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Gender and Legal Writing: Law Schools' Dirty Little Secrets

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Commentary

FOREWORD BY THE BERKELEY WOMEN'S LAW JOURNAL

Next month, the California Senate Select Committee on Government Oversight will release an audit detailing the abysmal hiring practices of the University of California regarding women in academia. The University of California system has hired women for only 23.5% of its professorships. At the University of California, Berkeley Boalt Hall School of Law, the numbers are even worse: although over 60% of the students are women, there are only 11 female professors in a faculty of 53. Even in academia, seemingly one of the most egalitarian social institutions, almost every woman has experienced or heard about experiences with the impenetrable glass ceiling.

Where are all of the women in academia? They fill the ranks of the lower paying, non-tenure track legal research and writing, clinical, and adjunct positions. It is not surprising that every legal research and writing instructor at Boalt is a woman. None of these women, including our director, is on a tenure track or has a vote on faculty committees. As individuals deeply committed to improving the quality of life for all women, we cannot accept the gendered, academic divide that exists right here at home.

The following Commentary explores the pay disparities and job insecurities of the predominantly female legal research and writing profession. Although legal research and writing instructors might not be considered underrepresented, we are publishing it because of its importance and relevance to many of the instructors at Boalt Hall. To be sure, our research and writing program has improved dramatically over the past few years. Valiant efforts were made to restructure our program by Professor Eleanor Swift (in her role as Dean of Academic Affairs), our immediate-past Dean Herma Hill Kay, current Dean John Dwyer, and other faculty. In particular, Professor Swift worked to allocate more money to the program and raise the instructor's salaries. These efforts have made a noticeable improvement in the quality of teaching.

But there is still a lot of work to be done. For instance, the salaries of Legal Research and Writing Directors in the far west region of the United States still trails more than forty percent behind the average director salary at law schools located in New York City. Salaries also lag behind those at mid-Atlantic and Northeastern law schools, even though the cost of living in the Bay Area is the most expensive in the country. Numerous clinicians, the Director of the Center of Social Justice, and other support faculty are not offered tenure or pay equity at Boalt. Women fill a disproportionate number of these positions, as well.

We strongly encourage our administration to continue to work on this issue.

Gender and Legal Writing:

Law Schools' Dirty Little Secrets

Kathryn M. Stanchi & Jan M. Levine†

I. INTRODUCTION

If you had asked either of us many years ago, when we were full-time practicing lawyers, whether we would find more, or less, blatant gender discrimination in law practice or in law teaching, we would have thought the answer obvious.¹ Few would contest our observations that law practice—whether for a large corporate firm or a government agency—tends to be conservative, both politically and in terms of its openness to change. Law faculties, by contrast, have the reputation for “pushing the envelope” in law—for producing scholarship that rejects the often discriminatory hierarchy of law and argues for radically egalitarian reforms.²

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† Kathryn M. Stanchi, Associate Professor, James E. Beasley School of Law of Temple University. Jan M. Levine, Associate Professor & Director of Legal Research & Writing, James E. Beasley School of Law of Temple University. The authors wish to thank Dean Robert J. Reinstein and our colleagues at the James E. Beasley School of Law of Temple University for having the vision to recognize the benefits of having secure, well-compensated legal writing professionals join them as members of the faculty, and for their courage to implement a legal writing program reflecting that vision. We also thank the editors of the *BERKELEY WOMEN'S LAW JOURNAL* for asking us to add to the growing commentary on women and legal education.

1. Please note that one of us is female, the other is male; before going into law teaching full-time one of us worked for a “white collar” firm, while the other worked in public service and public interest positions. Nonetheless, we both shared the same perceptions about law schools before we began teaching.
2. See, e.g., Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981) (“[H]ow would you decide the X case? . . . My answer, in brief, is . . . which result is, in the circumstances now existing, likely to advance the cause of socialism?”); DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 79 (1983) (recommending, among other things, that lawyers, law professors, paralegals, secretaries, and law firm janitors should make the same salary). As one legal writing professor has noted, Kennedy does not mention legal writing faculty in his argument. Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105, 139 n.158 (1998). The radicalism of American law professors is so legendary that it has led one commentator to joke that the only Marxists left in the “entire world” teach in American universities. James Gordon III, *How Not To Succeed in Law School*, 100 YALE L.J. 1679, 1698-1699 (1991).

Yet a blatant example of gender discrimination can be found in American law schools. It is a version of gender discrimination that no law firm or corporation would dare to institutionalize or rationalize, let alone put into print. Unlike any law firm or corporation, the legal academy has an explicit and *de jure* two-track system for its lawyers: a high-status, high-pay professorial track made up overwhelmingly of men, and a low-status, low-pay "instructor" track made up overwhelmingly of women.³ The lower track of this two-track system emerged after the huge surge in the numbers of women admitted to law schools, which took place in the mid-1970s.⁴ We suggest that this sudden emergence is not a coincidence. This in-house discrimination is the first dirty secret of the supposedly progressive legal academy.

The second secret—really a corollary to the first—is that disparate treatment of faculty based on gender is most obvious in law schools when one looks at the faculty teaching legal writing, which is the fundamental skill most important to the training of future lawyers and judges.⁵ The legal writing course, which requires intensive labor by teachers and an individual focus on each student, is taught by faculty accorded the lowest status in the institution. Almost all of them are severely underpaid,⁶ and many of them are discouraged from (or forbidden from) teaching at the

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3. Seventy-four (74) percent of tenure-track, doctrinal law teaching jobs—the high-status, high-pay track—are held by men. Seventy-three (73) percent of the non-tenure track, legal writing jobs—the low-status, low-pay track—are held by women. Jan M. Levine & Kathryn Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. (forthcoming 2001) (on file with authors); Jo Anne Durako, *Second Class Citizens in the Pink Ghetto*, 50 J. LEGAL EDUC. (forthcoming 2001) (on file with authors) [hereinafter Durako, *Pink Ghetto*]; see also, e.g., Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117 (1997).

Clinical faculty comprise yet another category of faculty, but clinical faculty have achieved—at least in a *de jure* fashion under the ABA Standard 405(c), see *infra* note 71 and accompanying text—significant status short of tenure via long-term employment contracts, a guaranteed role in faculty governance, assurances of academic freedom, and commensurate recognition in salary levels. But those perquisites of faculty appointments still elude most legal writing professors. We suspect that this is because clinical faculty members, who are not as "pink" (predominantly female) a group as legal writing teachers, and who include in their ranks a significant number of law reform lawyers and litigators, attacked these problems earlier than did legal writing teachers.

There are other jobs in law schools where women predominate, such as in libraries, assistant dean positions and non-faculty appointments in administrative programs. See Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. (forthcoming 2001).

4. See *infra* notes 24-25 and accompanying text.
5. See, e.g., Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 481-84, 489-90 (1993) (reporting on the 1991 American Bar Foundation survey of Chicago-area practitioners); AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 264 (1992) (commonly referred to as THE MACCRATE REPORT).
6. See Jo Anne Durako, *Stop the Presses: Gender-Based Differences Discovered in the Legal-Writing Profession*, 7 SCRIBES J. LEGAL WRITING 87, 87 (1998-2000).

school for very long.⁷ Virtually all lawyers and judges acknowledge that legal writing is the single most important course in law school and agree that this course provides the fundamental underpinnings of law practice. In spite of this, the overwhelmingly male power structure in law schools disdainfully treats teaching this course as “women’s work.”⁸ Moreover, since the appearance of the second track, this view has become entrenched in most American law schools,⁹ mostly without protest from the progressive—even feminist—voices in the academy.¹⁰ The absence of public support from female faculty with tenure, or female deans, has been perhaps the most disturbing piece of this story.¹¹

While great strides have been made by legal writing professors in the past two decades, many law schools—perhaps most accurately, many law school deans—try to avoid the investments needed to provide their students with professional, high-quality instruction in legal research and legal writing.¹² Law professors, including women law professors, have reacted

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7. Jan M. Levine, *Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching*, 7 SCRIBES J. LEGAL WRITING 51, 55-57 (1998-2000). Many legal research and writing programs have “caps” on the number of years teachers are permitted to stay at the institution. These caps force legal writing teachers to leave their positions after a short duration, usually between two and four years of service. *Id.*
 8. See, e.g., Pamela Edwards, *Teaching Legal Writing as Women’s Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN’S L.J. 75 (1997); Arrigo, *supra* note 3.
 9. Temple University’s law school, where we teach, is one of a growing number of law schools that has broken from the past. The director of the legal writing program at Temple is a tenured member of the faculty who has taught legal writing for more than fifteen years and had directed programs at several other law schools before coming to Temple. Five years ago, Temple’s dean and faculty decided to hire the director and allocated four faculty positions for other full-time legal writing professors. The faculty in those four positions are given the protections of ABA Standard 405(c); the legal writing faculty are on long-term contracts, vote on all faculty matters (but for awards of tenure and promotion of those on the tenure track), and have all the perquisites and responsibilities commensurate with regular faculty status, such as being eligible for summer research grants, teaching upper-division courses, and serving on faculty committees. All of these legal writing professors were hired after they had taught legal writing at other schools, and all have produced scholarship in the field of legal writing. The program also has several other teachers who are enrolled in a program awarding an L.L.M. in Legal Education. Adjunct faculty are also employed to teach in the school’s evening division.
 10. It is only recently that legal scholarship has documented this second tier, and that scholarship was written by legal writing professors, not by well-known critical legal theorists or feminist legal theorists. See, e.g., Levine & Stanchi, *supra* note 3; Durako, *Pink Ghetto*, *supra* note 3; Arrigo, *supra* note 3. However, several legal research and writing instructors who wrote articles about the second tier later received tenure-track appointments to teach doctrinal courses. See, e.g., Edwards, *supra* note 8; Christine Haight Farley, *Confronting Expectations: Women In The Legal Academy*, 8 YALE J.L. & FEMINISM 333, 352 (1996).
 11. In private, a handful of deans may support the reform proposals covered in this commentary. Individual faculty members at some schools may quietly support reform. However, at the time of publication, the authors were aware of only one instance when any individual or any organized group of women—outside of the membership of the two organizations comprised primarily of legal writing professors—offered, in public, verbal testimony or documents in support of the reform proposals. That sole source of public support was the ABA Commission on Women in the Profession. See *infra* note 84 and accompanying text.
 12. See generally Mary Beth Beazley, “Riddikulus!” *Tenure-Track Legal Writing Faculty and the Boggart in the Wardrobe*, 7 SCRIBES J. LEGAL WRITING 79 (1998-2000) (debunking law school deans’ most common arguments against providing legal writing teachers with tenure opportunities).

to their deans' decisions to maintain the status quo largely by quiet acquiescence—although in some cases they openly support that stance.¹³ Legal writing seems to be just too hard, and too demanding in time and energy, to be taught by doctrinal law professors, most of whom are men who feel they have better things to do.

This essay offers an explanation about how law schools arrived at this uncomfortable place. It reveals the depth of the salary differentials between legal writing teachers, their faculty colleagues down the hall, and the students who have just received their degrees. The essay then explains how these gender-based disparities and disdain for law practice have become institutionalized and validated by the American Bar Association's Standards for Approval of Law Schools. It summarizes the recent actions that legal writing teachers have taken to secure for themselves the status, stature, and pay afforded to other law faculty. Finally, we focus on legal research and writing professors' work to create a standard of writing instruction on which students can rely to begin their practice of law successfully.

The goals of this essay are to publicize the two-track system and its gendered nature; to ask law faculties, law students, and the bar to critically examine the decisions that have created this problem; and to urge reform.

II. THE LESSONS OF HISTORY: WOMEN, LAW SCHOOLS, AND LAW PRACTICE

Only within the past half-century have legal writing and skills courses become part of the modern vision of legal training and made their way into the law school curriculum and the ABA Standards. The modern law school became cast in its current form because the prevailing pedagogy encouraged schools to hire small numbers of highly paid teachers to process large numbers of students.¹⁴ This notion of profitability may be

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13. Both of us have had the unfortunate experience of being in the middle of a law school's struggle with "what to do with legal writing." We found law faculties have many reasons for their acceptance of the two-tier system. Some faculty members may fear that more resources for legal writing mean fewer resources for them. Henry Kissinger is often quoted as saying that academic politics are so savage because there is so little at stake. See Geoffrey Wheatcroft, *Troublemaker: The Life and History of a J.P. Taylor*, NEW STATESMAN & Soc'y (Sep. 11, 2000). Some faculty may have felt threatened by the potential elevation of legal writing courses and teachers, perhaps because of the gender factor, or because they feared that the resultant emphasis on practical skills would highlight a weakness in their own courses or teaching. Others may fear emergence of a "voting block" with the ability to influence faculty decisions. For whatever reason, we both have worked with tenured faculty philosophically sympathetic to the cause of legal writing and legal writing teachers who decided to do nothing while we—and others—were firmly cemented into a second-class status or even forced out of the school.
 14. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 63 (1983). Stevens' book examines the history and evolution of American legal education in great detail, including the relationship of law schools and the American Bar Association's accreditation efforts. *Id.* at 172-80. The work has been criticized, however, as focusing too much on the Harvard Law School and elite institutions. See Steven Alan Childress, Review Essay, *Historiciz-*

the key legacy of Christopher Columbus Langdell, who is often revered as the inventor of the law school casebook and the so-called "Socratic method."¹⁵

Until fairly recently, full-time teachers of legal writing simply did not exist.¹⁶ Once law schools finally acknowledged their presence, the embedded forces of tradition and self-interest led law school faculties and deans to a shared, and often unquestioned, understanding that legal writing courses were unimportant and legal writing teachers were not really faculty.¹⁷ Until the 1980s, a tenure-track appointment for a legal writing teacher was something that almost no one could imagine.¹⁸

The appearance of a cadre of low-pay, low-status positions in skills courses flowed from two major events in the history of American law schools: the sharp rise in general law school enrollment in the 1970s and early 1980s and the influx of women into law schools in the mid-1970s.¹⁹

First, there was a boom in overall admissions to law school in the 1970s and 1980s, in addition to a substantial increase in the number of law schools in the United States.²⁰ The growing size of the entering classes in American law schools posed a particular problem for the teaching of legal writing. While increases in class size tended to affect lecture courses only marginally, the impact on writing classes—and their teachers—was substantial.²¹ At the same time, the bench and bar began to pressure law schools to provide adequate skills training to young lawyers, especially in the areas of writing and research.²² The problem, however,

ing Law Schools: An Alternative to The Socratic Tunnel Vision?, 38 BUFFALO L. REV. 315, 316 (1990).

15. STEVENS, *supra* note 14, at 63.

16. See Levine & Stanchi, *supra* note 3, at 12.

17. See Beazley, *supra* note 12, at 80.

18. 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, 537, 548 (1995) (noting that about twenty percent of all ABA-accredited law schools had at least one tenure-eligible legal writing professional, and finding that the appearance of such positions was a recent development).

19. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 454 (Rick L. Morgan & Kurt Snyder, eds., 2001) (showing the rise in law school enrollment).

20. *Id.*

21. Levine & Stanchi, *supra* note 3, at 26 n.99. Legal writing pedagogy, unlike the Langellian teaching model, is characterized by the constant interaction between the individual student and the professor—both in the form of individual and comprehensive critique of written work and individual, face-to-face meetings between the student and the professor. See generally, Jo Anne Durako, et al., *From Production to Process: Evolution of a Legal Writing Program*, 58 PITT. L. REV. 719 (1997) (detailing legal writing pedagogy's focus on constant professorial intervention in student writing). Many legal writing programs have a written assignment due from each student almost every week of the semester, which means that the professor is providing constant feedback to the student on a rapid turnaround. Thus, every new student added to a doctrinal course meant just another end-of-semester bluebook examination to be graded, which added an hour or two to the per semester teaching burden. In a legal writing class, each new student represented a full series of papers to be read and critiqued, several formal conferences to be held, and another hand to hold through the rough terrain of the first year of law school. This represented an additional time burden of at least another two hours per week.

22. Arrigo, *supra* note 3, at 119.

was that very few, if any, of the established law professors wanted to teach writing.²³

A concurrent and related phenomenon provided the solution to the dilemma. Beginning in the 1970s, women entered law school in ever-increasing numbers. These newly graduated women provided law schools with an excellent labor pool from which to hire skills teachers. There were a number of reasons that law schools hired many more women than men as legal research and writing instructors. First, the position of many women in the legal job market was precarious; when they could get legal employment, it was usually in low-pay, low-status positions.²⁴ There were more women lawyers than jobs for women lawyers.²⁵ Second, discrimination in law firm hiring, along with entrenched social norms regarding gender roles, forced many women lawyers, especially those with families, to compromise their careers. These careers, of course, were within the narrow range of choices they had in the field.²⁶ Finally, many women—professional or otherwise—overwhelmingly bore (and still bear) the burden of childcare and other family related duties. Thus, they were likely lured to law school teaching by the promise of flexible and predictable work hours as compared to the time demands of law practice.²⁷ Many women were probably also attracted to legal writing because of its emphasis on learning and individual attention, as compared with the combative, hierarchical method of traditional doctrinal teaching.²⁸

23. See Levine & Stanchi, *supra* note 3, at 26-27 (noting that increase in student enrollment made teaching writing unattractive because the demanding and time-consuming work interfered with scholarship and other activities).

24. See Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 553 (1988).

25. See, e.g., Donna Fossum, *Women in the Law: A Reflection on Portia*, 69 ABA JOURNAL 1389 (1983) (stating that in the 1970s law firms would not hire women except as secretaries).

26. See Farley, *supra* note 10, at 351-52; Janice Fanning Madden, *The Persistence of Pay Differentials: The Economics of Sex Discrimination*, in *WOMEN AND WORK* 79, 88-90 (Laurie Larwood, Ann H. Stromberg & Barbara A. Gutek eds., 1985). This trend applies to a subset of women in "traditional" family situations—heterosexual, married, and, probably, mothers. The women in these situations often became "second wage earners," whose jobs necessarily were subordinated to the jobs of primary breadwinners when the demands of family intervened.

27. See Farley, *supra* note 10, at 356. Since these reasons all reflect or rely on discriminatory gender norms, the assumption that mostly women are hired in legal writing because mostly women apply for these positions hardly dispels the spectre of discrimination—if anything, it reinforces that discrimination against women is the ultimate reason for the bright gender line that divides doctrinal and legal writing faculty positions. See Dan Subotnik, *See Through "The Glass Ceiling": A Response to Professor Angel*, 50 J. LEGAL EDUC. (forthcoming 2001) (arguing that the predominance of women in low status faculty positions begs the question, "[w]ho applies for these positions?"). More importantly, such an assumption fails to apprehend the critical question, which is: why are these positions, filled predominantly with women, so devalued by the legal academy?

28. See, e.g., Arrigo, *supra* note 3, at 154; Maureen Arrigo-Ward, *LRW: Worthy of Academic Respect In Its Own Right*, 9 SECOND DRAFT 4, 4 (Mar. 1994) (on file with the Legal Writing Institute, Tacoma, Wash.) ("From the first day I set foot in the classroom I was in love."); see also Carrie Menkel-Meadow, *Feminist Legal Theory. Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"*, 38 J. LEGAL EDUC. 61 (1998).

These new women lawyers were the answer to law schools' dilemma: they were highly qualified lawyers attracted to legal education, but, at the same time, were geographically immobile, shut out of the legal practice market, and forced by sex discrimination in both law practice and American culture to take legal jobs at whatever salary and status they could find.

III. THE WORST PART OF A BAD DEAL: NEW DATA ON WAGE DISPARITY

Although the influx of women into the profession proved an excellent bargain for law school deans, and may have led to better instruction for law students, legal writing professors (most of whom were women) soon discovered that they were left with the worst part of a bad deal.

Teaching legal writing is one of the most labor-intensive jobs in the law school;²⁹ yet the teachers of legal writing find themselves lowest on the salary ladder. Compared to traditional, doctrinal teaching jobs, legal writing requires more time and work from its professors, yet it pays substantially less.³⁰ Moreover, legal writing professors make a fraction of the salaries their students command as new graduates.³¹ Although the inflation of newly-hired law firm associate salaries has broadened the gap between academic salaries and the salaries paid to new lawyers, the gap between the salaries paid to writing professors and the salaries paid to new graduates is far larger than the similar salary gap found between doctrinal faculty salaries and new graduates' salaries. Illogically, therefore, the professors who teach critical lawyering skills—presumably hired because they were expert practitioners—are paid salaries furthest from those salaries paid to the soon-to-be practitioners they are training.³²

29. See *infra* note 85 and accompanying text. Many legal writing professors muse that they simply replaced clients with students.

30. See *infra* note 46 and accompanying text.

31. See *infra* note 52 and accompanying text.

32. The argument that legal writing teachers simply are not as competent or as "well-trained" as their doctrinal colleagues is a presumption that is not only without a scintilla of supporting evidence, but one that itself reveals an underlying presumption about gender and legal ability. For example, Professor Subotnik asks whether "contract employees are as well-trained as those hired for the professorial positions," in the context of women holding low-status instructor positions. Subotnik, *supra* note 27, at 2. Professor Subotnik also states that "status provides benefits in legal academia that are too frequently unearned." He does not clarify, however, if he is speaking of legal writing professors or doctrinal tenured professors when he refers to those who have not earned their status. *Id.* at 3. No one has ever published any evidence that legal writing teachers hired within the past two decades from national searches are less qualified than other faculty at the law school. In fact, we have heard anecdotally from more than one professor during that time that recent candidates for legal writing jobs are more qualified for faculty appointments than are many of the tenured faculty. Yet some deans and doctrinal professors find it easy to explain away the stark gender gap we note by attacking, without any evidence, the competence or training of legal writing teachers, who just happen to be predominantly women.

The argument also seems to ignore, or wholly misunderstand, the way gender is treated in law—and has been for decades. If the law of gender discrimination and equal protection jurisprudence tell us anything, it is that when we see conditions, like the one in the legal academy,

Until recently, surveys of legal writing professors, to the extent that they touched on salary at all, dealt only with mean salaries of entry-level teachers.³³ This made it difficult to compare legal writing salaries to the salaries paid to doctrinal teachers. However, we now know that legal writing directors who are male are paid higher salaries than directors who are female, and they tend to get the higher-status jobs.³⁴ We also know that legal writing faculty are paid more if the director of the program is male.³⁵ While some salary comparisons have been made between the pay of legal writing professors and the pay of other law professors, all of the surveys gathered their data from questions asked of legal writing directors, and all the surveys have focused on aggregate data or average salaries in ranges.³⁶ None of the surveys collected data from individual writing professors who were not directors, and none took into account the local cost of living or the experience levels of the individual legal writing teachers.³⁷

In an article which appeared in the spring of 2001, we reported on a survey we conducted of legal writing teachers in 1997-98.³⁸ Our survey examined legal writing salaries based on a number of variables that were not examined previously in such detail. Our study took into account the public or private status of the school, the geographic region in which the school was located, the year of the instructor's law school graduation, and the number of years the instructor had been teaching legal research and writing.³⁹ We adjusted our salary figures for the local cost of living, and then compared our data to similarly adjusted data reported by the Society of American Law Teachers about the 1997-98 median salaries for all three academic ranks for tenure-track and tenured faculty at American law schools.⁴⁰ We then compared the adjusted legal research and writing salaries to the adjusted salaries paid to new associates hired by law firms in the cities where the law schools were located.⁴¹

that create a clear gender disparity in salary and status, that is a classification that requires the creator of the situation to account for its legitimacy. The meaning of gender as a suspect class—and it has been one for quite some time—is the acknowledgment that gender classifications are often based on discrimination against women. In this situation, that requires the acknowledgment that circumstances where women lawyers are paid less and have less job security than male lawyers within the same institution is suspect.

33. Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: A Sharper Image*, 2 LEGAL WRITING: J. LEGAL WRITING INST. 1, 17-18 (1996) (describing survey based on questions that ask for the estimates of the differentials); Durako, *Pink Ghetto*, *supra* note 3, at 10-15.

34. Jo Anne Durako, *A Snapshot of Legal Writing Programs at the Millennium*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 95, 117-18 (2000) [hereinafter Durako, *Snapshot*].

35. *Id.* at 118.

36. *Id.*

37. *See, e.g.*, Ramsfield, *supra* note 33, at 16-18 (1996); Durako, *Snapshot*, *supra* note 34, at 103-105.

38. Levine & Stanchi, *supra* note 3.

39. *Id.*

40. *Id.*

41. *Id.*

The empirical data we collected paints a disturbing picture of gender discrimination in the legal academy. It confirmed the existence of two tracks for law teaching: one high-pay track overwhelmingly composed of lawyers who are men, and one low-pay track largely composed of lawyers who are women.⁴²

The numbers could not have been clearer. The mean salary for legal writing professors of all experience levels was \$37,294; the median salary for doctrinal assistant professors, who generally have been teaching for between zero and three years, was \$66,191.⁴³ In dollars adjusted for the hypothetical location with 1998's average cost of living of 100, the mean salary paid to legal writing faculty of all experience levels was, on average, 57% of the average median salary paid to assistant professors. This was a difference of \$28,226.⁴⁴ Legal writing professors were being paid, in adjusted dollars, 53% of the average median salary paid to associate professors. The difference was \$33,708.⁴⁵ They were being paid, in adjusted dollars, 41% of the average median salary paid to full professors. The difference was \$56,132.⁴⁶

Moreover, the often shamefully low salaries paid to legal writing professors were virtually unaffected by the two variables commonly used to calculate doctrinal salaries: date of graduation from law school and years of teaching experience.⁴⁷ Date of graduation from law school—a strong salary indicator for both legal practice and academic jobs—proved to be statistically of low relevance in predicting legal writing salary levels.⁴⁸ In addition, the legal writing salary levels tended to remain stagnant despite years of teaching experience. Our data revealed that the mostly female legal writing professors, receiving a 5% raise each year, would have to teach for twelve years to reach the 1998 average median assistant professor salary, fourteen years to reach the 1998 average median associate professor's salary, and eighteen years to reach the 1998 average median full professor's salary.⁴⁹ Of course, during those ensuing decades, the doctrinal faculty salaries would not remain unchanged, and the legal writing

42. *Id.*

43. Levine & Stanchi, *supra* note 3.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Levine & Stanchi, *supra* note 3, at n.125. This data exposes one of the perfect ironies the academy creates for legal writing instructors. Although one of the justifications for lower legal writing salaries is the close link between legal writing and law practice (as opposed to law theory), substantial practice experience does not translate into higher legal writing salaries.

49. For a detailed explanation of the methodology used in making this calculation, see *id.* at n.134. Of course, few if any legal writing teachers on contractual appointments teach long enough to reach any of those salary levels. We found that the highest legal writing salaries paid to people not on the tenure-track hit the proverbial "glass ceiling" at the salary level of assistant professor, and that level was reached at only a handful of schools.

teacher would be caught in a variation on Zeno's Paradox,⁵⁰ getting ever closer to her goal, but never reaching it. Worse, this is a calculation using *teaching* experience only; the years required to reach equity go up substantially when the legal writing professors' years out of law school are added.⁵¹

We also found that law schools paid legal writing teachers much lower salaries than were being paid to new graduates of the class of 1998.⁵² This disparity was far greater than the disparity between doctrinal and new graduate salaries.⁵³ After adjusting for cost of living, the average salaries paid to legal writing teachers in almost every city and region often closely tracked the geographic differences in median associate salaries reported by the National Association for Law Placement, but the legal writing salaries consistently fell, in adjusted dollars, about \$10,000 to \$15,000 below the median of the market-driven law firm salaries for brand-new graduates.⁵⁴ To fully comprehend this inequity, it is important to remember that we were comparing attorneys having extensive practice experience with novice attorneys who have no experience. We were not, for example, comparing legal writing professors with eight years of practice experience with the salaries of lawyers with eight years of experience.

Finally, our data suggested that legal writing professors who lived in high cost of living areas were worse off than their peers who taught at schools in low cost of living areas.⁵⁵ Perhaps this is due to higher law firm salaries in those areas, and the presence of more women attorneys who were not in practice.

Legal writing professors have the greatest salary difference from those in practice. Ironically, they teach the very skills which enable new graduates to earn such high salaries. At best this is irrational; however,

50. See Steven D. Jamar, *Essay: This Article Has No Footnotes: An Essay on RFRA and the Limits of Logic in the Law*, 27 STETSON L. REV. 559, 581-583 (1997) (explaining one of Zeno's Paradoxes, which posits that you can never walk all the way across the room, because you must first walk halfway across the room, and there is always half the distance left to travel). The legal writing variation is that the wall—the salary paid to doctrinal tenure-track faculty—is a target always moving farther away, because of yearly pay raises for those tenure-eligible faculty already hired, and from inflationary pressures raising entry-level salaries.

51. Levine & Stanchi, *supra* note 3. In reviewing the data, one must remember that the typical assistant professor is a relatively new law school graduate, often three to five years out, and has been teaching for only about three years. The typical associate professor probably has about five to eight years of law teaching experience, and the typical full professor probably has about a dozen years of experience. The average experienced legal writing professor in our survey has four years of teaching experience, and is more than ten years out of law school; over 8% of the group has ten or more years of teaching experience. *Id.*

52. *Id.*

53. *Id.* If a law school location did not have a corresponding match on the NALP charts, we used the lowest reported in-state mean salary for a city.

54. *Id.* We compared legal writing salaries directly to the salaries for new graduates based on the U.S. Census bureau regions and individual cities. We used the NALP mean salary figures for salaries paid by law firms to graduates of the class of 1998.

55. *Id.*

the gender make-up of the legal writing profession certainly is one factor which could be at the root of this phenomenon.

Pure market forces do not explain the data—especially when many lawyers want to teach in law school. If unfettered market forces were the true determinant of academic salaries, and if schools wanted to save money on faculty salaries, then the schools should abolish tenure, “renew” their faculties, and hire all their faculty members on short-term contracts at the low salaries paid to legal writing teachers.

IV. INSTITUTIONALIZING THE LOWER TIER: THE ABA ACCREDITATION STANDARDS

American Bar Association (ABA) accreditation is a necessity for any school seeking national or regional stature and a broad pool of applicants. The American Bar Association (ABA) publishes a set of rules called the Standards for Approval of Law Schools (Standards), which set basic requirements that law schools must meet to receive accreditation.⁵⁶ An appointed Council determines the Standards. The Council consists of law school deans, a handful of judges, and a few non-academics.⁵⁷ Since 1952, the Council has been recognized by the U.S. Department of Education as the governing body that determines the accreditation criteria for professional law schools.⁵⁸ In addition to setting accreditation criteria, the Council has the “authority to grant or deny a law school’s application for provisional or full approval.”⁵⁹ This authority is recognized by a majority of high state courts, which “rely upon [ABA] approval of a law school to determine whether legal education requirement for admission to the bar is satisfied.”⁶⁰ The Standards are the law of law schools.⁶¹

The Standards, and their accompanying Interpretations, are best understood as compromises that result from the clash of competing political and economic forces. Just as federal agency regulations reflect national

56. *Standards for Approval of Law Schools*, A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS B. (2000) [hereinafter *Standards*], available at <http://www.abanet.org/legaled/standards>. Proposed changes to the Standards, and a rationale for each of them, were announced on December 19, 2000. Memorandum from John A. Sebert, Consultant on Legal Education, and Beverly Tarpley, Chair, Standards Review Committee, to various organizations and individuals, including Deans of ABA Approved Law Schools, University Presidents, and Leaders of Other Organizations Interested in ABA Standards (December 19, 2000), available at <http://www.abanet.org/legaled/standards/proposed.html> [hereinafter *Proposed Changes*]. To see the full text of some of the relevant standards, see *infra* Appendix.

57. *Standards*, *supra* note 56, at 20 (foreword).

58. *Id.*

59. *Id.* (Standard 801(a)).

60. *Id.*

61. Traditionally, the Standards were treated as statutes because they had to be approved by the ABA Board of Delegates, and the Interpretations as interpretive regulations because they required no approval other than the Council’s. Because the Council now has the authority to promulgate both Standards and Interpretations without approval from any other ABA entity, the Standards and Interpretations have equal weight.

politics, the Standards reflect pedagogical assumptions, compromises based on power politics, and economic choices. Not surprisingly, the Standards reflect the widely held view that full-time law professors are the heart and soul of the modern law school. The Standards are written, and have long been implemented, as if legal writing and skills courses are not "real" courses and as if those teaching it are not "real" professors.

The Standards clearly state that law schools are required to offer to all students

(1) instruction in the substantive law, values and skills (including legal analysis and reasoning, legal research, problem solving, and oral and written communication) generally regarded as necessary to effective and responsible participation in the legal profession; (2) at least one rigorous writing experience; and (3) adequate opportunities for instruction in professional skills.⁶²

This clear valuation of legal writing and skills training is remarkable, even ironic, considering that all other courses and skills are described only in the most vague and general terms.⁶³ However, if one looks further, it becomes obvious that these Standards may be mere window dressing, unaccompanied by what is needed for their implementation.

For example, Interpretation 302-1 explains that instruction in law school does not need to be limited to any specific skill or list of skills, because "each law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school."⁶⁴ Schools are encouraged to develop programs such as trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting.⁶⁵ Yet, despite the deliberate emphasis on legal writing in Standard 302(a) and creative educational programs in Interpretation 302-1, the ABA has permitted law schools to avoid investment in faculty resources needed for professional writing instruction. In part, this is because the Standards clearly identify *full-time law professors* as the key to providing quality educational services. According to Standard 402(a), accredited law schools are required to "have a sufficient number of full-time faculty . . . [to] fulfill the requirements of the Standards and meet the

62. *Standards*, *supra* note 56, at 40 (Standard 302(a)).

63. Standard 301(a) says that, "A law school shall maintain an educational program that is designed to qualify its graduates for admission to the bar and to prepare them to participate effectively in the legal profession." *Standards*, *supra* note 56, at 40. Standard 301(b) states, "A law school shall maintain an educational program that prepares its graduates to deal with both current and anticipated legal problems." *Id.*

64. See *infra* Appendix. However, this Standard and the Interpretation are the subjects of proposed changes, from both the Council and organizations promoting legal writing. *Id.*

65. *Standards*, *supra* note 56, at 41.

needs of its educational program.”⁶⁶ According to Standard 402(c), full-time faculty members must, during the academic year,

devote substantially all working time to teaching and legal scholarship, participate in law school governance and service, ha[ve] no outside office or business activities, and [limit] . . . outside professional activities, if any, . . . to those that relate to major academic interests or enrich the faculty member's capacity as scholar and teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one's responsibility as a faculty member.⁶⁷

In addition, the Standards require schools to support *full-time* faculty scholarship and service,⁶⁸ “establish and maintain conditions adequate to attract and retain a competent [*full-time*] faculty,”⁶⁹ and have an “established and announced policy with respect to [*full-time faculty's*] academic freedom and tenure”⁷⁰

The explicit emphasis in the Standards on full-time faculty stands in stark contrast to the standards for clinical courses and legal writing instructors. Without explanation, Standard 405(c) allows law schools to treat teachers of clinical courses as “different” from other faculty. The Standard says:

A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.⁷¹

Standard 405(d) implicitly permits schools to limit the status of legal writing teachers by merely requiring that “law schools employing full-time legal writing instructors or directors . . . provide conditions *sufficient* to attract well-qualified legal writing instructors or directors.”⁷²

66. *Id.* at 48.

67. *Id.*

68. *Id.* at 51. Under Standard 404(a), “A law school shall establish policies with respect to a faculty member's responsibilities in teaching, scholarship, service to the law school community, and professional activities outside the law school.” Standard 404(a)(3) explains that these policies are to address “[o]bligations to the law school and university community, including participation in the governance of the law school.” Standard 404(a)(4) requires law schools to implement policies to address “[o]bligations to the profession, including working with the practicing bar and judiciary to improve the profession.” Finally, Standard 404(a)(5) mandates that schools fulfill “[o]bligations to the public, including participation in pro bono activities.” *Id.*

69. *Standards*, *supra* note 56, at 52 (Standard 405(a)).

70. *Id.* (Standard 405(b)).

71. *Id.*

72. *Id.* (emphasis added).

These policies perpetuate a two-tiered system that discriminates against clinical faculty and legal writing teachers. Instead of promoting minimal levels of training for law students, the Standards serve merely to protect the existing perquisites of the tenured and tenure-eligible faculty, and the financial interests of mainstream law schools. One of the hidden ironies in the current iteration of the Standards is that both 405(c) and 405(d) were positive steps, added to offer some protection to clinical faculty and legal writing faculty. Before the inclusion of those sections, the persons teaching these courses were not given any of the rights and privileges afforded to the persons hired to teach other courses: the teachers of non-doctrinal courses were simply not considered, in any way, to be "faculty."

Legal writing is now a universally-taught first-year course in law school. Except for courses on professional responsibility, legal writing and skills courses are the only ones singled out for attention by name within the Standards themselves. Although the Standards do not require schools to offer Contracts, Torts, or Civil Procedure, they treat the faculty teaching legal research and writing courses as lesser beings to those teaching doctrinal courses. This needs to change.

V. CURRENT PROPOSALS FOR CHANGE

The ABA Standards have been under review since 1998, partially in response to the settlement of an antitrust suit brought by the U.S. Justice Department and pressure from the U.S. Department of Education.⁷³ In 1999, the committee within the ABA charged with addressing legal writing asked for changes in the Standards. These changes were geared at improving the caliber of instruction offered to law students.⁷⁴ The Standards Review Committee offered some proposals, and many legal writing pro-

73. See *United States v. ABA*, 934 F. Supp. 435, 436 (D.D.C. 1996). Under the consent decree, the ABA is now prohibited from collecting faculty salary data as part of the accreditation process, unless it is in response to an allegation of unlawful discrimination. This is interesting, in light of the fact that the U.S. Department of Justice took this action at a time when two former non-tenure-track law school professors were living in the White House. During this time, the Department of Education, which approved the ABA as the agency charged with accrediting law schools, also called for an on-going review of the "validity and reliability" of the Standards. See *Standards*, *supra* note 56, at 20-23.

74. Memorandum of the American Bar Association Communication Skills Committee, Section of Legal Education and Admissions to the Bar, to the Standards Review Committee (Jan. 12, 1999) (on file with authors). One of the authors of this essay was the Chair of the Communication Skills Committee at the time the memorandum was prepared.

fessors testified at several hearings.⁷⁵ Still, the Council voted not to take any action.⁷⁶

On January 21, 2000, the two professional associations composed of members of the legal writing community, the Association of Legal Writing Directors (ALWD) and the Legal Writing Institute (LWI), submitted a report to the American Bar Association detailing pervasive gender discrimination and the lower status afforded to legal writing instructors. Additionally, the report found that the quality of legal instruction offered to law students is visibly hurt because of discriminatory policies.⁷⁷ The ALWD/LWI Report summarized data which showed that law schools have hired a disproportionate number of women for these low-status, low-pay legal writing positions.⁷⁸ The report was based largely on national surveys conducted by the two organizations and the scholarship of individual legal writing professors.

The ALWD/LWI Report made two simple proposals for changes in the Standards.⁷⁹ The first proposal was to amend Standard 405(c) and the related Interpretations to extend to legal writing faculty the minimal protections of job security and academic freedom offered to clinical faculty who are not on the tenure-track.⁸⁰ The second proposal, offered as an alternative to the first, was to amend Standard 405(d) to prohibit employment caps on legal writing teachers' contracts and to amend Standard 405(c) to offer at least the protections of that Standard to the person serving as director of a school's legal writing program.⁸¹ The submitted

75. In 1999, a total of nine legal writing professors appeared before the Standards Review Committee to offer testimony, in New Orleans, San Diego, and Chicago. E-mail from Pamela Lysaght, President, Association of Legal Writing Institute, to Jan M. Levine, Associate Professor of Law & Director, Legal Research and Writing Program, Temple University School of Law (Jan. 15, 2001, 09:37:01 EST) (on file with authors).

76. Association of Legal Writing Directors and the Legal Writing Institute, *Quality Legal Writing Instruction and ABA Accreditation Standard 405: Report and Recommendations*, 2000, available at www.alwd.org [hereinafter ALWD/LWI Report].

77. *Id.* The ALWD/LWI Report explains the membership and purposes of the two organizations:

The Association of Legal Writing Directors has over 240 members, primarily current and former Legal Writing directors from more than 150 law schools in the United States. ALWD's goals include improving the quality of law school Legal Writing programs, encouraging research and scholarship on the educational responsibilities of Legal Writing directors, collecting and disseminating data relevant to directing Legal Writing programs, and improving understanding about the field of Legal Writing. ALWD holds annual conferences and supports scholarship and publications in the field of Legal Writing.

The Legal Writing Institute has over 1,200 members, representing virtually all the ABA-accredited law schools, as well as law schools in other countries, English departments, consulting organizations, and the practicing bar. LWI's purpose is to provide a forum for research and scholarship about Legal Writing and legal reasoning.

Id.

78. *See id.* at 2-9.

79. *Id.* at 9-12.

80. *Id.* at 14-15 (adding the words "and legal writing" everywhere the word "clinical faculty" appears so that the Standards would apply to "clinical and legal writing faculty").

81. *Id.* at 16-19.

report explained that the second proposal would not solve the endemic sex discrimination problems or fully resolve law schools' quality of instruction problems. Instead, these proposals were offered "only to show how any alternative [to the first proposal] would be inadequate."⁸²

When it offered the second alternative, the ALWD/LWI Report focused on the problems of employment caps, which at the time were present at twenty-five law schools:

Teaching expertise develops over time. In any subject, very few teachers are fully effective in their first or second year of teaching, and sustained superb levels of teaching are not usually reached before the third or fourth year. If one wanted to design failure into education, an employment cap—which disposes of faculty as soon as they have learned to teach well—is an excellent foundation.

For that reason, employment caps harm students, the legal profession, and the public, particularly in an era when lawyers and judges depend more than ever on the effectiveness of writing. As the ABA Sourcebook on Legal Writing Programs observes, "It is not in the students' best interest to be taught by people who spend their first year learning how to do the job and their second year looking for their next job. Students benefit the most by learning from experienced faculty who feel invested in the writing program and are committed to excellence in teaching Legal Writing."

Law schools treat no other class of employees this way. No accredited law school can adopt a similar policy regarding clinicians. Assistant deans, development officers, librarians, placement officers, admissions directors, and academic support teachers are not asked to leave at the point where they reach a level of expertise. Nor are non-professional employees such as secretaries or janitors. There is no justification for some schools' singling out legal writing faculty and legal writing courses for this kind of treatment, particularly where it falls disparately on women and damages instruction in a field that the bench and the bar consider essential.⁸³

The ALWD/LWI Report secured the endorsement of the American Bar Association Committee on the Status of Women.⁸⁴ In 2000 and 2001, many legal writing professors appeared before the Standards Review Committee and the Council to offer testimony in support of the ALWD/LWI proposals.⁸⁵

82. ALWD/LWI Report, *supra* note 76, at 13.

83. *Id.* at 17 (citations omitted).

84. Letter from Deborah E. Rhode, Chair, and J. Cunyon Gordon, ABA Commission on Women in the Profession, to Dean John A. Sebert, Consultant to the Section on Legal Education and Admissions to the Bar (Feb. 2, 2001) (on file with the authors). The Commission, chartered to "further the ABA's commitment that women are entitled to participate as equals in all aspects of the profession," endorsed fully the ALWD/LWI proposal to modify Standard 405. *Id.*

85. E-mail from Pam Lysaght, President, ALWD, to Jan M. Levine, Associate Professor of Law & Director, Legal Research and Writing Program, Temple University School of Law (Jan. 15,

Both of the authors testified before the ABA's representatives. The experience of testifying was empowering for each legal writing professor. The speakers in attendance were largely legal writing faculty; often only one or two other persons spoke, and many times the only testimony received was from legal writing professors addressing Standards 302 and 405. Everyone present understood the implications of the testimony: legal-writing teachers, mostly women, had a chance to communicate directly to very influential and powerful deans, professors, and judges. They advocated vociferously for themselves and their students, and proved to the most powerful members of the legal education establishment that they were organized, involved, and committed to speaking out against gender discrimination and inadequate skills training. These instructors used their legal advocacy and analytical skills, usually reserved for training students, to advocate for their own rights.

The response came in December 2000, when the Council and Standards Review Committee published some modest proposals for public comment during 2001, in anticipation of a final action by June 2-3, 2001.⁸⁶

The Council and Standards Review Committee recognized that there existed "agreement within the legal education community . . . that law schools should require substantial legal writing as part of a J.D. program."⁸⁷ Although a number of schools currently do require more than just one semester of legal research and writing courses, the Council and the Committee encouraged schools to require more than the basic Standards. They concluded that substantial writing experience in the first year was "fundamental," and that students would benefit from a writing experience "beyond the first year."⁸⁸ They endorsed the rewording of Standard 302(a), which makes clear that law schools must have a program of legal education that provides all students with a curriculum providing instruction in the fundamentals, including substantive law, values, and skills (including writing). They also stated that law school writing classes are essential for effective participation in the legal profession.

We applaud the enhanced call for skills training, and believe the Council took a small, but positive, step to address the retention of legal writing teachers, the harms of second-class status, and endemic gender discrimination. However, we believe that the Council's proposals do not go far enough to address the serious problems endemic in the way that law schools treat their legal writing programs. The Proposed Changes state,

2001, 08:58:42 EST) (on file with authors). In 2000, twenty-one legal writing professors testified before the Standards Review Committee or the Council in Washington, D.C. and in Dallas, Texas. Thirteen testified again in Washington, D.C., at a third hearing. Forty were present and eleven testified in 2001 in San Francisco, California, at a fourth hearing. *Id.*

86. *Proposed Changes*, *supra* note 56.

87. *Infra* Appendix.

88. *Id.*

although "many, perhaps most, law schools today choose to have their legal writing instruction delivered by full-time teachers and administered by a full-time director . . . [we do not conclude that] these employment arrangements should be mandated by the Standards as the exclusive way to offer a sound legal writing program."⁸⁹ While acknowledging that short-term or non-renewable employment arrangements "might disrupt or interfere with a law school's offering of a sound legal writing program," the Council felt that, "it [is] not possible to conclude that such employment arrangements would always have those effects."⁹⁰

In addition, we feel that there is no need to gather further data on the harms of second-class status and gender discrimination or to provide yet another parallel track for faculty. General language addressing the rights and privileges of law professors should be applied to *all* full-time faculty, regardless of the courses they teach. Law schools should not be permitted to replace full time instructors with a cast of insecure, full-time but short-term novice teachers, inexperienced upper-division students, and adjuncts who already have full-time jobs. We know that our colleagues teaching legal writing will not rest until they are considered full, participating members of the legal academy and our students receive the training they deserve.

VI. WHERE SHOULD WE GO FROM HERE?

1. First, law schools must recognize that professional instruction in legal research and writing is critical to the training of lawyers and demands greater investment of law school resources because it is significantly more time intensive than teaching doctrinal classes under Langdell's model.

Teaching writing is labor intensive. Unfortunately, the Standards and the shared pedagogical traditions and assumptions in law schools favor the cost-savings and economic efficiencies of Langdell's model and encourage schools to invest little in legal writing training. When compared to legal writing courses, doctrinal courses permit vastly higher student-faculty ratios and effective teaching in those courses requires less faculty time.⁹¹ Legal writing courses are more akin to apprenticeships and re-

89. *Id.*

90. *Id.*

91. See Durako, *Snapshot*, *supra* note 34, at 108 (describing intensity of teaching legal writing courses). Many articles about legal writing describe the crushing workload and calculate the hours and pages involved. The most recent national survey reports that the average legal writing professor "taught 53 entry-level students, 5 hours per week, using 3 major and 4 minor assignments, while reviewing 1,870 pages of student work and holding 69 hours of conferences." *Id.* At Temple, we calculated that in our fall semester legal writing class each professor spent approximately 10.5 hours per student in required contact hours over the semester. Letter from Jan

quire individual mentoring. These notions are now virtually unknown in law firms which focus on the “bottom line” and are rarely found in elite law schools which focus on theoretical scholarship instead of mentor-based student-faculty relationships.⁹² Good legal writing and clinical programs cost more than what law schools are used to paying for the instruction of their students. Each legal research and writing instructor cannot teach as many students as can a professor in a typical doctrinal course who reviews written work once or twice a semester for a mid-term or final exam.⁹³ Writing and thinking *well*, and teaching others to write well by providing detailed feedback and critique, requires time. It requires special talents, special pedagogy, a love of teaching, and a love of real-world law practice. Not surprisingly, these qualities are among those that many commentators, particularly judges, find sadly lacking among law school faculties.⁹⁴

Levine, Associate Professor & Director of Legal Research & Writing, James E. Beasley School of Law, of Temple University, et. al., to faculty of the James E. Beasley School of Law (Nov. 16, 2000) (on file with authors). This works out to 315 hours for a typical thirty-student class. This further translates to 22.5 hours per week over the full semester. These hours do not include the time needed for development of the writing assignments, class preparation, classroom teaching, e-mail and telephone consultation with individual students, holding extra meetings with students, and reviewing extra rewrites. Most doctrinal courses, which rely on professorial review of one examination at the end of the semester, require a fraction of the time commitment of legal writing. This de-emphasis on teaching is purposeful—the lesser time commitment required by Langdell’s model is calculated to free up significant periods of time for the other two primary requirements of the academic job: scholarship and service. Thus, Langdell’s model allows law schools to benefit from the full range of law professor talents, without making professorial hours unmanageable. However, for those legal writing professionals who perform scholarship and service in addition to teaching—and there are many who do so despite the lack of financial or institutional rewards—the 22.5 plus hours of teaching can mean a seventy-plus hour work week.

92. See generally Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998).

93. The allegedly higher costs of teaching legal writing well are less clear-cut than they may seem at first glance, however. The most valuable and critical course in the first-year curriculum is the last place where any wise curriculum planner would want to conserve faculty resources—investing in faculty for such courses is likely to reap a greater overall reward, and therefore be worth more than investing faculty resources in boutique seminars offered to small numbers of upper-division students. Virtually all law schools have made such investments in the first-year required curriculum without question, and should not skimp on legal writing merely because it is difficult to teach well.

Furthermore, persons doing this cost-benefit calculus should realize that all courses taught by all faculty are not large-enrollment courses. The faculty member who teaches contracts to a section of eighty-five first-year students is also likely to teach a small seminar to a few upper-division students, and the average overall teaching load of that professor is usually far smaller than is often suggested. Furthermore, secure and experienced legal writing professionals can teach other law school courses, produce scholarship, and serve as contributing members of the law school community, all institutional benefits that cannot be reaped by using short-term inexperienced teachers, adjuncts, or upper-division students to teach legal writing.

94. See, e.g., Harry T. Edwards, *Symposium on the 21st Century Lawyer: Another “Postscript” to The Growing Disjunction Between Legal Education and the Legal Profession*, 69 WASH. L. REV. 561 (1994); Harry T. Edwards, *The Role of Legal Education in Shaping the Profession*, 38 J. LEGAL EDUC. 285 (1988); Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421 (1995); see also *United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars*, 955 F.2d 712 (D.C. Cir. 1992) (Silberman, J., concurring) (noting that “many of our law reviews are dominated by rather exotic offerings of increasingly out-of-touch faculty members”).

For these reasons, legal writing instruction does not fit the Langdellian norm. So-called "doctrinal" professors do not generally teach in this way. An honest dean would admit that most law faculty members would not do so even if they could. Most law school deans will acknowledge the importance of writing,⁹⁵ but few schools on their own will allocate tenure-track faculty resources for such a critical need because it is not consistent with the self-interest and desires of the existing faculty. We suspect that few faculty members or deans would argue with the commonly-held beliefs that, in general, law schools do not reward faculty for teaching well, law professors do not laud colleagues for teaching well, and our institutional incentive structures work against intensive teaching and individualized instruction.⁹⁶ Most faculty acknowledge that scholarship is the "coin of the realm."⁹⁷ Even so, the growing scholarship produced by legal writing teachers is discounted.⁹⁸ Decisions on faculty hiring, tenure, promotion, and pay raises often turn on the promise or reality of scholarly production without regard to effectiveness in teaching or a professor's impact on students.⁹⁹

2. Second, the ABA Standards should offer legal writing professionals at least the minimal protections of job security and academic freedom now granted to clinical faculty.

The current Standards, and even the Council's proposed changes, support the existing limited vision of legal education and give law schools a loophole for underinvesting in legal writing. At virtually every law school in the nation, legal writing is a first-year required course,¹⁰⁰ yet the law school power structure makes legal writing courses an exception to the general principles of professional faculty instruction in required core courses. The Standards, and even the Council's proposed new Standards,

95. See John D. Feerick, *Writing Like a Lawyer*, 21 *FORDHAM URB. L.J.* 381, 381-82 (1994) ("Good legal writing is a virtual necessity for good lawyering. Without good legal writing, good lawyering is wasted, if not impossible. Good lawyering appreciates and is sensitive to the power of language to persuade or antagonize, facilitate or hinder, clarify or confuse, reveal or deceive, heal or hurt, inspire or demoralize.").

96. See Schiltz, *supra* note 92, at 749-52.

97. *Id.* See also J. Cunyon Gordon, *A Response from the Visitor From Another Planet*, 91 *MICH. L. REV.* 1953, 1959-60 (1993).

98. As schools have granted legal writing professors job security and supported their professional development there has been an exponential growth in the production of scholarship by legal writing teachers, despite the immense demands of teaching their courses. Several bibliographies of recent legal writing scholarship have been prepared. See, e.g., Ralph L. Brill, et al., *Sourcebook on Legal Writing Programs*, 1997 A.B.A. SEC. LEGAL EDUC. ADMISSIONS B. 149-74 (1997); THE POLITICS OF LEGAL WRITING: PROCEEDINGS OF A CONFERENCE FOR LEGAL RESEARCH AND WRITING PROGRAM DIRECTORS 155 (Jan M. Levine et al., eds., 1995); George D. Gopen and Kary D. Smout, *Legal Writing: A Bibliography*, 1 *LEGAL WRITING: THE J. OF THE LEGAL WRITING INST.* 93 (1991). Quarterly listings of new legal writing scholarship are also available. See, e.g., Donald J. Dunn, *Legal Research and Writing Resources: Recent Publications*, 9 *PERSPECTIVES: TEACHING LEGAL RES. & WRITING* 20 (Fall 2000).

99. See Schiltz, *supra* note 92, at 749-752.

100. Ramsfield, *supra* note 33, at 3.

permit legal writing courses to be taught by underpaid faculty, by adjuncts,¹⁰¹ or even by upper-division law students.¹⁰² The tragic irony here is that what is taught in modern legal writing courses – written legal analysis and synthesis—lies at the heart of all law practice, constitutes the most critical part of any lawyer’s repertoire, and also defines the soul of legal scholarship, even the most theoretical and abstruse. Our society would not tolerate medical school instruction of future surgeons to be offered solely by residents. Yet we allow similar models of instruction in legal education, even though we have data showing their inadequacies. The legal academy firmly espouses the benefits of better instructional models for all other core law school courses, but refuses to see the failures inherent in the current structure of legal writing programs.

3. Third, we should recognize that gender bias is at the heart of law schools’ treatment of legal writing teachers.

Why is it taking so long for law schools to invest in legal writing and to recognize the contributions of legal writing professors? We suggest it is because law schools have treated the teaching of legal writing as “women’s work.”¹⁰³ While the high percentage of women found teaching legal writing may not always be the result of conscious discrimination, the gender disparity certainly reflects an institutional willingness to take advantage of the position of women lawyers. Moreover, it is likely that many deans and faculty members simply accept it as a “fact of life” that women teach writing. We suspect, however, that many deans and faculties know that women will work hard, know that women will “mother” the students, and know that if they hire women, they can pay them less than men and treat them less favorably. Despite all of this, most of those women will enter and leave the academy unnoticed, only to be replaced by another woman for a few years. With an ever-larger pool of very talented female lawyers entering our law schools and practice, many grow disillusioned with practice or leave to raise families; who better to teach—and teach well—for low pay and no job security?

101. Who may in turn be supervised by an underpaid faculty member or an uninterested doctrinal professor.

102. See Levine, *supra* note 7, at 55-56.

103. Feminist law professors have long noted the phenomenon of valuing scholarship over teaching and mentoring, and its disparate impact on women law professors. See, e.g., Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1, 23 (1995) (urging law schools to redefine merit for tenure purposes to include the “enhanced advising function” served by women and other minorities and noting that “[h]ours spent inside or outside of the office advising students . . . are usually not included in the definition of merit for tenure.”); Deborah Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1183 (May 1998) (discussing how socialization patterns may encourage women law professors to spend “a disproportionate amount of time” advising students, a factor that is of little importance in the tenure review process).

Hiring these capable women to teach legal writing arguably does provide students with better instruction than in the past, but the instruction at many schools is not what it could—and should—be. It permits law school faculties to appear diverse—when they are not. It lets schools save money—but they save it on the most critical and hard-to-teach course in the curriculum. It allows law schools to see legal writing teachers—who are mostly women—as fungible, disposable, and subordinate. So who is hurt by these practices? The students and those teaching legal writing and therefore, the legal profession. We should recognize this for what it is: a coupling of sex discrimination and an elitist disdain for lawyering and law practice. It is shortsighted, it is wrong, and it may be unlawful.

The saddest irony of all is that the field of legal writing, and those energetic and enthusiastic faculty teaching it, offer law schools one of the best ways to invigorate themselves, to improve the training of future lawyers, to bring women into the mainstream of legal education, and to bridge the growing gap between the profession and the academy. Lawyers in the United States proudly point to the role of lawyers throughout our history as the founders of our nation, as leaders at all levels of society and government, and as protectors of individual rights and liberties. Our students deserve the best possible training, and our society needs the best-trained lawyers. Our students know the truth of this, as do individual lawyers, judges, and the leadership of the bar. The failure of American law schools to invest in basic legal writing instruction—and the failure of the ABA to require this investment in the face of the clear gender discrimination it encourages—is inexcusable and unconscionable. Legal writing professors should be welcomed into full membership in the law school world, and those steps should be taken now, before more harm is done to the profession.

APPENDIX

This appendix includes the standards, interpretations and rationales that the ABA has provided regarding Standards 302 and 405. Please note the generous language in Standard 302 may be mere window dressing, unaccompanied by what is needed for its implementation. Additionally, the harmful language of Standard 405 defeats any gains that Standard 302 is meant to provide. The contradictory nature of these two standards is striking when provided side-by-side.

The Proposed Changes in Standard 302 (Curriculum)
(new language in bold face, language to be deleted with strikeouts, notations in italics):

Standard 302. CURRICULUM

(a) All students in a J.D. program shall receive:

(1) instruction in the substantive law, values and skills (including legal analysis and reasoning, legal research, problem solving and oral and written communication) generally regarded as necessary to effective and responsible participation in the legal profession; and

(2) substantial legal writing instruction, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year.

(b) Unchanged

(c) A law school shall offer in its J.D. program:

(1) adequate opportunities to all students for instruction in professional skills; and

(2) live-client or other real-life practice experiences. This might be accomplished through clinics or externships. A law school need not offer this experience to all students.

(d) The educational program of a law school shall provide students with adequate opportunities for small group work through seminars, directed research, small classes, or collaborative work.

(e) Unchanged

(f) Unchanged

The Proposed Changes in Standard 405(d):

Standard 405. PROFESSIONAL ENVIRONMENT

(d) A law school shall have an announced policy designed to afford legal writing teachers whatever security of position and other rights and privileges of faculty membership that may be

necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 302(a)(2), and (2) safeguard academic freedom.

The New Interpretation 302-1 would say:

Instruction in professional skills need not be limited to any specific skill or list of skills. Each law school is encouraged to be creative in developing programs of instruction in professional skills related to the various responsibilities which lawyers are called upon to meet, using the strengths and resources available to the school. Trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting are among the areas of instruction in professional skills that fulfill Standard 302(c)(1).

The New Interpretation 405-9 would say:

A law school may offer short-term or non-renewable contracts to full-time legal writing faculty provided that the use of such contracts does not have a negative and material effect on the quality of its legal writing program.

The Council and Standards Review Committee's rationale for the changes to Standard 302 reads:

The proposed revision will require law schools to make certain that all students receive at least two rigorous writing experiences as part of the J.D. program. At least one of these must be in the first year and at least one must be outside the first year. There has been substantial agreement within the legal education community, including the Standards Review Committee and the Council, that law schools should require substantial legal writing as part of a J.D. program. The existing standard, which requires one rigorous writing experience, can be met by a law school's introductory research and writing course. Many schools require more, but we agree with others that it is important that the Standards' requirements in this area be increased.

There are, of course, a variety of ways to state an increased requirement. Some have suggested that the Standards simply require two writing experiences, rather than one. Many schools might suggest that they meet such a requirement by a two-semester first-year course. Others might suggest that two senior writing seminars would meet such a standard. Neither of those schemes is satisfactory. We believe that a substantial writing experience in the first year is fundamental, and we believe that students

will benefit from a writing experience beyond the first year. We believe that increasing the required number of writing experiences from one to two and insisting that one of those experiences be outside of the first year accomplishes the objective of ramping up what law schools must do and still leaves schools with an appropriate amount of flexibility to design programs that fit their student bodies and missions.

These revisions also reorganize the curricular requirements of Standard 302 to more clearly communicate what curricular requirements law schools must meet to comply with the Standards. The rewording of Standard 302(a) makes clear that law schools must have a program of legal education that provides for all students to receive instruction in the fundamentals—substantive law, values and skills (including writing)—that are essential for effective participation in the legal profession. Subsection (c) is restated to specifically address professional skills and clinical education. Law schools shall offer adequate opportunities to all students for “skills” instruction, but need not require all students to receive this instruction; and schools must offer live-client clinics and/or externship programs, though a law school need not be organized to provide this experience to every student. The provision in revised Standard 302(c)(2) concerning live-client and other real-life practice experiences has been in the Standards for a number of years and is not substantively altered in this proposed revision.

**The Council also authorized the distribution for
comment of a new Interpretation 405-9 to
accompany Standard 405:**

Many, perhaps most, law schools today choose to have their legal writing instruction delivered by full-time teachers and administered by a full-time director. Many law schools have taken the additional step of providing security of employment through long-term contracts or other means to legal writing directors and faculty. The Standards Review Committee did not conclude, however, that these employment arrangements should be mandated by the Standards as the exclusive way to offer a sound legal writing program. Considerable discussion at the public hearings and in the written commentary focused on whether a law school's use of short-term or non-renewable contracts prevents a law school from offering a sound legal writing program. While such employment arrangements might disrupt or interfere with a law school's offering of a sound legal writing program, it was not possible to conclude that such employment arrangements would always have those effects. The new interpretation is designed to focus on whether such contracts have a negative and material effect on the school's legal writing program.