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Papercuts: Hierarchical Microaggressions in Law Schools

Nantiya Ruan

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I. INTRODUCTION

> It is hard to say no to the existing social and political order—and to mean it, to mean it with an everyday commitment of energy.
>
> —Dorothy Day[1]

Death by a thousand cuts.[2]

Torts lacks the status of Contracts. In this alternate universe,[3] it is the drafting and interpreting of legal documents that is most valued in the law. As the Professors of Contracts like to opine in the law school classroom and faculty lounges, law's origin is Contract: from the Code of Hammurabi, to the Magna Carta, to the Declaration of Independence. The Law of Legal Documents, Contractual Remedies, and Transactional Law are required two-semester, first-year courses in most law schools across the country, while Torts is usually taught pass/fail on Friday afternoons, mostly by adjuncts or upper-level law students. Those that teach and write about Contracts receive the highest pay, prestigious titles (including Distinguished Chairs and Program Directorships), and the most secure job status—tenure. In stark contrast, Torts Teachers (as they are called) receive significantly lower pay and lesser titles, with most receiving yearly employment contracts and only a small minority who are granted tenure status. Students looking for their Torts Teacher often have to travel to the basement of the law library, while they find their Contracts Professors on the top floor, in large, sunny offices.

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1. Robert Coles, *Hierarchy and Transcendence*, 97 HARV. L. REV. 1487 (1984) (reviewing DUNKAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983)).

2. *Lingchi* (Chinese: 凌遲), translated variously as the slow process, the lingering death, or slow slicing, and also known as death by a thousand cuts, was a form of torture and execution used in China from roughly 900 CE until it was banned in 1905. *Lingchi May Be The Most Terrifying Punishment in History*, ALL THAT'S INTERESTING, (May 2, 2017), https://allthatsinteresting.com/lingchi [https://perma.cc/B8W7-DWJ3].

3. Thanks to Professor Rachel Arnow-Richman for providing the idea of an alternate universe example for this Article.

It doesn't take law students long to learn: Contracts is Important, while Torts is Not Important.

This Article investigates law schools as locations of workplace fairness by examining their hierarchical structure and the power dynamics at work. Many scholars have researched and written on the myriad ways in which "legal skills faculty"[4] are treated unfairly (the "Torts Teachers" in the alternate universe) as compared to those that primarily teach non-skills (or doctrinal classes)[5] (the "Contracts Professors") because of the subject matter that they teach and the assumptions that are made about their credentials and ability to contribute to the law school mission.[6] Likewise, many other scholars have critically examined the discrimination experienced by law school faculty members based on race, gender, sexual orientation, and other identities, including microaggression[7] in the law school workplace.[8] What has thus far been missing is an awareness and examination of how microaggression based on one's role in the law school is experienced by skills faculty and the detrimental effects this type of microaggression can have when ignored and compounded over time.[9] This Article fills that gap.

Law schools are the precursor to the legal hierarchy in law firm culture, where the top ranks (partners/tenured professors) receive the majority of the resources and the bottom ranks (associates, paralegals, staff/nontenured professors, staff) too often are subjected to adverse treatment. Those seeking to justify this legal hierarchy point to "natural differences" in talent, the desire to maximize the quality of legal services, and other meritocracy and efficiency-based explanations for the inequity, reflecting the general principle that "hierarchy reflect[s] desert."[10] Although some may view legal

4. "Legal skills faculty" is a shorthand term for law school teachers that teach a variety of law school classes, including legal research, writing, and analysis (LRW), clinics, externship, academic success, and other experiential teaching that primarily involves skills education. Some legal educators dislike the term because it divorces taking action within the law from the law itself—as if writing a motion does not mean grappling with the doctrinal law as well as the narrative, structure, advocacy, or communication of the motion.

5. Doctrinal classes mean classes such as torts, contracts, or constitutional law. It refers primarily to lecture-based classes, which often do not require action by the students beyond examinations and answering questions in class.

6. *See infra* notes 121-123.

7. Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCHOL. 271, 271 (2007) (Microaggression is examined at length in this Article and is defined as the "brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults toward people of color").

8. *See infra* note 20.

9. Microaggression based on hierarchy is a type of harm experienced by those perceived as lower on the hierarchy scale in law schools, such as those that teach skills as opposed to doctrine. As stated throughout this paper, recognition and study of hierarchical microaggression is not meant to equate those harms as being on par with race or gender microaggression, or liken the experience to those harmed by microaggression based on important characteristics, such as one's race or gender (or other personal identities, such as sexual orientation or religion, to name a few).

10. DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A

hierarchy as "socially neutral," this assumes that the ranking of a workplace is merit-based and is "optimally adjusted to achieving the benefits of labor."[11] The "myth of meritocracy"[12] belies this assumption.

Instead, consistent with the "myth of meritocracy" argument, the stratification of law school faculty should be examined with the recognition that the selection mechanisms for law schools are not entirely meritocratic and the compulsory job specialization of law schools is a function created to regulate and promote hierarchy.[13] Law schools categorize and silo faculty based on what they teach (doctrinal, legal writing, clinical, externship, academic success, and so on) and their effect results in status hierarchy by blocking opportunity and is non-meritocratic: working on one category often disables you from working in the other.[14] Only those at the top of the hierarchy are allowed to compete for the best rewards—specifically, the highest salaries, job security, and time (in the form of sabbaticals, course relief, and other actions that remove institutional obligations and provide freedom for the faculty member to pursue their own projects).[15]

This status hierarchy results in rankism[16] when those higher in the hierarchy, without recognition of the power difference, abuse their power to the detriment of those lower in the hierarchy.[17] One way in which status hierarchy and rankism play out in law schools is not only the larger discriminatory effects of pay inequity, job insecurity, and other employment metrics, but also in the everyday slights experienced by those with less power. In other words, the "papercut harms," or microaggressions, inflicted by those with greater status on lesser-status faculty include comments about what they teach, their roles in the institution, their lesser status, and the perceived value of their contributions.

Microaggressions are pernicious, in part, because they are quick, like hit-and-run accidents. They often are unintentional and remarking on them or

POLEMIC AGAINST THE SYSTEM, 42 (AFAR Cambridge 1983).

11. *Id.* at 79.

12. "The myth of meritocracy--has its origin in the 'just world phenomenon,' the cognitive desire to view our society, the organizations of which we are a part, and ourselves as just and legitimate. . . . This myth coopts possible system challengers, who instead legitimize the existing social structures." Note, *Trading Action for Access: The Myth of Meritocracy and the Failure to Remedy Structural Discrimination*, 121 Harv. L. Rev. 2156, 2157 (2008). *See generally* Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585 (1996).

13. Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 480 (2004).

14. Duncan Kennedy, *Dismantling Hierarchies in Legal Education*, 73 UKMC L. REV. 231, 234 (2004).

15. Stanchi, *supra* note 13, at 480.

16. ROBERT W. FULLER, SOMEBODIES & NOBODIES: OVERCOMING THE ABUSE OF RANK 2–5 (2003) (Rankism is "rank-based abuse," whereby "differences of social rank . . . reflect underlying power differences," resulting in "abuses of power vested in rank-holders.").

17. *Id.*, *see generally* ROBERT W. FULLER, ALL RISE: SOMEBODIES, NOBODIES, AND THE POLITICS OF DIGNITY (2006). *See also* David C. Yamada, *Dignity, "Rankism," and Hierarchy in the Workplace: Creating A "Dignitarian" Agenda for American Employment Law*, 28 BERKELEY J. EMP. & LAB. L. 305, 306 (2007).

identifying them as such is often met with surprise or denial. But it is the compound effect of the repeated insults that cause real harm to the targeted listener. Skills faculty members are too often the targeted listener for microaggressions based on their role in the institution. This Article outlines and examines four types of hierarchical microaggression experienced by skills faculty: (1) **devaluing** microaggressions based on perceived status; (2) **degrading** microaggressions based on perceived roles; (3) **demeaning** microaggressions based on unexamined bias; and (4) **discrediting** microaggressions based on structural norms of law schools.

The Article starts by examining law schools as workplaces with status hierarchy and the precursor to hierarchy in the legal profession. Additionally, the irony of law schools with missions for justice and graduating "practice ready" lawyers is underscored by examining how such law schools treat their experiential teaching faculty. The disheartening reality is that those most attuned to social justice in law schools—including critical legal studies scholars—have failed to be allies to skills faculty in addressing inequities in the institution, including microaggressions.

The Article then provides an overview of microaggression as researched and written by experts in the field of psychology. Most work has been one in the areas of racism and sexism, but more recent scholarship explores other identities, including hierarchical microaggressions based on one's role in the workplace. This section delves into the work on hierarchical microaggression in the university setting.

Next, the Article explores the ways in which hierarchical microaggression are experienced by skills professors, applying the previously examined concepts to the law school workplace. Here, four new types of hierarchical microaggression are defined in order to understand the harm caused by the devaluing, degrading, demeaning, and discrediting insults experienced by skills professors. Examples of each are unpacked and examined.

Having defined and explored categories of hierarchical microaggression, the Article turns to two important concluding issues: why should we address hierarchical microaggression in the law school workplace? And how can law schools, as well as faculty members, successfully address hierarchical microaggression?

Lastly, the Article ends with personal final thoughts by the author, who has experienced the examples of hierarchical microaggression explored in this Article.

By becoming aware of status hierarchy and the hierarchical microaggression experienced by skills faculty, this Article aims to start a conversation in law schools on how to successfully address them and bring a bit of dignity and justice back in those workplaces.

II. STATUS HIERARCHY: THE LAW SCHOOL WORKPLACE

Law schools are workplace precursors that provide the template for the hierarchy found in law firm culture. To understand both systems, rankism explains how we categorize those we encounter in the world- including our workplace. We rank individuals and treat people according to their rank. In the law school faculty, this is evidenced in the status hierarchy: Doctrinal, tenured teachers rank higher and are given privileged status (with corresponding benefits) over skills teachers, especially those without tenure track status, who are privileged over adjuncts and other temporary statuses (such as long-term visitors or teaching staff).[18] This section explains how rankism and status hierarchy is cultivated in law schools and the paradox such hierarchy reflects in law schools committed to justice and experiential learning.

A. Rankism in the Law School Workplace

While law schools' mission is to educate lawyers for tomorrow, they are also employers of workers, including teaching faculty, administrative staff, security workers, and cleaning personnel.[19] Yet law schools are not often the subject of scholarly attention as employers with their own peculiar employment habits and trends in hiring, promotion, and pay structures.[20]

In many ways, law school workplaces align with the professional settings of other American industries. People work long hours, either on salary or hourly. They must be productive and accountable to the goals of the mission of the organization, as outlined in their job description. Although there are certainly exceptions, most workplaces are hierarchical in structure. Workers are supervised, supervise others, and report to those higher up in the organizational chart. In this way, law schools are no different.

Yet law schools, both public and private, do differ in a fundamental way from commercial organizations, as well as other academic institutions. Because law schools educate future lawyers, and law is the tool of the trade,

18. This Article focuses on the hierarchy within the teaching faculties of law schools. The treatment of law school staff could (and should) be the source of its own study because they are too often considered to fall outside the law school enterprise and are accorded little to no respect in the work they do to further the law school mission, when in fact, staff employees are critical to the work of educating law students.

19. Note that this list is hierarchical, from highest to lowest paid and status.

20. For a few that do, *see* Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371 (2001); Ann C. McGinley, *Discrimination in Our Midst: Law Schools' Potential Liability for Employment Practices*, 14 UCLA WOMEN'S L.J. 1 (2005); Melissa Hart, *Missing the Forest for the Trees: Gender Pay Discrimination in Academia*, 91 DENV. U. L. REV. 873 (2014); Elizabeth M. Iglesias et al., *Labor and Employment in the Academy - A Critical Look at the Ivory Tower: Proceedings of the 2002 Annual Meeting of the Association of American Law Schools, Joint Program of the Section on Labor Relations & Employment*, 6 EMP. RTS. & EMP. POL'Y J. 129, 130 2002); Deborah J. Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997).

the law school mission includes promoting justice.[21] But do law schools reflect a just workplace? Is justice paramount, not just in the academic mission but also in the organization itself—in how it's run, how it operates, how it functions? A just workplace would have transparent pay structures and equal opportunity for hire and advancement.[22] Workers would feel that their workplace is fundamentally fair because job performance is measured and evaluated in ways that are knowable and consistent with the institution's mission and job description.

This Article investigates law schools as locations of workplace fairness by examining their hierarchical structure and the power dynamics at play. To begin, more than thirty-five years ago, Duncan Kennedy opined in his work, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*,[23] that law schools not only reflect but perpetuate illegitimate hierarchies found in law firm culture. These hierarchies, introduced in the law school environment and concretized in law firms, have three commonalities, as described by Kennedy. First, law school workers have particular roles that require different activities that draw on different capacities.[24] Second, workers playing different roles receive unequal rewards and are given unequal degrees of power over decision making in the workplace.[25] Third, the law school workplace reflects a "meritocratic legitimating ideology,"[26] reflecting "a cultural framework that gives a meaning to the differences in activities and capacities, and to the inequality of power and reward."[27]

As Kennedy sees it, the justification for the legal hierarchy is "the natural differences between people, with respect to talent and energy" that "serves the social function of maximizing the quantity and quality of legal services to society, and that it is therefore just."[28] While some might value this hierarchy as "socially neutral,"[29] those doing so assume that the ranking of workers is "accurately reflective of merit and optimally adjusted to achieving the benefits of labor."[30] Because the "myth of meritocracy"[31] belies this vision, Kennedy ultimately views legal hierarchy as social perversion and

21. *But see* Elizabeth M. Iglesias et al., *Labor & Employment in the Academy – A Critical Look at the Ivory Tower: Proceedings of the 2002 Annual Meeting of the Association of American Law Schools, Joint Program of the Section on Labor Relations and Employment*, 6 EMP. RTS. & EMP. POL'Y J. 129, 162 (2002) ("We share the outlook, hierarchy, and cultural attitudes of higher education more than a first allegiance to law.").

22. For more information about workplace fairness principles, see WORKPLACE FAIRNESS, https://www.workplacefairness.org.

23. KENNEDY, *supra* note 10.

24. *Id.* at 42.

25. *Id.*

26. *Id.* at 43.

27. *Id.* at 42.

28. *Id.*

29. KENNEDY, *supra* note 10, at 79.

30. *Id.*

31. *See generally* Rhode, *supra* note 12.

the denial of hierarchy as "false consciousness."[32]

Another way to examine law school workplace fairness and whether law schools fairly divide labor resulting in just rewards and balanced power, requires a closer look at the ranking of workers. This includes studying legal hierarchy through the lens of "rankism." For Robert Fuller, an author and former academic, "rankism" is "rank-based abuse," whereby "differences of social rank . . . reflect underlying power differences," resulting in "abuses of power vested in rank-holders."[33] Such abuses can take the form of "disrespect, inequity, discrimination, and exploitation" of workers lower in the rungs of the hierarchy. In his book, *Somebodies and Nobodies: Overcoming the Abuse of Rank,* Fuller argues that rankism is a "cancer"[34] that "underlies many of the seemingly disparate maladies that afflict the body politic."[35] Some examples he identifies include stark harms, such as sexual abuse by clergy and elderly abuse in life care facilities; others might be more innocuous but also cause harm, such as scientists taking credit for their assistants' research.[36] In the workplace setting, Fuller notes that rankism "insults the dignity of subordinates by treating them as invisible, as nobodies. . . . Nobodies are insulted, disrespected, exploited, ignored. In contrast, somebodies are sought after, given preference, lionized."[37]

Both Fuller and Kennedy carefully explain that differences in capabilities and individual talents, in themselves, are not the problem.[38] As Kennedy observes,

> To the very limited extent that legal hierarchy flows from the division of labor and from differences in individual talent (whether we think these have an irreducible genetic base or are merely the inescapable consequence of the socialization of children), it may be a necessary evil. But it is something to be hated even as [some] enjoy its benefits, and it is an argument against living in a way that requires those benefits.[39]

And as Fuller contributes, "rank differences merely reflect power differences, so rank differences are not the problem either, any more than color or gender differences are innately a problem."[40] The problem is when these differences "are used as an excuse to abuse, humiliate, exploit, or subjugate."[41]

32. KENNEDY, *supra* note 10, at 77.
33. Fuller, *supra* note 16; *see also* Yamada, *supra* note 17, at 306; Fuller, *supra* note 17.
34. Fuller, *supra* note 16, at 3.
35. *Id.*
36. *Id.*
37. *Id.* at 5.
38. Fuller, *supra* note 16, at 4; KENNEDY, *supra* note 10, at 79.
39. KENNEDY, *supra* note 10, at 79.
40. Fuller, *supra* note 16, at 4.
41. *Id.*

In the law school workplace, there are four categories of employees: administration, faculty, staff (such as administrative support), and support services (such as building maintenance). Within the teaching ranks of the law school (i.e., law faculty), some categories of workers are granted preferential treatment such as increased compensation, titles, rights, and opportunities. Kathryn Stanchi calls this law school rankism "status hierarchy," borrowing from social theorist Max Weber, where ranking is based on "some characteristic that has subjectively been assigned social importance."[42] In her work, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, Stanchi calls out the status hierarchy of law schools as attempting to legitimize its rankism as meritocracies.[43] The fallacy of the meritocracy within the ranks of law school faculties is witnessed by the lack of opportunity for advancement into higher ranks and the myth that credentialism explains the ranking order. "[T]he 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. . . . Credentialism is a method of exclusionary closure that allows status hierarchies to appear meritocratic."[44]

Kennedy, remarking on Stanchi's work in this area, agrees: if one looks at the stratification of law school faculty as a problem of discrimination or segregation, those enjoying the privileges of their higher rank will not see their position as benefited from "discrimination based on immutable characteristics or suspect categories, such as race or gender, but rather as organizing the division of labor, and rewards within it, according to a rational, non-discriminatory plan."[45] But when looked at through the lens of status hierarchy, interrogating the "supposedly meritocratic selection procedures" and "functional compulsory job specialization in the system" opens the conversation anew.

From this perspective, we begin to question the initial job categories—doctrinal, clinical, legal writing, externship, academic success, and so on—and why they are distinct to begin with. Moreover, "[t]he categories are self-perpetuating: working in one of the categories disables you from working in the other";[46] but "[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."[47]

Status hierarchy, as Stanchi concludes, is "a discriminatory system [made to] 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

42. Stanchi, *supra* note 13, at 470–71.
43. *Id.* at 472.
44. *Id.*
45. Kennedy, *supra* note 14, at 234.
46. *Id.*
47. Stanchi, *supra* note 13, at 473.

the definition is a shill."[48] Those who have examined the rankism between doctrinal professors (who teach lecture-focused courses on subjects such as contracts, torts, property law, etc.) and skills professors (who teach legal writing, clinics, externships, and the like) reflects this fallacy of meritocracy. No rational argument has been credited to explain why "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."[49]

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.[82] 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.[50]

Most inside the legal academy would point to the criterion of scholarly production as the differentiating point between doctrinal and skills faculty that validates their ranking order. Doctrinal faculty engaged in legal scholarship are "knowledge producers" while skills professors outside the ranking of tenure are not required to engage in scholarly writing, and therefore are not considered to be responsible for or engaged in the production of knowledge.[51] Of course, gross generalizations about who is writing meaningful scholarship is empirically ungrounded—for every example of a legal writing professor who produces scholarly articles cited by the U.S. Supreme Court, there is a corresponding example of a long-tenured doctrinal professor who has failed to produce a full-length law review article since their tenure piece. But more meaningfully, "the justification 'you do not publish so we do not pay you as much' implies . . . that legal writing professors could change the unhappy reality of our own poor salaries, if only we would publish."[52] As Stanchi observes, "[t]he rhetoric is brilliant in how it implies that legal writing professors are to blame for their own poor

48. *Id.* at 480.

49. Stanchi, *supra* note 13, at 481 (citing 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)).

50. *Id.*

51. Susan P. Liemer, *The Quest for Scholarship: The Legal Writing Professor's Paradox*, 80 OR. L. REV. 1007, 1022–23 (2001) (citing John D. Feerick, *Writing Like a Lawyer*, 21 FORDHAM URB. L.J. 381, 385 (1994); 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, 751 (1998) ("Scholarship ... is 'the hallmark of intellectual worthiness' in the academy .... [T]he 'importance of scholarship to the careers of law teachers is difficult to overestimate.' Intellectual satisfaction, prestige, promotions, increased salaries, and opportunities to move laterally all depend as much upon writing, and as little upon teaching, as does tenure.")).

52. Stanchi, *supra* note 13, at 482–83.

salaries, when the reality is that law schools, by a number of methods, block legal writing professors from opportunities to publish."[53] The fact remains that many skills professors are denied the primary incentive to publish: they are ineligible for tenure independent of the quality and quantity of their scholarly contributions.[54]

B. The Not-So-Hidden Contradiction Within the Law School Workplace

Those working to educate law students have a shared mission: graduate law students to be professional, ethical, competent lawyers. At the core of legal education, law is taught as a system for justice. The contradiction in legal education is that law faculty who believe in justice and equality fail to recognize or act when those ideals are violated in their own workplace.

Legal educators across ideologies believe in justice. While law school professors argue over what constitutes social justice, what the contours of a working criminal justice system are, and the degree to which morality should be investigated in ethics courses, they would agree that conceptually, seeking justice is a core component of a fair legal system.[55] Yet, professors at the top of the status hierarchy all-too-often fail to identify injustice in their own backyard—or down their own hallway.

Examples abound. At conferences, in blog posts and listservs, during private conversations, faculty share stories about small (and not-so-small) injustices experienced in their law school workplaces.[56] Tenured faculty who spend class time teaching students the injustices of discrimination and inequality will come to a faculty meeting and request that nontenured faculty members be disqualified from voting on curricular matters that impact everyone. Faculty who teach about the professionalism and ethical standards in the legal profession might treat staff as incompetent or lazy. Academic support professors are told that they must proctor doctrinal faculty's exams, messaging that their time is less important than other faculty.

Especially disheartening is the general lack of support given to lower-ranked faculty from higher-ranked faculty committed to Critical Legal Studies (CLS). While a handful of CLS scholars (including Critical Race Theorists (CRT) and Feminist Legal Scholars) have written on the issue and

53. Stanchi, *supra* note 13, at 483.

54. *Id.* at 484 ("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."). *See also* Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 UMKC L. REV. 253 (2004).

55. Peter L. Davis, *Why Not A Justice School? On the Role of Justice in Legal Education and the Construction of A Pedagogy of Justice*, 30 HAMLINE L. REV. 513, 514 (2007) ("Law is supposed to be the instrument, the handmaiden, of justice; justice is the ultimate goal.").

56. Stories such as these can be found on the listservs of clinic and legal writing faculty, including lawclinic@lists.washlaw.edu and lrwprof-l@list.iupui.edu.

advocated for status equality, the perpetuation of status hierarchy by faculty who align themselves as CLS scholars is difficult to ignore. CLS scholars view law as a system of oppression that maintains the status quo of society's power structures and codifies the marginalization of certain disenfranchised groups. Yet too many CLS faculty are stout gatekeepers of limiting access to tenure for skills professors. To be sure, CLS scholars noted early on the insidious effects of microaggression on faculty of color and female faculty.[57] What is notably absent is a similar rebuke to status hierarchy. As the noted child-welfare researcher Robert Coles recognized in his review of Kennedy's work: "Arrogance and pomposity are not rare qualities among many of us who climb our way up, always up, then nervously look over our shoulders lest someone, somewhere, threaten what we hold in our clenched fists."[58]

What is being held in the collective fist is tenure. Tenure is an anomaly in employment-at-will states; it is under attack by University Boards that want less expensive options, as well as the popular media, despite its laudable goal of academic freedom. While many CLS faculty have worked to swing wide the tenure doors to women and people of color, these efforts generally lack a critical look at tenure as perpetuating rankism and status hierarchy. For example, a recent anthology on higher education by CRT and feminist jurisprudence scholars is *Presumed Incompetent: The Intersections of Race and Class for Women in Academia.*[59] The book includes 30 essays that highlight the significant obstacles that women of color encounter in gaining tenure and in their post-tenure work. It is focused on how women of color succeeded, despite the odds, and provides recommendations about how to win the tenure game.[60] The book published to critical acclaim, and spurred a follow-up legal symposium to continue the conversation.[61]

Reading *Presumed Incompetent* from the perspective of disrupting status hierarchy is disappointing. While it is a collection of stories of women of color struggling to attain and hold on to tenure with respect and dignity, it fails to address the status hierarchy imbedded in the system itself. Within the book, very few authors examine status hierarchy and the role of tenure within it. Ruth Gordon is one of those few, acknowledging the "persistence of hierarchy," and writes about the law school hierarchy where she feels more akin to the support staff, with whom she shares a racial identity.[62] Instead of choosing "to be unfriendly or rude" to the support staff, she instead

57. Catherine Wells, *Microaggressions in the Context of Academic Communities*, 12 SEATTLE J. FOR SOC. JUST. 319, 321 (2013) (citing Richard Delgado, *Minority Law Professors' Lives: The Bell/Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 360 (1989)).

58. Coles, *supra* note 1, at 1494.

59. GABRIELLA GUTIÉRREZ Y MUHS ET AL., PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (2012) [hereinafter PRESUMED INCOMPETENT].

60. *See* PRESUMED INCOMPETENT, *Chapter 30: Lessons from the Experiences of Women of Color Working in Academia*, 446–99.

61. *See* Carmen G. González & Angela P. Harris, *Presumed Incompetent: Continuing the Conversation (Part I)*, 29 BERKELEY J. GENDER L. & JUST. 183, 183 (2014).

62. Ruth Gordon, *Chapter 22: On Community in the Midst of Hierarchy (and Hierarchy in the Midst of Community)*, in PRESUMED INCOMPETENT 323–35.

connects on shared experiences.[63] The fact that this is noteworthy in her account speaks to the embedded status hierarchy prevalent in the law school workplace—one in which faculty do not normally engage with support staff in such a personal way. Gordon concludes by finding it "interesting" "that many of us spend our professional lives contesting hierarchy and exclusion—whether on the basis of race, gender, or class—but when it comes to academia—and I would suggest especially legal academia—we appear to have finally found a hierarchy we can believe in."[64] What is also noteworthy is that in examining the broader community of legal academia where "race and especially gender loom large," Gordon acknowledges the inequality amongst law faculty only in passing—but does so by naming those affected by unequal treatment as "legal writing instructors."[65] Failing to call them professors is notable for its unconscious bias, even in the exercise of examining bias.

In the *Presumed Incompetent* symposium that followed, the editors acknowledged "that more remains to be written,"[66] including the fact that the "vulnerability of female faculty of color may foreshadow the vulnerability of all but the most elite professors, as teaching is increasingly done by faculty who lack job security, benefits, and a living wage—yet are held responsible for 'adding value' to their students."[67]

The added value for law students includes the modern learning objective that law schools must graduate "practice ready" lawyers.[68] Efforts to reform legal education mostly center on encouraging law schools to involve students in "real lawyering" throughout the curriculum. "Experiential learning" is the touchstone for these reform efforts that seek to inculcate pedagogies for engaging students in legal work of real client problems. As experiential learning in legal education draws more attention and gains momentum, legal pedagogy scholars have extended these concepts to address the pressing needs of law schools.

In response to the call for an integrated approach to legal education taught experientially, law schools have experimented in ways to do so in a cost-effective manner.[69] Schools have experimented with hybrid offerings

63. *Id.*

64. *Id.* at 326–27.

65. *Id.* at 324. For further discussion of how downgrading one's title from "professor" to "instructor" in this context can be a harmful microaggression, *see infra* section III.D.

66. PRESUMED INCOMPETENT, *supra* note 59, at 184.

67. *Id.* at 186.

68. *See* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); AMERICAN B. ASS'N SEC. LEG. EDUC. & ADMIS. TO BAR, LEG. EDUC. AND PROFESSIONAL DEVELOPMENT—AN EDUC. CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf (accessed June 28, 2019).

69. *See* Martin J. Katz, *Understanding the Cost of Experiential Legal Education,* 1 J. EXPERIENTIAL EDUC. 28 (2014–15).

that include client work in doctrinal classes, lab formats, and writing assignments in doctrinal classes. But that experimenting has been at the fringes. The prevailing method for teaching lawyering skills remains the providence of particular law school programs (legal writing, clinical, externship, and academic success) that are staffed by faculty with the expertise to teach those skills, while inhabiting the lowest rank and pay bands in their workplaces.

The irony posed here is apparent: as law schools are strongly encouraged to provide more experiential learning opportunities for their students, law schools systemically marginalize the very faculty that teaches those skills to a lower-caste status.[70] Like the disheartening effects of CLS scholars or other justice-focused educators that fail to see the injustice in their own workplace, it is equally demoralizing to hear law school administration and tenured faculty espouse the benefits of experiential learning as critically important to the law school mission (and heavily market and advertise their experiential programs and classes) but dismiss those that teach those experiential learning classes—skills professors—to the lowest ranks of the law school hierarchy.

Skills professors experience the insidious nature of status hierarchy in many ways: by their title, their compensation, their job security, and their governance rights, to name a few. The next section explores a daily reminder of these indignities: microaggression in the workplace.

II. THE HARM OF MICROAGGRESSION

Microaggression is the "brief, everyday exchanges that send denigrating messages to certain individuals because of their group membership."[71] While microaggressions and the harm they cause to people of color, women, and LGBTQ individuals have received important public awareness, how everyday prejudices are expressed and felt outside those categories are less studied. It is important to note here that, as witnessed throughout the Article, this study is not aimed at equating racial or gender-based microaggressions to hierarchical microaggressions, but rather analyzing certain dynamics that are common to all these experiences. This section explains the psychology of microaggression, how those "everyday slights" are experienced by listeners, and then explores the work on hierarchical microaggression in the university setting.

70. For an analysis of how skills faculty are lower "caste" within the law school, *see* Kent D. Syverud, *The Caste System and Best Practices in Legal Education,* 1 J. ASS'N LEGAL WRITING DIRS. 12, 14 (2002). For scholarship that analyzes the job insecurity of women of color in skills faculty, see Teri A. McMurtry-Chubb, *On Writing Wrongs: Legal Writing Professors of Color and the Curious Case of 405(c)*, 66 J. LEGAL EDUC. 575, 576 (2017).

71. DERALD WING SUE, Preface to Derald Wing Sue's MICROAGGRESSIONS IN EVERYDAY LIFE RACE, GENDER, AND SEXUAL ORIENTATION, at xv, xvi (2010).

A. Microaggression: The Psychology

Microaggressions have been defined as the "constant and continuing everyday reality of slights, insults, invalidations, and indignities visited upon marginalized groups by well-intentioned [individuals] . . . ."[72] The term is attributed to Dr. Chester Pierce, an early African-American psychiatrist and medical school faculty member,[73] from his 1970 work, *Offensive Mechanisms*.[74] In researching the indices and effects of racism, Pierce explained that most offenses are "subtle and stunning" that can only be appreciated "when one considers that the subtle blows are delivered incessantly."[75] Importantly, "[t]he cumulative effect to the victim and to the victimizer is of an unimaginable magnitude."[76]

More recently, after studying and providing a comprehensive synthesis of the research regarding microaggression,[77] professor and psychologist Dr. Derald Wing Sue expansively defined it as: "brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, which communicate hostile, derogatory, or negative slights, invalidations, and insults to an individual or group because of their marginalized status in society."[78] Sue broadened the scope of his research to include racial, gender, and sexual-orientation microaggressions, focusing on the harm from unconscious perpetrators. "The power of microaggressions lies in their invisibility to the perpetrator, who is unaware that he or she has engaged in a behavior that threatens and demeans the recipient of such a communication."[79]

The term "micro" preceding "aggression" reflects the size of the infraction as viewed by the aggressor or perceived perpetrator. As compared to "macro" aggressions overtly committed by racist, sexist, and homophobic individuals, including but not limited to illegal hate crimes and harassment, "micro" references the perception by the speaker that the remarks are trivial or innocuous.[80] The impact on the listener (sometimes called the potential victim) is, of course, not "micro," but instead subjects listeners to concrete harms.

Microaggressions can cause harm to the listener. Sue refers to this as microaggressive stress, the effect and severity of which depend on the "nature of the challenge posted by the threat and the perceived available

72. *Id.* at xv.

73. In keeping with the spirit of studying rankism and status discrimination, the author declines to highlight the names of academic institutions as not to feed into credentialism.

74. CHESTER PIERCE, OFFENSIVE MECHANISMS (1970), *reprinted in* The Black Seventies 265, 265–55 (Floyd Barbour ed., 1970).

75. PIERCE, *supra* note 74 at 266.

76. *Id.*

77. SUE, *supra* note 71.

78. Sue, *supra* note 7, at 271.

79. SUE, *supra* note 71, at xv.

80. Wells, *supra* note 57, at 328–29.

resources of the person."[81] Sue identifies four "pathways" of negative impact: (1) biological: direct physiological reactions (blood pressure, heart rate, etc.) or damage to one's immune system; (2) cognitive: thoughts and beliefs about the meaning of the stressor that can cause cognitive disruption and diminished functioning; (3) emotional: "anger, rage, anxiety, depression, or hopelessness" that "may dominate the person's immediate life circumstance"; and (4) behavioral: coping strategies or reactions by the listener that may "enhance adjustment or make the situation worse," such as hypervigilance and skepticism.[82]

Researchers stress that it is often the cumulative effect of microaggressions on listeners that result in significant detrimental consequences.[83] Part of the fatigue and cognitive impairment comes from having to unpack the multiple meanings a microaggression can have—targets of microaggression are left to unpack the hidden meanings in seemingly off-hand comments. For perpetrators of microaggression, it is helpful to remember that no one is immune from "the inherent bias of their forbearers."[84] As a society, we are more aware of the fact that we are unaware; thanks to projects such as Project Implicit,[85] unconscious or implicit bias is not an unknown phenomenon any longer. Yet the environmental impacts of such biases are still being felt.

Sue and his colleagues propose a taxonomy of racial, gender, and sexual-orientation microaggressions: microassaults, microinsults, and microinvalidations. First, microassaults are explicit "derogations characterized primarily by a violent verbal, nonverbal, or environmental attack meant to hurt the intended victim through name-calling, avoidant behavior, or purposeful discriminatory actions."[86] Examples of microassaults include racial epithets or sexist jokes. These actions intend to communicate to the listener that the aggressor perceives them as an unworthy, inferior, subhuman, or lesser person.

In contrast, microinsults are often communications that the speaker may not consciously mean to be derogatory, but that nevertheless convey rudeness and insensitivity and "demean a person's racial, gender, or sexual orientation, heritage, or identity."[87] They might seem like subtle snubs, but they convey hidden messages that demean the targeted listener. Such hidden meanings can relate to: (1) "ascription of intelligence": assigning a degree of intelligence to a person's identity (e.g., "I thought all Asians were good at math"); (2) "second class citizen": treating someone as lesser than as compared to a member from the power group (e.g., legitimizing the disparate treatment of immigrants because of their ancestry); (3) "pathologizing

81. SUE, *supra* note 71, at 96–97.
82. SUE, *supra* note 71 at 97, 101–05.
83. *Id.* at 7.
84. *Id.* at 22.
85. *Project Implicit*, https://implicit.harvard.edu/implicit/ (last visited July 14, 2019).
86. SUE, *supra* note 71, at 29.
87. SUE, *supra* note 71, at 31.

cultural values/communication styles": communicating that the values and communication styles of the dominant/white culture are the baseline or ideal (e.g., "Your food is so exotic"); and (4) "assumption of criminal status": presuming to be a criminal, dangerous, or deviant based on racial or ethnic identity (e.g., moving to the other side of the street from an African American man).[88]

Third, microinvalidations are also communications that are often unconscious but they specifically "exclude, negate, or nullify the psychological thoughts, feelings, or experiential reality" of the listener.[89] The potent themes of microinvalidations include: (1) "alien in own land": signifying the belief that visible racial/ethnic minority citizens are foreigners (e.g., "No, where are you REALLY from?"); (2) "color blind-ness": denial or pretense that a white person does not see color or race (e.g., "I never thought of you as Hispanic"); (3) "myth of meritocracy": statements that assert race or gender plays a minor role in life success (e.g., "Anyone can pull themselves up by their bootstrings in America"); and (4) "denial of individual racism": denying personal racism or one's role in its perpetuation (e.g., "One of my closest friends is Black").[90]

B. Hierarchical Microaggression

From race and gender microaggression literature, scholars have applied these principles to the workplace to describe the microaggression faced by workers perceived as different. For example, Dr. Mary Rowe describes microinequities in the workplace as "small events that may be ephemeral and hard to prove; that may be covert, often unintentional, and frequently unrecognized by the perpetrator; that occur wherever people are perceived to be different; and that can cause serious harm, especially in the aggregate."[91] Microinequities essentially are a type of workplace microaggression that result in workers being overlooked and devalued because of one's identity, such as race or gender.

Recently, more awareness has come to the issue of workplace bullying, which includes the use of microaggression to demean and devalue workers.[92] Workplace bullying is especially pernicious when directed by supervisors or managers to their subordinates, relying upon their advantage in the power dynamics of a workplace. Difference in power and status exist across most workplaces. Most employers delineate different roles in order to function effectively, and within those roles, some are deemed more or less desirable, with a higher or lower value attributed to them. When workers are treated poorly because of their lesser power or status, that status hierarchy can be

88. *Id.* at 29, 32–33.

89. *Id.* at 29.

90. *Id.* at 29, 32–33.

91. MARY ROWE & ANNA GIRALDO-KERR, THE SAGE ENCYCLOPEDIA OF PSYCHOLOGY AND GENDER, 679–82 (2017).

92. *See, e.g.*, David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 477-78 (2000).

expressed in myriad destructive ways.

In the university workplace setting, power and privilege disparities are reflected in the hierarchical status of workers, which play out across campuses, departments, and offices through differentiation in title, pay, responsibilities, and benefits. Such differentiation in power and privilege can express itself through microaggression. In the first study of microaggressions based on hierarchy in higher education, Professors Kathryn Young, Myron Anderson, and Sarah Stewart coined the term "hierarchical microaggressions," in their examination of the "everyday slights found in higher education that communicates systemic valuing (or devaluing) of a person because of the institutional role held by that person in the institution."[93] In *Hierarchical Microaggressions in Higher Education,* the authors explore this type of microaggression through examining qualitative data from cultural competency trainings on college campuses.

As Young, Anderson, and Stewart explain, while many institutions delineate different roles,[94] the ranking system within higher education is "more complex than the traditional business model and directly relates to campus climate."[95] For campus employees, "role" becomes "the defining identity of employees at a university because [they] are organized by two main groups: faculty and staff" and "the salience of the roles people hold at universities to their day-to-day workplace interactions and to the overall climate of the university."[96] Insults and slights in this context provide "a new lens to understand microaggressions experienced by employees" in university workplaces.[97]

Young, Anderson, and Stewart identified four types of hierarchical microaggression in the data they collected. First, the authors' explored microaggressions that **value or devalue based on one's role or credential**. Like the microaggressions identified by Sue as being treated as a second-class citizen, these types of microaggression devalue employees because of their status in the institution, or can reflect heightened value of one employee over another because of their roles.[98] Privileges are "ascribed to certain roles and oppressive structures placed on others."[99] Examples of this type of microaggression from the study include: "educational bias (left out of meetings)" and having recommendations ignored "but in the same meeting, same recommendations made by another person received positively."[100] The authors found that these types of remarks constituted 52% of the hierarchical

93. Kathryn Young et al., *Hierarchical Microaggressions in Higher Education*, 8 J. DIVERSITY HIGHER EDUC. 61, 66 (2015).

94. *Id.* at 62 (citing Patreese D. Ingram, *Commentary: The Ups and Downs of the Workplace*, J. EXTENSION 44 (2006)).

95. *Id.* at 63.

96. *Id.*

97. *Id.*

98. Young et al., *supra* note 93, at 66.

99. *Id.*

100. *Id.* at 66–67.

microaggressions found in their study.[101]

The authors argue that in academic institutions, microaggressions based on devaluing a person because of the role she or he was hired into works similarly to microaggressions based on identity characteristics (like race or gender) because the harms are targeted at characteristics that the person cannot change.[102] When a person is hired into a job expecting to be valued for her or his contributions to the mission of the organization, only to learn once employed, that she or he is less capable or less valued because of the position itself, those harms are identity based without avenue for change.

Second, the authors identified hierarchical microaggressions involving "**[c]hanging accepted behavior based on role**."[103] These microaggressions occur when a person in a position of privilege changes how she or he interacts with another depending on the role of the person they are interacting with. "'Equals' interact differently than those who are not considered equal."[104] Examples from their study include: "People chang[ing] attitude when they find out student status"; "junior faculty feel they cannot express themselves, speak up in meetings, or challenge tenured faculty in formal or informal settings"; and "Boss making jokes about error/mistake."[105] The authors estimate that these types of microaggressions account for 10 percent of the reported hierarchical microaggressions.[106]

The authors identified a third theme involving **actions, such as ignoring, excluding, surprising, or interrupting**, that people experience from others that are related to roles held at the university.[107] Often, such actions create or reinforce in-group and out-group status and microaggression of this type send the message that "you do not belong, you are not like us" or you "are not smart people."[108] Examples of actions relating to role in the study include: "interruptions—shutting people down"; "Person of power who doesn't acknowledge/greet employees"; "Exclusion in environments like meetings, work"; "'Actually good'—said with surprise."[109] "In an environment based on belonging and smartness, these messages impact employees professionally and personally."[110] These types of actions accounted for 36% of hierarchical microaggressions in the study.[111]

101. *Id.* at 66.
102. *Id.* Note that this sentence says: hierarchy microaggression *works similarly*, not *are similar* to race or gender microaggression. For a person of color or a woman, microaggression based on one's race or gender can feel very different and can carry very different meaning than microaggression based on hierarchy or status.
103. *Id.* at 67.
104. *Id.*
105. *Id.*
106. Young et al., *supra* note 93, at 67.
107. *Id.* at 68.
108. *Id.*
109. Young et al., *supra* note 93, at 68.
110. *Id.*
111. *Id.*

Lastly, the fourth theme of hierarchical microaggression is **terminology related to work position**.[112] This theme relates to the words used to talk about someone's role at the academic institution, which indicates their relative power in the university. Use of certain words or phrases signals where a person is on the hierarchy and can be invoked purposefully to devalue. "Much like in the critiques raised in identity-based literature related to the question 'what are you' where respondents do not want to be a 'what' but a 'who,' a person at a university wants to hold a position, not become one."[113] Using the title "Instructor" instead of "Professor" is an example of this type of microaggression. In their study, terminology related to role accounted for 2% of the hierarchical microaggressions.[114]

The authors concluded that while hierarchical microaggressions may exist in most workplaces, they are "of a unique type in a university because of the rhetoric related to equality and upward mobility associated with college going."[115] University hierarchical microaggressions also have a particular type of harm because university employees take on an identity associated with their status at the university, an identity related to the amount of higher education they attain or the elite status of the institution from which they graduate.[116] And, the experiences of those lower on the academic hierarchy are compounded by the multiple and intersectional forms of microaggressions experienced because of their other identities, including race and gender.

What makes Young, Anderson, and Stewart's study a first of its kind is its focus on how microaggression is experienced based on one's position in the academic hierarchy. Other scholars have examined microaggression in academic settings based on race and gender, including in the law school context.[117] What has thus far been lacking in the literature is an examination of the hierarchical microaggressions particular to law school environments.

III. HIERARCHICAL MICROAGGRESSION TARGETING LEGAL SKILLS PROFESSORS

The law school workplace culture, while it should be aligned with equity and justice, instead reflects the legal hierarchy, rankism, and status hierarchy that puts job categories on a best to least desirable chain. Other scholars have studied and described the polarizing effect of status hierarchy in legal

112. *Id.* at 66.

113. *Id.* at 68 (citing James Paul Gee, *Identity as an Analytic Lens for Research in Education*, 25 REV. RES. IN EDUC., 99–125 (2000-01)).

114. *Id.*

115. *Id.* at 61, 69.

116. *See* Young et al., *supra* note 93, at 61, 69.

117. *See* McMurtry-Chubb, *supra* note 70; Lorainne Bannai, *Challenged X 3: The Stories of Women of Color Who Teach Legal Writing*, 29 BERKELEY J. GENDER L. & JUSTICE 275, 281 (2014); Teri A. McMurtry-Chubb, *Writing At the Master's Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 DREXEL L. REV. 41 (2009); Wells, *supra* note 57.

education, including not just low morale and job satisfaction, but also tangible workplace conditions.[118] Lower pay, less job security, lower-ranking job titles, and limited academic freedom are common to many legal skills teaching positions as compared to their doctrinal counterparts.[119] Other workplace conditions, although less obvious, can be just as demoralizing or demeaning, such as worse offices and undesirable class schedules.[120]

When microinsults, microinvalidations, and microassaults are levied against skills professors, as described in detail below, some might counter that pointing out the undesirability of those positions is not a microaggression but instead, a comment on the reality of the current workplace dynamic. This view demands two responses. First, when an individual in a position of power or privilege makes seemingly casual remarks on the listener's lesser position, whether it is based on a personal characteristic, such as one's race, gender, or sexual orientation, or based on one's work identity, the harm felt by the listener remains potent. Second, microaggression is not felt in a lesser way by the listener simply because it reflects a current status quo. For example, while it might be true that women are paid less than men, insulting a female worker by remarking on her low pay (without portraying investment in changing the status quo) still can be perceived as a microaggression.

Additionally, an argument against finding microaggression based on status hierarchy in law schools might be that unlike an immutable personal identity such as race, gender, or sexual orientation, the workplace identity is chosen: legal skills professors chose to take the position at the law school. Again, two responses are needed. First, the skills professor might not realize or be attuned to the extent of the ramifications or "toxic" culture of status hierarchy when one enters the law school workplace. When a skills professor is hired into a job expecting to be valued for her or his contribution in readying law students for the practice of law, only to learn once employed, that skills professors are viewed as less capable or less valued because of the position itself, those harms are keenly felt as an injustice. And once in the position of a skills professor, at that point, it is very difficult to change because opportunities to move to other faculty positions are rare. Second, some skills professors enter the discipline of legal writing, clinical, externship or academic success education wanting to be part of that

118. *See* Mary Beth Beazley, *Revising Langdell: Legal Education Reform and the Lawyer's Craft: Finishing the Job of Legal Education Reform*, 51 WAKE FOREST L. REV. 275 (2016); Todd A. Berger, *Three Generations and Two Tiers: How Participation in Law School Clinics and the Demand for "Practice Ready" Graduates Will Impact the Faculty Status of Clinical Law Professors*, 42 WASH. U. J.L. & POL'Y 129 (2013); Durako, *supra* note 54; Lucille A. Jewel, *Oil and Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies*, 31 COLUM. J. GENDER & L. 111 (2015); Susan P. Liemer & Hollee S. Temple, *Did Your Legal Writing Professor Go to Harvard? The Credentials of Legal Writing Faculty at Hiring Time*, 46 U. LOUISVILLE L. REV. 383, 385-88 (2008).

119. *See* Durako, *supra* note 54; Liemer, *supra* note 118.

120. *See* Durako, *supra* note 54; Liemer, *supra* note 118.

particular discipline because of its intrinsic value as a profession: teaching law students to understand the law, to think, write, analyze like a lawyer and be an ethical advocate while representing clients, are valuable endeavors to devote one's career to. Microaggressions by those in positions of power or privilege that demean the discipline itself are no less acute because the listener chose that profession.

With that framing in mind, the next sections unveil four types of microaggression experienced by legal skills professors in law schools: (1) **devaluing** microaggressions based on perceived status; (2) **degrading** microaggressions based on perceived roles; (3) **demeaning** microaggressions based on unexamined bias; and (4) **discrediting** microaggressions based on structural norms. Each section begins with a quote that was spoken directly to the author or in the presence of the author, by a tenured professor who teaches doctrinal, in contrast to skills, courses, and was chosen to exemplify the particular type of microaggression examined in each category.[121]

A. Devalued – Microaggression Based on Perceived Status

> Why would such a highly-qualified candidate want to teach legal writing?[122]

Microaggressions levied against legal skills professors based on their perceived status in the law school hierarchy is the first classification of microinsults, microinvalidations, and microassaults. These status indignities communicate to the targeted listener that he or she is less capable, less important, and less valued by the speaker who is in a position of greater power or privilege. Microaggressions in this category can reflect an attitude that teaching skills, either in legal writing, clinics, externship, academic success, or other discipline is not a job worth having in comparison to doctrinal teaching.

This type of microaggression highlights the differential in power and privilege that separates teaching legal doctrine from legal skills. These comments aimed at skills faculty reminds the listener that teaching skills is less desirable or less important, and those that teach skills hold lower status because of the type of teaching.

"*Why would such a highly-qualified candidate want to teach legal writing"* is an example of a microaggression based on the lower status (and therefore lower value) of the position as perceived by the speaker when spoken from an individual with a more privileged status. Law school faculty hiring is a time and resource intensive process. While some law schools have

121. For more context, the author/listener is a legal writing professor who identifies as a woman and person of color. Three of the four speakers are men. Three are CLS scholars. All four are tenured, teach doctrinal classes, and identify as people of color.

122. Asked in the audience of the author by a doctrinal, tenured CLS professor of color, during a hiring interview of a candidate for a legal writing professor position.

separate processes for hiring doctrinal and skills professors, others have one hiring committee and one process for hiring in both type of courses. Microaggression, both unconscious and conscious, are voiced in such a setting. Questions and comments include: why one would choose to teach skills; what sort of assumptions can be made about candidates wanting to move from teaching skills to teaching doctrine ("is the skills candidate just trying to get in the door and will move to doctrinal teaching as soon as possible?"); what qualifications are needed for doctrinal teaching ("does the candidate show intellectual rigor?"; "did the candidate clerk for a federal judge?") versus skills teaching ("does the candidate have any adjunct teaching experience?"; "how long did the candidate practice law?"). These types of microaggressions devalue teaching skills and those that engage in the discipline. It signals that the perception of the speaker is that teaching skills requires less "intellectual rigor." When the speaker has a more powerful status, the listener with less status experiences a devaluing of their discipline that underscores their lesser privilege.

Devaluing skills teaching is not confined to the hiring process. Microaggression are experienced in faculty meetings, hallway conversations, and other interactions that make skills professors feel less important or capable because their contributions are demeaned as less valuable. Like the first type of hierarchical microaggression studied in universities by Young, Anderson, and Stewart regarding valuing or devaluing a person's opinion based on credentials, these types of microaggressions can occur when in faculty meetings, a tenured faculty member's opinion is given more weight and consideration than a nontenured faculty member. Anytime remarks are made that signals that teaching doctrine is more important (or more difficult, or more time intensive, or requires great talent to teach) than teaching skills, a microaggression occurs on the skills faculty listener. Because they are said or done casually, without any personal reflection by the speaker, and are repeated so often, the cumulative effect of these devaluing microaggressions resonate more deeply each time they occur.

B. Degraded – Microaggression Based on Perceived Roles

> [The legal writing candidate] could be a Research Assistant for me.[123]

Microaggressions levied against legal skills professors based on their roles in the law school is the next classification of microinsults, microinvalidations, and microassaults. These behaviors often reflect a conscious decision to interact differently with a faculty member because of the difference between statuses. When one member of the faculty with more privilege behaves differently towards another because of that person's

123. Said to the author after a job talk of a candidate for a legal writing position by a doctrinal, tenured professor of color.

different role, that type of microaggression sends a powerful message to the recipient: you are less important because of what you do for the institution.

Role degradation resonates deeply with skills professors in part because they accept positions with the belief that their contributions are valued, especially given the focus on experiential learning in many law schools. They soon realize that as compared to their doctrinal colleagues, their faculty status is second class. When consistently and repeatedly reminded of that status difference by faculty with more power and privilege, those actions or comments carry weight as microaggression.

One way that roles are differentiated in some law schools is based on who does and does not produce legal academic scholarship. Of course, many skills professors engage in deep and meaningful scholarship on a wide variety of topics, including doctrinal, rhetorical, pedagogical, empirical, and theoretical works.[124] Some scholarship by skills professors is downgraded because it is not considered properly theoretical or doctrinal, which can be communicated as a reflection on the skills professors' ability to engage in the more valued type of scholarship. "*[The legal writing candidate] could be a Research Assistant for me*" was a microaggression levied after a candidate for a legal writing position presented at a lunch job talk before the faculty. The candidate's scholarship was deemed lacking by one particular tenured professor, who commented that while the candidate was lacking as a scholar, the candidate had enough skill to be a research assistant for the tenured professor. The comment was made to the author, and not the candidate (thankfully) but still remains a microaggression given that the listener held the same role as the candidate—legal writing professor. Because comments are consistently made that de-legitimize the scholarly contributions of skills professors, telling one legal writing professor that another legal writing professor is only good for assisting a tenured professor, and incapable of scholarly work on their own, the listener receives the comment as a microaggression. It is conceivable that the comment was made in jest—but the intent of the speaker does not mitigate the harm of the microaggression.

Similarly, degrading microaggression based on role can occur when attendance at functions is divided amongst the faculty, and only the more privileged faculty are invited, while the lesser privileged faculty are excluded. Sometimes, the invitation is done privately as exclusive invites

124. *See, e.g.*, Linda L. Berger et al., *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 521, 521 (2010) ("[M]ap[ping] the contours of a third generation of legal writing scholarship—one that integrates the elements of our professional lives and engages more effectively with our professional communities . . . ."); J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: J. ASS'N LEGAL WRITING DIRECTORS 247, 249 (2015); Ruth Anne Robbins, *An Introduction to Applied Legal Storytelling and to This Symposium,* 14 LEGAL WRITING: J. LEGAL WRITING INST. 3, 9 (2008); Kathryn Stanchi, *Persuasion: An Annotated Bibliography*, 6 J. ASS'N LEGAL WRITING DIRECTORS 75 (2009).

that those excluded do not always learn about, such as lunch meetings, scholarship groups, or invites to meet new or visiting professors. Other times, the exclusion is carried out publicly in a way that invokes a sense of shame for those excluded. For example, at faculty meetings where all faculty are invited for the general meeting, sometimes business items call for attendance of faculty with certain faculty governance rights,[125] such as tenured faculty only. At that moment, either as an agenda item (so notice is given) or when a faculty member with governance rights invokes the privilege (so as a surprise without notice), the meeting goes into "executive session," such that faculty without the privileged status are excluded. Those faculty then have to stand up and leave the room, while the privileged faculty remain seated. It is a stark reminder of which roles are privileged and which are less.

Such microaggression is similar to the second hierarchical microaggression studied by Young, Anderson, and Stewart, regarding a change in person's behavior based on the targeted individual's role at the university. There, university employees who are in a position of privilege interact with people in the same role differently than people in lesser roles, such as in-jokes or exclusive invites. While on the surface, such rebuffs might seem slight (perhaps invoking a middle school-like inference), they resonate as a degradation to the listener when consistently told that all roles are not equal in the institution.

C. Demeaned – Microaggression Based on Unexamined Bias

> I would not advise a person of color to take a legal writing job.[126]

Microaggressions levied against skills professors based on the unexamined bias of the speaker, who is in a position of power and privilege over the listener, is the next classification of microinsults, microinvalidations, and microassaults. These microaggressions lack an obvious intent by the speaker to demean, yet they are experienced by the listener as a diminution of their role and importance at the law school. As previously discussed, Sue and his colleagues recognized that microaggressions are often perpetrated by speakers based on their unconscious bias, which gives microaggression its particular type of harm: "The power of microaggressions lies in their invisibility to the perpetrator, who is unaware that he or she has engaged in a behavior that threatens and demeans the recipient of such a communication."[127]

The unexamined bias against skills professors by faculty with more

125. Governance rights are the right to vote on certain agenda items at faculty meetings, such as hiring, promotion, curricular, and other matters that relate to law school business.

126. Said to the author by a doctrinal, tenured CLS professor of color, in a hallway conversation.

127. SUE, *supra* note 71, at xv.

privilege and power can be communicated directly in a way that highlights the doctrinal/skills hierarchical divide. These include belittlements about the courses they teach, such as: assumptions that skills courses should "fit around" the schedule of doctrinal classes; that doctrinal classes is the "core" of the law school curriculum; or that teaching doctrinal classes is the most challenging and intellectually rigorous part of the curriculum. Unintentionally harmful remarks can also regard the role or status that skills professors have in the law school endeavor, such as: who are the "real" faculty worthy of making decisions about the future of the institution, and therefore, should have faculty governance rights; whether skills faculty require academic freedom and therefore "earn" the right for higher levels of job security (i.e., tenure).

As is true with most microaggressions, while one solitary remark might not carry much punch, it is the repeated, cumulative effect of unintended slights that amplify any one particular comment at any given moment. "*I would not advise a person of color to take a legal writing job*" was said to the author by a well-intentioned ally on the faculty during a particularly trying part of the semester that included many other microaggressions about hierarchical status. The remark acknowledged the status quo: that legal writing positions are often lower paid with less status and less job security. What was left unexamined by the speaker was that legal writing was a course with value that a teacher would *want* to teach and might *choose* to teach if given the choice. Although too many positions teaching skills are marginalized in ways examined in this Article and elsewhere, teaching a skills course like legal research, writing, and analysis is also fulfilling: first-year students learn and grow tremendously, in smaller classroom settings, after many individual conferences, triumphs, and challenges. There is value in teaching a legal writing course—for the student, teacher, and institution—that should not go unnoticed, yet is too often unexamined by other faculty. When spoken from a position of more power and privilege, even by an ally, that comment hurts.

What was also being acknowledged by the comment is that people of color, as targets of racial bias, should not be marginalized or discriminated against twofold by adding status hierarchy and the resulting discrimination. Which leads to the next point: part of the difficulty in facing unexamined microaggressions is that listeners are sometimes experiencing lesser privilege or power on multiple fronts. It takes effort to unpack the multiple meanings a microaggression can have, and if you are a person of color, a woman, identify as LGBTQ, or are marginalized in other ways, figuring out what is really being said or having to look for hidden meanings, even from seemingly well-intentioned aggressors, is exhausting.

Microaggressions involving multiple identities can be especially challenging when the communication is nonsubstantive in nature. When a skills professor is constantly interrupted by a professor with more privilege and power, is it because of her position as a skills professor, her gender, or something else? This type of microaggression (such as surprise when one

speaks, interrupting when one speaks, or other rude behavior) is akin to the actions identified by Young, Anderson, and Stewart in the university setting, such as ignoring, excluding, surprising, or interrupting, that reinforce in-and out-group culture. When privileged faculty fail to examine their behavior as it relates to those in positions of lesser privilege, the resulting impression of being devalued continues and compounds.

D. Discredited – Microaggression Based On Structural Norms

Legal Writing Instructors[128]

Microaggressions levied against skills professors based on the structural norms of the law school is the last classification of microinsults, microinvalidations, and microassaults. In the workplace setting, structural norms often refer to employment hours, shifts, schedules, and other regulatory policies.[129] However, structural norms more generally refer to how roles define power and responsibilities and how hierarchies structure groups and individuals.[130] Here, the structural norm of law schools with regard to faculty employees is a hierarchy with doctrinal teachers on top and levels of skills professors below, which reflects the attendant titles, pay, job security, and other employment benefits. Comment on the divergent titles or other status indicators is a microaggression when voiced by those in power with the privilege of the higher status.

As is true with many professions, titles matter. The terminology used in a particular profession to signal one's position has meaning to both the speaker and the professional. As Young, Anderson, and Stewart identified in the university setting, terminology related to work position has significant meaning when referring to someone's role at an academic institution as an indication of their relative power in the university. For many legal skills professors, they follow the law school norm of referring to the teacher as "Professor" in the classroom. Failing to recognize a skills faculty member as a professor, while assuming that doctrinal faculty are always professors, is a way to discredit skills faculty and their role in the institution. Being called a "*Legal Writing Instructor*" is one such example. During a national conference of legal writing faculty, a tenured doctrinal professor used the title "Legal Writing Instructor" several times during a presentation to a couple hundred legal writing faculty in attendance. What was particularly

128. Stated three times by a doctrinal, tenured professor of color to an audience of legal writing faculty, including the author, to a large audience at a national conference on diversity and inclusivity in the legal writing profession.

129. *See* Nicole Buonocore Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 DENV. U. L. REV. 963, 963 (2014).

130. *See* Patrice Caire, *A Normative Multi-Agent Systems Approach to the Use of Conviviality for Digital Cities, in* PROCEEDINGS OF THE 2007 INTERNATIONAL CONFERENCE ON COORDINATION, ORGANIZATIONS, INSTITUTIONS, AND NORMS IN AGENT SYSTEMS III 245, 6 (Jamie Simano Sichman et al. eds., Springer-Verlag 2007).

notable was that the topic of the conference was diversity and inclusivity in the legal academy generally, and the legal writing discipline particularly. As an unexamined microaggression, calling a room full of legal writing professionals "Instructors" is particularly corrosive when spoken by a doctrinal faculty member with privileged status, who would never assume the title "Instructor" for her or himself.

Of course, one of the most difficult aspects of structural norms is its entrenchment. Perhaps those who call legal skills professors other titles—including instructor, first names, Mr/Ms—do so without malice or are simply adhering the norms of the institution. But again, just because a term is used unthinkingly or unintentionally does not negate the harm to the listener. Nor does it alleviate the need for privileged faculty to examine their own bias, including those that more easily identify bias and discrimination in other areas, such as the CRT and feminist legal scholars writing in *Presumed Incompetent*, who generally failed to reference skills professors but did identify legal writing professors as "Instructors."[131]

In order to challenge structural norms, including entrenched hierarchies and the status privileges that accompany them, it is necessary to identify why the norms exist and who they serve.

IV. COMBATING HIERARCHICAL MICROAGGRESSION IN LAW SCHOOLS: MICRORESISTANCE AND MICROAFFIRMATIONS

The law school mission is to educate lawyers in advocating for justice in the many arenas that justice is required for a fair and equitable world. The irony is that law schools teach justice to their students while perpetuating injustice in their buildings. For purposes of this Article, justice in the building means treating all law faculty with dignity and ameliorating the effects of status hierarchy and rankism in the law school workplace. This section addresses two important concluding issues: why should we address hierarchical microaggression in the law school workplace, and how can law schools successfully address hierarchical microaggression in order to become more just institutions.

A. Must We Address Hierarchical Microaggression In Law Schools?

The first question is an empirical one: are skills faculty experiencing hierarchical microaggression in law schools in a meaningful way as to require redress? While a validation study and survey is outside the scope of this Article, other evidence suggests the answer is yes. Scholarship on the unequal treatment of skills faculty abounds, which showcases the dissatisfaction many experience in their titles, job security, pay, schedules, and other employment metrics.[132] Similarly, the electronic mail listservs of

131. GORDON, *supra* note 62.

132. *See, e.g.*, Bryan L. Adamson et al., *The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy*, 36 J.

legal writing and clinical faculty are vibrant venues of dialogue amongst a national cross-section of each discipline; a peek inside those discussions reveal experiences of hierarchical microaggression akin to those discussed here.[133] From the author's experience having presented on hierarchical microaggression in several venues with legal skills faculty audiences, the overwhelming response has been: Me Too.[134]

From a workplace fairness and equity standpoint, hierarchical microaggression can invoke feelings of isolation and lower satisfaction with professional lives. For those experiencing repeated microaggression, the cumulative effects can compound and amplify negative thoughts and feelings, which may lead to physical and mental health consequences.[135] Aside from those outcomes, the workplace should be a space that workers do not feel devalued, degraded, demeaned, or discredited because of their role in the institution.

From a workplace efficiency standpoint, when a worker feels undervalued or degraded, they are unlikely to do their best work. Law schools should prioritize diminishing microaggression in the workplace if for no other reason than to ensure their workers are contributing to the mission as capably as they can. Employers value and promote healthy workplace environments to allow their workers to do their jobs well—this includes being free from microaggression. Moreover, the polarizing effects of microaggression inhibits full faculty cooperation and for law schools to meet their educational mission, cooperation across the doctrine/skills divide is vital to fostering the best student learning outcomes, as modern learning initiatives such as *Best Practices* and the Carnegie Report promote.[136]

LEGAL PROF. 353 (2012); Arrigo, *supra* note 49; Beazley, *supra* note 49; Berger, *supra* note 118; Durako, *supra* note 54; Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000); Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN'S L.J. 75 (1997) [hereinafter Edwards, *Teaching Legal Writing as Women's Work*]; Jewel, *supra* note 118; Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105 (2010); David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105 (2003-2004); Lome Sossin, *Discourse Politics: Legal Research and Writing's Search for a Pedagogy of Its Own*, 29 NEW ENG. L. REV. 883 (1994); Stanchi, *supra* note 13; Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 3 (2001); Syverud, *supra* note 70, 13-16.

133. *See, e.g.*, lawclinic@lists.washlaw.edu and lrwprof-l@list.iupui.edu.

134. Again, this Article does not mean to equate the harm experienced by those who spoke out against sexual abuse during the Me Too movement with the status discrimination harm outlined in this Article. The analogy refers to the power of speaking out about past harm once others have voiced their histories.

135. *See* SUE, *supra* note 71, at Chapter 5.

136. *See* STUCKEY, *supra* note 68; SULLIVAN, *supra* note 68; AM. B. ASS'N SEC. LEG. EDUC. & ADMIS. TO BAR, *supra* note 68. For a discussion of modern learning initiatives and experiential learning in law school, see Nantiya Ruan, *Experiential Learning in the First-Year Curriculum: The Public-Interest Partnership*, 8 LEGAL COMM. & RHETORIC: J. ASS'N LEGAL WRITING DIRECTORS 191, 216 (2011).

With regard to student learning, the entrenched hierarchies in law schools and the disparate statuses of faculty are experienced not just by faculty, but students as well. Students notice where faculty offices are located, the titles of their teachers, and are aware of relationships in the building. They read law school blogs and some are aware of legal scholarship on the issue. And they probably hear the hierarchical microaggressions in class or in the hallway. Law students receive the message that skills education is less important, which harms the law school mission in several ways: by diminishing experiential learning goals; by decreasing the chance that students will be the best advocates they can be in the legal system; and by perpetuating legal hierarchies. Equally important is that by allowing microaggression to continue in their community, the promotion of injustice is advanced, in direct contrast to the mission of law schools.

B. How Can Law Schools Address Hierarchical Microaggression?

Having determined that hierarchical microaggressions should be addressed to lessen the impact they can have on faculty and students, the next question is how can they be tackled to lessen its corrosive effects. With regard to microaggression research based on identity traits of race, gender, and sexual orientation, there is no clear consensus on the how to resolve microaggression because of its "slippery nature" and the challenge of acknowledging hidden biases and motivating individuals in different contexts.[137] And surprisingly, there have been few controlled studies of specific interventions for responding to microaggressions and how to cope with its negative effects.[138]

For overcoming bias based on roles (or "rankism" as discussed above) in law schools, addressing the entrenched structural norms of hierarchy and the doctrinal/skills divide is a re-envisioning of legal education on a global scale. As many have argued, just because change is difficult does not mean it is unobtainable. First, valuing skills education on par with doctrinal teaching is key, including being inclusive of all forms of scholarship. Modern learning experts have advocated for breaking down the doctrinal/skills divide for decades,[139] with some success: experiential learning in law school is ascendant, even though it is more resource intensive. Law schools that equalize job title, pay, security, and other benefits for professors of all types of courses do exist but unfortunately remain in the significant minority.[140] But a uniform tenure track is not a

137. *See* Robert C. Mizzi, *Tough Times: Adult Educators, Microaggressions, and the Work Context*, 29 NEW HORIZONS ADULT EDUC. 54, 57 (2017).

138. *See* Robert Berk, *Microaggressions Trilogy: Part 2. Microaggressions in the Workplace*, 31 J. OF FAC. DEV. 69, 72 (2017); SUE, *supra* note 71, at 67.

139. *See, e.g.*, LINDA EDWARDS, THE DOCTRINE-SKILLS DIVIDE: LEGAL EDUCATION'S SELF-INFLICTED WOUND (2017).

140. A few schools with "unified tenure track" faculties include: Texas A&M University School of Law, University of Nevada Las Vegas, John Marshall Law School, University of

panacea if faculty still feel undervalued. As one tenured faculty member who teaches legal writing told the author, her awareness of microaggression against skills faculty actually increased upon receiving tenure: now she's "in the room" to hear how bias exists and plays out in hiring and governance decisions. So while a "uniform" faculty track with equal benefits is ideal and should continue to be sought across law schools, hierarchical microaggression based on roles might persist and need further ameliorative efforts.

Although specific steps and answers have yet to be supported through controlled study, researchers have developed guidelines for addressing microaggression in workplaces, including in the university setting. Sue and his colleagues provide concrete suggestions on how to overcome microaggression in the workplace,[141] which have been adopted and expanded for the university workplace.[142] From these, steps to address hierarchical microaggression are adapted here for the law school workplace.

First, the voices of employees affected by the bias must be heard. This validates the experiences and concerns of the affected groups and individuals who are often made to feel devalued, degraded, demeaned, and discredited. Regular meetings between skills faculty and administration (such as Deans, Provosts, and Chancellors) should be scheduled to open the channel of communication and dialogue on equal opportunities, status discrimination, and hierarchical microaggression. Discussion topics can include: ways to manage and equalize teaching loads; support for scholarship, conferences, mentoring, and community engagement; faculty evaluations and performance metrics; and service assignments (such as equitable committee work), to promote fairness and ameliorate discrimination and lessen microinequities.

Prior to such administrative meetings, skills professors can meet among themselves to discuss priorities, experiences with microaggression, and support for each other. Sue and his colleagues developed a "Microaggression Process Model" that may help skills professors identify and discuss their experiences with hierarchical microaggression:

1. Incident: Identify an event or situation experienced by the targeted listener that impacted them.
2. Perception: Discuss the listener's belief about whether or not the incident was motivated by their status or role in the law school.
3. Reaction: Determine the listener's immediate response to the incident, including cognitive (a reaction that involves thought processes, whether spoken or internal); behavioral (a reaction that involves an action); and emotional (a reaction that involves an emotion, like

Wyoming, and Georgetown University School of Law.

141. SUE, *supra* note 71, at 227-230.

142. Berk, *supra* note 138, at 72–74; Wells, *supra* note 57, at 342–47; Mizzi, *supra* note 137, at 57.

anger, surprise, or hurt).
4. Interpretation: Investigate the meaning of the incident as interpreted by the listener, answering questions such as: why did the event occur? What were the speaker's intentions?
5. Consequence for Listener: Examine the thought, behavioral, and emotive processes that have or could develop over time as a result of the incident. [143]

By processing incidents of hierarchical microaggression, the skills faculty can not only better identify their experience and look for ways to move forward, but provide support for one another. Additionally, skills faculty can advocate with their administration for ways to create a work environment that is more positive, supportive, welcoming, and collaborative amongst all faculty. Skills faculty can make the case that a positive work culture facilitates productivity and professional advancement in one's chosen discipline. Administration should be encouraged to adopt particular outcomes for their institutions, including commitments to:

1. Increase faculty knowledge and awareness of hierarchical microaggression;
2. Enhance faculty knowledge and appreciation of the different roles and the importance to each role to the mission of the law school;
3. Understand the serious psychological and physical consequences of hierarchical microaggressions to listeners;
4. Identify individual's implicit biases and prejudices to take action to improve;
5. Appreciate the value and status of all employees at all levels of the academic hierarchy;
6. Raise faculty sensitivity levels to recognize microaggressions when they occur;
7. Serve as an effective ally and advocate for skills professors who are targets of hierarchical microaggression by promoting their work to the entire faculty and institution;
8. Select appropriate strategies for speakers and listeners to respond to microaggression;
9. Formally document all incidents as the speaker and listener for accountability; and
10. Take on the role of change agent to eliminate microaggression at their law school.[144]

143. SUE, *supra* note 71, at 68–69.
144. Berk, *supra* note 138, at 73.

Furthermore, awareness can be raised on the corrosive effects of hierarchical microaggressions throughout the institution. Faculty meetings or retreats, professional development workshops, or more informal discussions can provide information about unconscious bias, status hierarchies, and microaggressions, including definitions, characteristics, examples, and consequences. Conversations about how to recognize microaggression, how to respond to it appropriately, and how to be an ally to targets of microaggression are important steps in combatting them effectively. Ideally, facilitators with an expertise in these areas (including inclusivity training, implicit bias, and workplace discrimination) should be employed to assist in these discussions.

In the process of combatting microaggression and facilitating a healthy work environment, faculty should be encouraged to be self-reflective, empathetic, and willing to address their biases and their impact on others in the workplace. Faculty can familiarize themselves with implicit bias by taking the *Implicit Association Test* found easily online.[145] Then, a discussion about other identities can be started, including status hierarchies. Faculty should remain open to the idea that all people have unconscious biases, in a variety of areas, and it is only through uncovering those hidden biases can microaggression be lessened. As Professor Ronald Berk has written about microaggression in the university workplace, unconscious biases "are the disease, and the microaggressions are the symptoms. We need to treat both."[146]

Lastly, tools are available to law school administrators from experts in the field of inclusive excellence to assist in these programs, including: supervisor awareness and training guidance on inclusive workplaces and microaggression; workplace inventories;[147] evaluations tools on promoting healthy workplace climates; and inclusive excellence toolkits.[148]

C. How Can Faculty Successfully Address Hierarchical Microaggression?

For skills professors who are targeted for hierarchical microaggression, there are a few strategies that psychologists recommend for how to react or address microaggression. First, however, is the recognition that listeners have the right to do nothing.[149] Just because an aggressor acts, consciously or unconsciously, in a way that devalues or demeans someone, does not put the onus on the targeted listener to correct or fix the behavior. Fatigue, stress, or other issues might make that too difficult for the listener.

145. Project Implicit, *supra* note 84.
146. Berk, *supra* note 138, at 74.
147. *Id.*
148. Jesús Treviño et al., *Inclusive Excellence Toolkit*, DENV. U. CTR. FOR MULTICULTURAL EXCELLENCE (last updated Mar. 2009), https://www.du.edu/gsg/media/documents/Inclusive ExcellenceToolkit-DUCME3-09.pdf.
149. SUE, *supra* note 71, at 55.

Moreover, as Sue points out, the listener might be: confused on how to respond; unable to respond because the incident is over so quickly; in denial about it happening; trying to rationalize away the importance of the incident; or in fear of negative consequences.[150] In any of those situations, response by the listener might be unmanageable.

Targets of hierarchical microaggression, as well as other listeners, can choose to act, during the incident, after, or both. "Microresistance" is a term used for the "small-scale individual or collaborative efforts that empower targeted people and allies to cope with, respond to, and challenge microaggression, with the goal of ultimately dismantling systems of oppression."[151] An ally in these situations is another faculty member who is not a skills professor but is aware of hierarchical microaggression and commits themselves to ending systemic oppression, following the lead of targets, and acting accordingly.[152]

Researchers have created several paradigms to assist listeners in addressing microaggression, both at the time of the incident or for later discussion. First, Professor Cynthia Ganote, Tasha Souza, and Floyd Cheung outlined the "Open The Front Door to Communication" (OTFD) technique.[153] The goal of OTFD is to make transparent the nature and effects of microaggression:

- **O**bserve: Describe clearly and succinctly what you see happening, in concrete, factual, and observable terms, as opposed to evaluative;
- **T**hink: State what you think about it and try not to put the speaker on the defense;
- **F**eel: Express your feelings about the situation or observation; and
- **D**esire: Assert what you would like to happen and make a specific request or inquiry about a desired outcome.[154]

For example, the OTFD technique can be used in a curriculum setting meeting where skills faculty are absent or excluded. An ally can say: I notice (Observe) that some faculty with expertise or experience in teaching our classes for many years is missing from this discussion. I think (Think) we need to collect and explore all ideas about the curriculum, including those that involve legal skills and experiential learning, so that we can learn from

150. *Id.* at 55–57.

151. Cynthia Ganote et al., *Microresistance and Ally Development: Powerful Antidotes to Microaggressions*, https://www.unomaha.edu/faculty-support/teaching-excellence/microaggressions-handout.pdf; *see also* Floyd Cheung et al., *Microaggressions and Microresistance: Supporting and Empowering Students*, *in* FAC. & FOCUS SPECIAL REP. DIVERSITY & INCLUSION C. CLASSROOM 1, 15–17 (2016).

152. *See id.*

153. Ganote et al., *supra* note 151, at 4, 5.

154. *Id.*

one another and make wise decisions about our curriculum. I feel uncomfortable (Feeling) moving forward with the discussion without those voices present. Can we please invite those members of our faculty (Desire) and give others the chance to share their thoughts?

Another similar but streamlined technique is called the "XYZ" approach: I feel **X** when **Y** because **Z**.[155] An example in the context of law school hierarchical microaggression would be: "I **feel** belittled **when** you compare my classroom to 'homeroom' time **because** it makes me feel that you think my course is less valuable than yours."

The workplace norms of law schools can make speaking up difficult. Framing the response as an act of microresistance may empower both the targets and other listeners/allies to speak up. With the OTFD or XYZ approach, the responder can be resisting, not just reacting. The resister should not feel that the response has to be perfect in order to speak, but instead focus on the response being an authentic reaction and expression of one's closely-held thoughts, feelings, and desires. For allies speaking up in this context, the goal of this type of microresistance is to relieve the person who is the target from having to address the issue with the speaker.

Lastly, if the hierarchical microaggression is so uncomfortable or quick that the listener feels unable to respond in the moment, but the microaggression was so impactful that the listener wishes to engage in a more involved microresistance, the listener might start a longer conversation with the speaker to open a dialogue to communicate feelings and educate the aggressor. One method to assist in that difficult conversation is the **ACTION** technique:

1. **A**sk clarifying questions to assist with understanding intentions, such as: "I want to make sure that I understand what you were saying. Were you saying that. . . ?" You could also begin a conversation about why it was important for you to ask that question: "Your role in this institution is highly respected" or "Our relationship is important to me because. . . ."
2. **C**arefully listen to their response. If the speaker disagrees with your paraphrase and offers a different meaning, you could end the conversation and reiterate why you opened this door. If you suspect the speaker is post-hoc changing the insult or trying to justify it, you may consider making a statement about the initial comment: "I'm glad to hear I misunderstood you, because such comments can be really hurtful to those that teach that course." If they agree with your paraphrase, explore their intent behind making the comment: "Can you please help me understand what

155. *Id.*

you meant by that?"

3. **T**ell them what you observed as problematic in a factual manner, for example: "I noticed that when people make assumptions about what is important for the school, or the content of a particular class, people's feelings are hurt and it doesn't respect the contributions of our varied colleagues."
4. **I**mpact exploration: ask for, or state, the potential impact of such a statement or action on others, by asking questions such as: "What do you think people who teach that class would think when they hear that type of comment?" or "What message do you think such a comment sends?"
5. **O**wn your own thoughts and feelings around the impact. This can start with phrases such as: "When I hear your comment I think/feel," "Many people might take that comment to mean," "That comment can perpetuate negative stereotypes and assumptions about," or "Such negative comments can cause division and defensiveness. I'm sure that wasn't your intent."
6. **N**ext steps: request appropriate action be taken. Ways to do that should be specific and clear, such as: "Please listen to everyone's comments without interruption," or "I'd appreciate it if you'd stop making these types of negative comments because. . . ."[156]

When engaging a speaker about a hierarchical microaggression, it helps to remember that the goal is to educate and find common ground for consensus (such as student learning, the value of equity, or respect for the institution). Challenging microaggressions in a respectful and appropriate manner can improve the odds of meeting those goals, while venting anger and hostile accusations can have the opposite effect.

For those on the other end of the conversation—the speaker or perceived aggressor—these conversations can be uncomfortable or embarrassing. Being confronted with one's own remarks, made unthinkingly or without intended harm, can be awkward or painful. Law faculty are used to being the experts and having the reputation of being thoughtful and valuing equality and justice. Being reminded that they are human, not omniscient, and make mistakes, can be difficult for law faculty, and having to acknowledge one's lack of insight or blind spots is especially disconcerting.

Sue and his colleagues acknowledged the challenge in confronting one's unexamined biases and microaggressions, including fear of appearing bigoted and fear of acknowledging one's own privilege.[157] They also

156. Ganote et al., *supra* note 151 at 16.
157. SUE, *supra* note 71, at 122–27.

researched the costs of microaggression to the perpetrators, including the cognitive costs of fear, anxiety and apprehension, guilt, and low empathy, as well as the behavioral costs of depriving one of rich interpersonal relationships and connection with others.[158] Being open to investigating one's biases based on roles and hierarchy is a different type of privilege examination.

What skills faculty are asking from other faculty in these situations is similar to what most victims of microaggression are seeking: for the perceived aggressor to listen, rather than speak. To show empathy for the perceived victim and ask for clarification about why the words or actions were harmful to the listener and what unexamined biases are at play. To acknowledge that the event happened without trying to put blame elsewhere, being defensive, or arguing why the listener should not feel the way that they do. To understand where the listener is coming from and show respect for the skills faculty member's role. To recognize that the cumulative effect of many seemingly small slights can demoralize listeners over time. To be open to discussing and exploring why the event was painful to the listener and exhibit that the speaker cares about the feelings of the listener. To apologize for the harm, even if unintentional, one's remarks or actions had on the person. And maybe a commitment to do better or be an ally in the future.

For law faculty deeply committed to the hierarchical nature of the academy, this can be a challenge. One way to move forward, after open discussion about status hierarchy and rankism, is to commit to engaging in "microaffirmations" in support of skills faculty. This practice is a conscious effort to build up colleagues at every opportunity, as opposed to finding fault, isolating, or excluding individuals or groups. Valuing an inclusive workplace includes acknowledging the contributions of all parts of the faculty and the role they play in educating tomorrow's lawyers. Restructuring the norms of the law school workplace can start with small steps: sending out an email congratulating a legal writing colleague on her new book; inviting a clinical professor to coffee to discuss bringing more real life advocacy into a doctrinal class and offering to reciprocate by participating in the clinician's class as well; asking academic success colleagues to join a curriculum meeting. These types of workplace outreaches are "microaffirmations": "small acts, which are often ephemeral and hard-to-see, events that are public and private, often unconscious but very effective, which occur whenever people wish to help others to succeed."[159] Such microaffirmations can include: leading rather than pushing; opening doors of opportunity; fostering inclusion and caring; building a sense of community; and giving credit to others.[160] These types

158. *Id.* at 128–33.

159. Mary Rowe, *Micro-affirmations and Micro-inequities*, J INT'L OMBUDSMAN ASS'N, 46 (2008). *See also* Maureen Scully & Mary Rowe, *Bystander Training Within Organizations*, 2 J. INT'L OMBUDSMAN ASS'N 89, 91 (2009).

160. Scully & Rowe, *supra* note 159.

of microaffirmations have the power to change the culture of a university workplace[161] and combat the effects of status hierarchy and rankism.

Lastly, Sue reminds readers that "the way forward is a difficult journey, but the moral and ethical mandate for social justice requires action, not passivity and inaction."[162] Relying on Gordon Allport's book, *The Nature of Prejudice*, Sue identifies seven important conditions needed to combat bias and prejudice, which are helpful reminders for law faculty wishing to create a healthy, inclusive, and just law school:

1. Having intimate contact with people who differ from us (including not only identities such as race, gender, and sexual orientation, but also difference in role, rank, and place on the legal hierarchy);
2. Working together in a cooperative rather than competitive environment;
3. Sharing mutual goals (such as student learning and law school excellence), as opposed to individual ones;
4. Exchanging and learning accurate information rather than stereotypes or misinformation;
5. Sharing an equal status relationship with other groups instead of unequal or imbalanced one;
6. Having leadership and authority as supportive of group harmony and welfare; and
7. Feeling a sense of unity and interconnectedness with all humanity.[163]

Perhaps the global goal is to have these conditions included as part of all law school mission statements.

V. FINAL THOUGHTS[164]

My journey in writing this paper can be summed up in a word that the latest, more enlightened generation uses quite a bit: triggered. Researching and writing this paper triggered for me the feelings I had been suppressing about how I have been treated for years for my role at my law school. The title "Papercuts" comes from my experience as a legal writing professor for fifteen years and counting. I experienced small slights about what I teach and my role and status on my law school faculty continually during those fifteen years, including but certainly not limited to the ones identified in this Article. And although each one stung just a little bit—like a paper cut—they accumulated until I found myself feeling wounded and needing a break. It

161. Berk, *supra* note 138, at 78.
162. SUE, *supra* note 71, at 133.
163. *See* SUE, *supra* note 71, at 133.
164. This last section purposefully moves to the use of personal pronouns in order to allow me to tell my story directly to you, the reader.

culminated in my needing respite from all national and local conferences so that I would not have to explain yet again: why I taught legal writing (to my doctrinal colleagues); why I remained at an institution that did not see fit to put me on the tenure track (to my legal writing colleagues); and why I continued writing legal academic scholarship when it made little to no difference in my career or to the outside world (to my non-legal academy colleagues).

When I conceived of and then presented the idea of hierarchical microaggression against skills faculty in law schools, my audience was mostly legal writing professors, with a few doctrinal colleagues thrown in for good measure. The response from those in the legal writing discipline was uniform: Me Too. The audience exhibited an overwhelming need to express their experience with being the target of hurtful (and often times outrageous) statements about their role and place on the law school hierarchy. Audience members were pleased to have a frame of reference—as hierarchical microaggression—for the very particular type of everyday slight. Some had not recognized the comments aimed at them as microaggression about their role, or had felt the irony of contributing to the much-publicized experiential learning of their law schools but then placed lower on the workplace hierarchy because of that contribution. Starting and guiding those discussions was cathartic and important work—I just didn't feel like writing about it.

Of course, I am now writing about it and in writing, I feel those triggering emotions all over again. I wish I could say that when confronted with the hierarchical microaggressions exemplified in this paper, I immediately replied to the offender with OTFD or XYZ techniques and engaged in ACTION steps to engage in meaningful dialogue in real time, but I didn't. In writing this paper, I feel like I have finally done so.

I hope this paper helps those skills professors who live this experience, moves the ball forward for law schools to build a more inclusive and just workplace, and gives insight for those that may have unintentionally harmed their colleagues, while infusing all parties with a desire to do better the next time.