal worker in the market without the family support that men enjoy or taking “mommy-track jobs or ‘women’s work,’ that is not equality,” it is gender discrimination. *Id.* at 39.

<sup>140</sup> Neumann, *supra* note 1, at 347.

#### IV. LEGAL WRITING: A MODEL FOR A MORE FEMINIST PEDAGOGY

In addition to the unjustifiable and sexist nature of the hierarchy, there is another reason for feminists and other critical scholars to work to remedy the subordination of legal writing professors. In its best forms, legal writing has developed a pedagogical model that embraces cooperative and contextual learning and has rejected the more rigid, combative forms of traditional law teaching.

Feminist and other critical legal theorists have long criticized law school pedagogy as hierarchical, inconsistent with educational goals, and alienating to outsiders. The critiques focus on both the substance of law school courses and methodology, as well as the alienating, often hostile, learning environment experienced by outsiders in law school.<sup>141</sup> Some of the critiques are over twenty years old, but the dominant paradigm of law school doctrinal pedagogy has not changed substantially, and problems have persisted.<sup>142</sup> Although many of the feminist critiques were born out of the particular alienation felt by women in law school, a feminist approach to pedagogy is one that seeks to enrich the law school experience for all students.<sup>143</sup> Nevertheless, there is significant empirical support for the premise that the law school experience has a negative "gendered effect."<sup>144</sup>

The methodological critiques of law school pedagogy urge a more contextual, cooperative and empathetic learning environment that balances the learning of legal doctrine with an emphasis on "the social context of legal decision-making."<sup>145</sup> Consistent with the general anti-hierarchical nature of

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<sup>141</sup> See generally Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988) (providing a feminist critique of tort doctrine); Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1988) (positing that the climate of the law school classroom contributes to female silence and lack of participation); Catharine W. Hantzis, *Kingsfield and Kennedy: Reappraising the Male Models of Law School Teaching*, 38 J. LEGAL EDUC. 155 (1988) (critiquing male paradigms of law school teaching and offering a "female" model of law school teacher); KENNEDY, *supra* note \*, at 3, 27, 30, 61; Grant Gilmore, *What is a Law School?*, 15 CONN. L. REV. 1, 1 (1982).

<sup>142</sup> See Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, STAN. L. REV. 1547, 1547-48 (1993) [hereinafter *Missing Questions*].

<sup>143</sup> *Id.* at 1554 ("[W]e can affirm concerns that resonate with women's experiences, but on the basis of feminist commitments, not biological categories."). This answers, to some extent, the concern that a focus on feminist pedagogy ignores diversity in the views among women and feminist theorists. See Katharine T. Bartlett, *Feminist Perspectives on the Ideological Impact of Legal Education Upon the Profession*, 72 N.C. L. REV. 1259 (1994).

<sup>144</sup> Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 45 (1994); Bartlett, *supra* note 143, at 1267.

<sup>145</sup> Rhode, *Missing Questions*, *supra* note 142, at 1563-65; Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 UCLA WOMEN'S L.J. 81, 82-84, 108 (1996); Hantzis, *supra* note 141, at 162-63; Carrie Menkel-Meadow,

feminism, feminist legal theorists are highly critical of the Socratic method, which establishes the professor as all-knowing authoritarian who controls the content and structure of the dialogue.<sup>146</sup> This methodology tends to isolate, alienate and mystify students, particularly outsider students.<sup>147</sup> In addition, feminists and critical legal theorists also have criticized other aspects of conventional law teaching—including the use of large classes, the lack of any feedback until a final examination, and the emphasis on ranking students as opposed to facilitating their educations.<sup>148</sup> Not only does this foster a climate unsuitable for learning law, but also may teach values at odds with the realities of legal practice, which often requires teamwork and cooperation.<sup>149</sup>

Feminists and critical scholars also have criticized the Langdellian case method, a primary method of teaching legal doctrine, arguing that it overemphasizes abstract and decontextualized rules of law, to the exclusion of the more human aspects of legal practice.<sup>150</sup> The case method encourages students to divorce law from its human context and obscures the reality that law is about people, with real problems, for whom legal decisions have very real consequences.<sup>151</sup> Another by-product of the Langdellian approach is the absence of “any sustained effort to address the emotional and interpersonal dimensions of legal practice.”<sup>152</sup>

Suggestions for reform of the educational environment include a re-examination of the utility and effectiveness of the Socratic method, smaller classes, more frequent assignments and more frequent feedback on a more diverse range of skills, an emphasis on collaborative projects, simulations, role-playing and interactive learning, and more attention to the human context of law and legal problems.<sup>153</sup> These feminist reforms describe the pedagogy of the more thoughtful, advanced legal writing programs at American law schools. Legal writing teachers have been at the forefront of pedagogical reform, and articles

*Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School,”* 38 J. LEGAL EDUC. 61, 77-81 (1988); see Kennedy, *supra* note \*, at 17, 30.

<sup>146</sup> Rhode, *Missing Questions*, *supra* note 142, at 1555; see also Menkel-Meadow, *supra* note 145, at 77-81; Fischer, *supra* note 145, at 89; Guinier et al., *supra* note 144, at 45-46; KENNEDY, *supra* note \*, at 3, 61-62.

<sup>147</sup> Rhode, *Missing Questions*, *supra* note 142, at 1555; see also Fischer, *supra* note 145, at 86-87.

<sup>148</sup> Rhode, *Missing Questions*, *supra* note 142, at 1555-57; see also Fischer, *supra* note 145, at 89-90; KENNEDY, *supra* note \*, at 26-27.

<sup>149</sup> Rhode, *Missing Questions*, *supra* note 142, at 1556-57; see also Fischer, *supra* note 145, at 88-90; KENNEDY, *supra* note \*, at 65.

<sup>150</sup> Rhode, *Missing Questions*, *supra* note 142, at 1558-59; see also Bartlett, *supra* note 143, at 1265; KENNEDY, *supra* note \*, at 6-13.

<sup>151</sup> Rhode, *Missing Questions*, *supra* note 142, at 1558-59; see also Margaret E. Montoya, *Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1, 18-19 (1994).

<sup>152</sup> Rhode, *Missing Questions*, *supra* note 142, at 1558-59.

<sup>153</sup> *Id.* at 1563-64; see also Fischer, *supra* note 145, at 95-96; Guinier et al., *supra* note 144, at 93-98; Hantzis, *supra* note 141, at 162-63.

about more effective pedagogy, student learning styles, and other methods of improving the teaching of law dominate legal writing scholarship.<sup>154</sup>

While it is by no means a perfect embodiment of feminist pedagogical ideals, legal writing is, without question, one of the only required courses in law school making consistent use of many techniques urged by feminist reformers.<sup>155</sup> Legal writing pedagogy rejects the traditional Socratic teaching style as well as the Langdellian case method and instead employs a pedagogy focused on experiential, cooperative learning.<sup>156</sup> It is a course based on simulation and problem solving and involves a high degree of interaction between professor and student.<sup>157</sup> That interaction includes frequent assignments, detailed, frequent and constructive feedback, and individual meetings.<sup>158</sup> Legal writing professors have documented their experimentation with cooperative pedagogical techniques such as student collaboration, peer feedback, role playing, and various non-Socratic

<sup>154</sup> See generally Clifford S. Zimmerman, "Thinking Beyond My Own Interpretation": Reflections on Collaborative and Cooperative Learning Theory in the Curriculum, 31 ARIZ. ST. L.J. 957 (1999) (discussing collaborative learning); see also Anne Enquist, *Critiquing and Evaluating Law Students' Writing: Advice from Thirty-Five Experts*, 22 SEATTLE U. L. REV. 1119 (1999) (discussing how to critique papers); Durako et al., *supra* note 88; 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 (1991); Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163 (1993).

<sup>155</sup> Of course, clinical courses also employ many of these techniques as well, but clinics, unfortunately, rarely are required courses. I am not arguing here that legal writing pedagogy is perfect, and I acknowledge that it struggles with many of the same problems that plague doctrinal law teaching. See Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7 (1998) (like doctrinal teaching, legal writing pedagogy can contribute to outsider alienation); see also Henry H. Perritt, Jr., *Taking Legal Communications Seriously*, 33 U. TOLEDO L. REV. 137, 138 (2001) (like doctrinal teaching, first year legal writing courses can be unduly focused on litigation).

<sup>156</sup> See generally Durako et al., *From Product to Process*, *supra* note 88; Kathryn M. Stanchi, *Exploring the Law of Law Teaching: A Feminist Process*, 34 J. MARSHALL L. REV. 193, 194 (2000); Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming a Professor of Legal Writing*, 26 FLA. ST. U. L. REV. 1067, 1072 (1999); see, e.g., Robin S. Wellford-Slocum, *The Law School Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 225 (2004) (explaining how to conduct student conferences); Mary Dunnewold, "Feed-Forward" Tutorials, Not "Feedback" Reviews," 6 PERSPECTIVES: TEACHING LEG. RESEARCH AND WRITING 105 (1998) (explaining how to conduct student conferences); Linda L. Berger, *A Reflective Rhetorical Model: The Legal Writing Teacher as Reader and Writer*, 6 LEG. WRITING 57 (2000) (discussing how to effectively critique students' writing). Although legal writing pedagogy does make use of Socratic dialogue, particularly in critiquing student papers, it eschews the version of the Socratic method used in large doctrinal classrooms, which is the version at the center of feminist critique. See Kearney & Beazley, *supra* note 154, at 886, 889; David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 140 (2003).

<sup>157</sup> Durako et al., *From Product to Process*, *supra* note 88, at 727; see Farley, *supra* note 73, at 356.

<sup>158</sup> Durako et al., *From Product to Process*, *supra* note 88, at 726, 732-33; Levine, *supra* note 156, at 1072.

in-class exercises.<sup>159</sup> Legal writing professors care about teaching and learning and spend a great deal of time mentoring and advising their students—so much so that the profession has, more than once, been compared to parenting.<sup>160</sup>

These reforms have the potential to change not only the reigning pedagogy of law school, but also the male face of the tenured law professorate. Feminists have long been at the forefront of the movement to change the value system of the legal academy—in part because even the ostensibly “neutral” value system of the legal academy seemed to devalue anything feminine or feminist. This movement has most notably focused on how law school pedagogy devalues relational reasoning and how the legal academy values different kinds of scholarship.<sup>161</sup> Broadening the concept “law professor” to include a wider pedagogy and a wider variety of human characteristics and strengths is a natural part of this movement, and in that sense, is feminist.

Part of the work of feminist law reformers and legal writing professors must include asking questions like: Why are teaching excellence and student relations activities devalued? Why is a stellar scholar who cannot, or will not, teach effectively more valuable than a stellar teacher who is not a scholar? Why should the law school teaching model be so skewed in favor of approaches that are evaluative as opposed to pedagogical? In sum, why must there be only one model of tenured law professor—scholar first, teacher second—one, not coincidentally, in which men seem far more comfortable than women? These are an especially important set of questions for feminist deans.

The bottom line is that legal writing is a well-spring of significant pedagogical advances in the legal academy—despite the low reward for this kind of work and the poor treatment of legal writing professors. These pedagogical advances mirror in important ways the reforms of law school teaching urged by feminists and critical scholars and represent a rich, untapped resource within the academy.<sup>162</sup> Feminist and critical legal scholars and legal writing professors have

<sup>159</sup> See, e.g., Durako et al., *From Product to Process*, *supra* note 88, at 726; see also Zimmerman, *supra* note 154; Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 LEG. WRITING 1 (2003); Jo Anne Durako, *Peer Editing: It's Worth It*, 7 PERSPECTIVES: TEACHING LEG. RESEARCH & WRITING 73 (1999); Elizabeth L. Inglehart et al., *From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom*, 9 LEG. WRITING 185 (2003); Barbara Tyler, *Active Learning Benefits for All Learning Styles: 10 Easy Ways to Improve Your Teaching Today*, 11 PERSPECTIVES: TEACHING LEG. RESEARCH AND WRITING 106 (2003).

<sup>160</sup> Farley, *supra* note 73, at 356; Stanchi & Levine, *Gender and Legal Writing*, *supra* note 1, at 23.

<sup>161</sup> For discussion of legal education's valuation of the rational over the relational, see, e.g., Susan H. Williams, *Legal Education, Feminist Epistemology, and the Socratic Method*, 45 STAN. L. REV. 1571, 1574 (1993); Rhode, *Missing Questions*, *supra* note 142, at 1555-56, 1558-59; Menkel-Meadow, *supra* note 145, at 77-81. For discussion of the legal academy's devaluation of feminist scholarship, see, e.g., Cain, *supra* note 108, at 29-32; Levit, *supra* note 77, at 793, 795-800; Delgado, *supra* note 108, at 1363, 1372.

<sup>162</sup> Arrigo, *supra* note 81, at 168-70 (discussing the often radical pedagogical ideas of legal writing, many of which conflict with the legal academic tradition).

substantial overlapping interests that could be a source of power and positive change within the legal academy, if we work together.

## V. CONCLUSION

This paper has argued that the treatment of legal writing professors by American law schools creates a contrived, illegitimate and gendered status hierarchy that exploits women's labor, perpetuates male dominance and takes advantage of gender discrimination in the market. The essay also has argued that feminists, critical legal scholars and legal writing professors have much in common, and, if our efforts were combined, could be a real source of change within the academy. Too often, however, the hierarchy is accepted as a given, even by those who have resisted it in other contexts, and those at the bottom are rendered invisible, even to those who have fought against their own invisibility.

This paper is critical, but its message is ultimately positive. A quintessential part of the feminist journey is to listen and hear the stories of the marginalized, even if it makes us uncomfortable, and even if we must confront our own complicity in the marginalization of others. One step in that journey for feminist and egalitarian professors and deans is to listen to and learn the stories of legal writing professors. Walk down the hall, or across the building, at your law school and find us. Talk to us about our status, our pedagogy, and our teaching philosophy. Ask us to lunch. We are interesting, vibrant people with many of the same goals as you! Read our work. Listen with an open mind—acknowledge difference without being defensive. Look for similarities—there are many. And, last but not least, speak out! Question, criticize and resist the baseless hierarchy that keeps this mostly female profession at the bottom.

