TEACHING LEGAL WRITING AFTER A THIRTY-YEAR RESPITE: NO COUNTRY FOR OLD MEN?

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"[T]oo often, but for understandable reasons, legal writing has become the stepchild of the curriculum, unwanted, starved, and neglected. But, also like a stepchild, it cannot be abandoned or people will talk."

I. Introduction

All in all, my law school has been a fairly benevolent step-parent. When I joined the faculty at The University of Baltimore three decades ago, legal writing was generally taught by junior tenure-track faculty. I expected to do so for years, but after only one year, I had to plug another hole in the curriculum.

Not long thereafter, our faculty shifted the burden of teaching writing to inexpensive adjuncts, albeit under the supervision of a tenure-track director. A few years ago, our former dean proposed to raise a substantial amount of money to hire a large number of legal writing experts for "Writing Across the Curriculum," the *ne plus ultra* of writing programs. In pursuit of that objective, we hired several experienced tenure-track legal writing faculty who taught it in connection with substantive courses.

But deans change, budgets and priorities change, and our hiring of legal writing faculty ended up a few fries short of a Happy Meal. We were left without enough writing teachers to teach reasonably-sized sections.

What to do? I was somewhat surprised to receive an e-mail from my associate dean in the fall of 2007 asking me what I thought of combining civil procedure, a course I had taught for many years, with legal writing.³ I

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¹ Stewart Macaulay & Henry G. Manne, *A Low-Cost Legal Writing Program—the Wisconsin Legal Experience*, 11 J. LEGAL EDUC. 387, 389 (1959).

² This approach was described in detail in Susan E. Thrower, *Teaching Legal Writing Through Subject Matter Specialties: A Reconception of Writing Across the Curriculum*, 13 LEGAL WRITING 3, 3 (2007).

³ This, I later learned, was not a novel idea. *See* Douglas E. Abrams, *Integrating Legal Writing into Civil Procedure*, 24 CONN. L. REV. 813, 816 (1992); Joseph W. Glannon et al., (*continued*)

replied, I think much to her surprise, that I thought teaching such a course would be great fun.

I suspect many of my colleagues thought that, somehow, the law school administration had the goods on me and had made me an offer I could not refuse. Although my dean expressed his appreciation, he then joked (I hope!) that if everyone thought this assignment was caused by my taunting about the playoff miseries of his beloved New York Yankees, that was fine with him.

I didn't have anything to worry about, did I? Little did I know how much teaching legal writing changed in the intervening decades since I last taught it; how the cast of characters had changed; how the improvements in working conditions of legal educators that I had enjoyed had so largely eluded teachers of legal writing; and yet, notwithstanding all those unnerving discoveries, how much fun I would have teaching legal writing again.

II. AFTER ALL, "LEGAL WRITING IS NOT ROCKET SCIENCE"4

At least it did not seem like rocket science when I taught it long ago as a teaching fellow at another law school. At that time, I did not have any particular qualifications or training, but I had over ninety students—two memos and oral arguments for all. The whole thing was in sync with the times—a Ford not a Lincoln.⁵

But now, as my law school hired legal writing faculty, the candidates were presented to us as specially trained, experienced practitioners of this

Coordinating Civil Procedure with Legal Research and Writing: A Field Experiment, 47 J. Legal Educ. 246, 246 (1997).

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⁴ Stewart Harris, Giving Up Grammar and Dumping Derrida: How to Make Legal Writing a Respected Part of the Law School Curriculum, 33 CAP. U. L. REV. 291, 305 (2004).

⁵ Watergate junkies will recognize this as President Gerald Ford's reassurance to a scandal-weary nation when he assumed the Presidency that he had a more modest conception of the office than his predecessor. DOUGLAS BRINKLEY, GERALD R. FORD 63–65 (2007). At that time, law schools were generally interested in the more modest, meaning cheaper, models of legal writing instruction. While a substantial majority of law schools now employ full-time faculty to teach legal writing, cheap and dirty is nevertheless alive and well. A considerable number of schools rely on adjunct faculty and a handful even employ students. Susan P. Liemer & Jan M. Levine, *Legal Research and Writing: What the Schools Are Doing, and Who Is Doing the Teaching (Three Years Later)*, 9 SCRIBES J. LEGAL WRITING 113, 120 (2003–2004). The use of students raises the question whether the teachers ever learn from teachers.

new art of teaching writing. Did I really have that much to learn? Oh yes, said our legal writing co-director; I was encouraged to attend the biennial conference of the Legal Writing Institute in Indianapolis in July 2008.

Oh great, I thought, teach legal writing and see the world! But this crowd was there to work—no excursions to the "Indiana wine country." This was a law professors' conference different from any other I had ever attended. The focus of most sessions was on methodology rather than substance. And there were some quirky subjects: naked grading, 6 the use of intensifiers in judicial opinions, and a skit on how to use humor to facilitate learning.

The atmosphere at this conference exuded a small-town feeling, a remarkable camaraderie among the participants. Yet, I was not entirely a part of that spirit, not simply because I was new, but because I was an "other" in this world. I was a life-long *doctrinal* teacher. However, I always thought of myself simply as a law professor. I was never aware that legal education makes distinctions among types of law professors, but it does, and they matter.⁸

⁶ Happily, it entailed nothing remotely running afoul of Title IX, of the Educational Amendments of 1972, or 20 U.S.C. § 1681 (2006). It is simply grading in real time in the presence of the gradee!

⁷ This is definitely not on the agenda when tax professors get together. The skit was very funny and, so too (though perhaps unintentionally), the notion that humor may be induced by encouragement.

⁸ The strong sense that I was in another pedagogical world is apparently not a figment of my imagination. Some legal writing scholars have commented upon, and decried, the sense that legal writing professors are a breed apart from the rest of legal education. For example, the "us vs. them" dialogic has become reified to the point that skills faculties actually do see themselves as different: different in pedagogy, different in teaching loads, different in focus (teaching v. scholarship), and so on. David T. Ritchie, *Who Is on the Outside Looking In, and What Do They See?: Metaphors of Exclusion in Legal Education*, 58 MERCER L. REV. 991, 1013 (2007). *See also* James M. Boland, *Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club*, 18 St. Thomas L. Rev. 711, 715 (2006) (suggesting that legal writing professors need to produce scholarship more like that of other professors); Mitchell Nathanson, *Dismantling the "Other": Understanding the Nature and Malleability of Groups in the Legal Writing Professorate's Quest for Equality*, 13 Legal Writing 79 (2007) (advocating equal responsibilities and treatment for legal writing professors and doctrinal professors).

A. Comparing and Contrasting Legal Writing Professors with Doctrinal Professors

Legal writing professors view themselves as focusing primarily on the classroom, and they do so in a unique way. To one degree or another, most of the full-time legal writing community has embraced a teaching ethos that emphasizes mandatory conferences with students and has supervised editing of students' preliminary drafts. This ethos combines an awareness that most law students lack basic writing skills with a scrupulous refusal to leave to chance students' development of such skills. More than any other participants in the legal education enterprise, save perhaps the clinicians, legal writing professors are willing to roll up their sleeves and do transformative dirty work.

If this were a perfect world, one would imagine that legal education, in appreciation of the legal writing professoriate's dedication to undertake such arduous tasks, would accord legal writing professors great respect and provide rewards commensurate with their service. But this is not a perfect world.

If I stand out somewhat at a conference of legal writing teachers, *they* stand out perhaps even more so in the wider world of legal education. Because of the nature of their work, they spend their days differently from most law professors. Teaching is at the center of their universe; that is much less so for other law professors. Law faculty other than legal

⁹ See Jo Anne Durako et al., From Product to Process: Evolution of a Legal Writing Program, 58 U. PITT. L. REV. 719, 722–23 (1997); cf. Harris, supra note 4, at 299 (criticizing this practice as "coddling" students).

¹⁰ See Macaulay & Manne, supra note 1, at 387("Most beginning law students do not write or think well.").

¹¹ See, e.g., Mary Beth Beazley, "Riddikulus!": Tenure-Track Legal Writing and the Boggart in the Wardrobe, 7 SCRIBES J. OF LEGAL WRITING 79, 81 (1998–2000) (stating that legal writing courses are not "the dirty diapers of legal education," but rather represent the very essence of what lawyers do, for example, identifying authorities, synthesizing rules, and applying them to relevant facts). I thank the author for the metaphor, but dispute its inapplicability. Untangling run-on sentences and insisting repeatedly that students correlate authority with facts are a good deal more unpleasant than changing dirty diapers.

¹² See Maimon Schwarzchild, *The Ethics and Economics of American Legal Education Today*, 17 J. CONTEMP. LEGAL ISSUES 3, 6 (2008) (stating that at most top law schools, the norm for professors is ten credits per year).

writing teachers, and perhaps clinicians and faculty librarians, 13 now devote perhaps most of their time to scholarship. 14

If there is a perception that legal writing teachers are scholarship-challenged, a number of explanations have been suggested. One explanation is that law schools fail to provide academic-year support for pursuing scholarship. Others suggest the time demands are imposed by interactions with students, which are demands not ordinarily shared by other faculty.

Whatever the explanation for the difference in production of scholarship between doctrinal faculty and legal writing teachers, the doctrinal faculty, for the most part, hold the keys to the kingdom in the legal academy. While the standard among law schools is to employ full-time faculty to teach legal writing, ¹⁷ most schools do not accord tenure status to legal writing directors and non-director full-time faculty. ¹⁸

This lack of tenure track or tenured status often means lack of job security that accompanies tenure and exclusion of participation in faculty governance, as well as petty indignities such as inferior titles and physical facilities.¹⁹

¹³ Spencer L. Simons, *What Interests Are Served When Academic Law Library Directors Are Tenured Law Faculty? An Analysis and Proposal*, 58 J. LEGAL EDUC. 245, 254 (2008) (arguing that overall, law library directors publish fewer law review articles than the general law professoriate).

¹⁴ Schwarzchild, *supra* note 12, at 7 (asserting that "lower teaching loads are an implicit subsidy" for such scholarship).

¹⁵ Susan P. Liemer, *The Quest for Scholarship: The Legal Writing Professor's Paradox*, 80 OR. L. REV. 1007, 1015 (2001).

¹⁶ See Harris, supra note 4, at 299–301; Jan M. Levine, Leveling the Hill of Sisyphus: Becoming a Professor of Legal Writing, 26 FLA. ST. U. L. REV. 1067, 1071–72 (1999).

¹⁷ See Melissa H. Weresch, Form and Substance: Standards for Promotion and Retention of Legal Writing Faculty on Clinical Tenure Track, 37 GOLDEN GATE U. L. REV. 281, 287 (2007) (stating that 133 law schools use full-time faculty).

¹⁸ Philip Frost et al., *2006 Survey Results*, THE ASS'N OF LEGAL WRITING DIRECTORS/ LEGAL WRITING INST. v. (2006), *available at* http://www.lwionline.org/survey/surveyresults 2006.pdf. As of 2006, directors were tenure track at sixty-two schools, and non-director full-time faculty had such status at twenty-five schools out of the 184 schools surveyed by the Association of Legal Writing Directors/Legal Writing Institute. *Id.*

Jo Anne Durako, Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal, 73 UMKC L. REV. 253, 253–71 (2004). A chilling portrait of how the lack of job security leaves dedicated and experienced legal writing faculty subject to administrative caprice was painted by Peter Brandon Bayer in A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties (continued)

The relative lack of scholarship of legal writing faculty and their widespread lack of tenure or tenure track status presents something like a chicken-and-egg conundrum: Do they not produce as much scholarship because it is not required, or is it not required because such faculty could not do so in light of the demands of the job?²⁰

If the nature of a legal writing professor's job effectively makes production of scholarship impossible or impractical, might legal education excuse or attenuate the scholarship requirement? Given the role of scholarship in the legal academy, such a notion is, for conceptual and practical reasons, quixotic.

Conceptually, ABA accreditation requirements compel professors to produce scholarship. ABA standards also require law schools to offer, as part of the curriculum, substantial instruction in "legal analysis and reasoning, legal research, problem solving, and oral communication . . ."²²

So what sort of "professor" is to provide this substantial instruction? The ABA standards finesse this, providing that law schools allow legal writing faculty only: "[S]uch security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction . . . and to (2) safeguard academic freedom."²³

Putting aside politesse, this standard requires that legal writing teachers be treated only as well as required by the law of supply and demand. Essentially, this places such teachers in a separate caste.

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as a Violation of Both Equal Protection and Professional Ethics, 39 Duq. L. Rev. 329 (2001). After ten years as director of legal writing at his law school, Professor Bayer had recommended to his dean that the school should hire two more faculty members. *Id.* at 329–30. Perhaps in response, the dean terminated Professor Bayer and his colleagues and moved to a system based on adjunct faculty. *Id.* at 330.

²⁰ This has been described more elegantly as an "expectancy confirmation sequence," which is the creation of a position permitting the holder to meet only a particular devalued standard. Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP, L. REV. 117, 167 (1997).

²¹ Standards and Rules of Procedure for Approval of Law Schools 2008–2009, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 32 [hereinafter A.B.A. Standards]. Standard 401 states that "[t]he faculty shall possess a high degree of competence, as demonstrated by its education, experience in teaching or practice, teaching effectiveness, and scholarship research and writing." *Id.*, Standard 401, at 32.

²² *Id.*, Standard 302(a)(2)), at 21.

²³ Id., Standard 405(d)), at 36.

The practical problem with excusing or attenuating scholarship as a means to provide equal status and job security to legal writing professors is that scholarship is increasingly becoming the be-all and end-all of the twenty-first century law school.²⁴ Universal acceptance by doctrinal faculty of a cohort less committed to scholarship would be highly unlikely given the doctrinal faculty's proclivity to scholarship.²⁵

It is questionable, at least to some, whether scholarship should play such a large a role in legal education. Responsible voices have lamented how far much legal scholarship has strayed from the central mission of legal education.²⁶ But for the time being, the allocation of resources in legal education is likely to remain as it is: monopolists do not surrender a monopoly absent some external exigency. If a cohort in legal education produces less scholarship, it will be inherently disadvantaged in competing for status and resources.²⁷

B. Analysis of Reports on the State of Legal Education

This de-emphasis of practical skills in favor of theoretical research has not happened because nobody was watching. Both the MacCrate and the earlier Cramton Reports noted shortcomings in legal education's

²⁴ See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 7–8 (2007) (stating that the Carnegie Report, to which legal education must at least pretend to genuflect, called productivity in scholarship and research "[t]he coin of [the] realm," while at the same time noting that such scholarship has moved away from the concerns of judges and practitioners).

²⁵ This proclivity is remarkable in light of the unlikelihood that most doctrinal faculty harbor any illusions about the social utility of much legal scholarship. As one commentator noted: "[M]any—perhaps most—law professors will gleefully and honestly assert that much of the 'scholarship' of their fellows is rubbish for which innocent trees are slaughtered...." Lloyd Cohen, *Comments on the Legal Education Cartel*, 17 J. CONTEMP. LEGAL ISSUES 25, 40 (2008).

²⁶ See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) ("[M]any law schools—especially the so-called "elite" ones—have abandoned their proper places by emphasizing abstract legal theory at the expense of practical scholarship and pedagogy.").

²⁷ Cf., e.g., Nina W. Tarr, In Support of a Unitary Tenure System for Law Faculty: An Essay, 30 WM. MITCHELL L. REV. 57, 61 (2004) (stating that she is not likely to share with another if it requires redistribution of resources to the former cohort's detriment: "[D]istinguishing one group of teachers from another can only be explained as an attempt by a select group to hang onto its monopoly on power in the legal academy because that group fears being exposed as emperors in new clothes.").

commitment to teaching legal writing.²⁸ Specifically, the MacCrate Report stated: "[C]omplaints heard by the Task Force concerning law graduates' writing skills suggest that further concerted effort is required to teach legal writing at a better level than is now generally done both in the law schools and in bridge-the-gap programs after law school."²⁹

The Report chided that deficiencies in law schools' skills training "may be due at least in part to the schools failure to value the importance of these programs to the training of lawyers to become competent professionals." ³⁰

The Carnegie Report duly noted MacCrate's admonition,³¹ and it set out a remedial course for legal education to consist of three apprenticeships: (1) The intellectual or cognitive, which focuses the student on the knowledge or way of thinking of the profession; (2) The forms of expert practice; and (3) The apprenticeship of identity and purpose, which introduces students to the "purposes and attitudes that are guided by the values for which the professional community is responsible." Doctrinal faculty carry out the first apprenticeship, legal writing and clinical faculty tend to the second, and all faculty are responsible for the third.

The Carnegie Report does not contemplate a hierarchy for the participants in these apprenticeships, but the ABA accreditation standards do because they provide incomplete employment protection for legal writing faculty.³³ In light of this discrepancy, whether production of more scholarship by legal writing faculty would add value to the enterprise of

²⁸ Robert MacCrate, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 264 (1992) [hereinafter MacCrate Report]; Roger C. Cramton, Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 15 (1979) [hereinafter Cramton Report].

²⁹ MacCrate Report, supra note 28, at 264.

³⁰ *Id.* at 266. The Task Force recommended, "Law schools should assign primary responsibility for instruction in professional skills to *permanent full-time* faculty who can devote the time and expertise to teaching and developing new methods of teaching skills to law students." *Id.* at 333–34 (emphasis added).

³¹ SULLIVAN ET AL., *supra* note 24, at 93.

³² *Id.* at 28

³³ Weresch, *supra* note 17, at 290.

legal education, the legal writing faculty, or for their professional survival and well being, legal writing professors should strive mightily to do so.³⁴

If it is incumbent on legal writing faculty to produce more scholarship, the next concern is whether the working conditions of legal writing professors would allow them to produce scholarship comparable to their doctrinal colleagues or whether those conditions should bend to allow legal writing faculty more time to write.

Does conscientious teaching of legal writing *really* require as much handholding as today's breed of legal writing teachers profess? As a former old-school legal writing teacher who has only one foot in the legal writing community, I say that it does *not*. Although I coordinated closely with and borrowed extensively from my new-school legal writing colleagues in teaching my course, I eschewed *mandatory* conferences and review of preliminary drafts of student work.

As to the mandatory conferences, I am not sure I could have done otherwise. I taught evening students whose availability on weekdays or after classes was limited. Saturdays and Sundays were not generally practicable for me or for the students. I conferred freely, in person, or by e-mail or telephone, with all students who wanted to do so. But that is what I do in civil procedure, federal income tax, and the other courses I teach. I held more student conferences than I ever had before, but no student was compelled to schedule one.

As for reviewing preliminary drafts, I am not sure how I could have reconciled that with our school's first year grading curve. If I review student work and give directions about how to improve it *before* it is turned in to be graded, I expect that the students as a group would be entitled to higher grades than I could honestly give them. Philosophically, I do not approve of *any* sort of grading curve for first year legal writing courses, but I have to attempt to live as honestly as possible with whatever is imposed upon me. Nevertheless, I made myself available to answer questions about student writing assignments before students turned them in. In short, my allocation of time among my responsibilities more resembled that of my years as a doctrinal teacher than that of the "modern" legal writing professor.

Although I believe my choice represented a reasonable reconciliation of the responsibilities of my different roles, I am not entirely sure that such

³⁴ A number of commentators from the legal writing community have suggested this. *See* Boland, *supra* note 8, at 715; Harris, *supra* note 4, at 296; Ritchie, *supra* note 8, at 1017.

a choice is consistent with ABA standards pertaining to legal writing courses. Such standards require substantial instruction in "legal analysis and reasoning, legal research, problem solving . . .,"³⁵ and "writing in a legal context, including at least one vigorous legal writing experience in the first year"³⁶ The ABA interpretation of this standard provides:

Factors to be considered in evaluating the rigor of writing instruction include: the number of writing projects assigned to students; the opportunities a student has to meet with a writing instructor for purposes of individualized assessment of the student's written products; the *number* of drafts that a student must produce of *any* writing project; and the form of assessment used by the writing instructor.³⁷

This interpretation embraces the most labor-intensive view of a legal writing course. ABA standards do not micromanage any other aspect of the curriculum to this degree. For example, ABA standards allow great flexibility with respect to clinics.³⁸

It is not surprising that the standards give law schools such broad latitude with respect to clinics and similar skills development programs; clinics are *expensive*. ³⁹ Legal writing programs *could* be just as expensive, but the applicable ABA standard addresses this not by allowing flexibility concerning content of the course, but rather with respect to the status of legal writing faculty. ⁴⁰ Although ABA standards pertaining to legal

³⁷ *Id.*, Interpretation 302-1, at 22 (emphasis added).

³⁵ A.B.A. Standards, supra note 21, Standard 302, at 21.

³⁶ Id.

³⁸ See id., Interpretations 302-2, 302-5, at 22. For example, with respect to Standard (a)(4), which pertains to instruction in professional skills, Interpretation 3-302 provides that "[e]ach law school is encouraged to be creative in developing programs of instruction in professional skills" Id., Interpretation 302-2, at 22. Pertaining to the same Standard, Interpretation 302-5 provides: "A law school need not offer [clinics or field placements] to every student nor must a law school accommodate every student requesting enrollment in any particular live-client or other real life-practice experience." Id., Interpretation 302-5, at 22

³⁹ Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595, 595 (2008).

⁴⁰ A.B.A. Standards, supra note 21, Standard 405, at 35. The A.B.A. Standard pertaining to the faculty status of clinicians, Standard 405(c), allows law schools a lesser degree of flexibility with respect to the status of clinicians than it does with respect to legal (continued)

writing programs require law schools to provide students with an educational Mercedes, they require schools to pay only for a Hyundai.

Often, this incongruity between what is expected of legal writing faculty and how they are rewarded has been reconciled by requiring that such faculty produce less scholarship than their doctrinal colleagues, if they are required to produce any at all.⁴¹ Something has to give!

To some, this may seem to be a workable compromise, but it overlooks both the essential nature of the job of a law school faculty member. The ABA standard pertaining to faculty qualifications states: "The faculty shall possess a high degree of competence, as demonstrated by its education, experience in teaching or practice, teaching effectiveness, and scholarly research and *writing*." In stating the degree of competence for faculty, the standard states no explicit caveat for writing faculty. ⁴³

And while at one time it may have been customary to think of legal writing and other skills development programs as somehow exempt from the requirement that fully qualified professors teach law school courses, it is difficult to reconcile with the Carnegie Report's notion that skills training comprises a second apprenticeship of legal education. It is also difficult to reconcile legal education's lip service to Carnegie with the reality that so many law schools have essentially subcontracted legal writing instruction to teachers it refuses to treat as full-fledged faculty.

Welcoming legal writing faculty as full members of the law school professoriate does not require turning the world upside down. If doctrinal faculty produce more and better scholarship than legal writing faculty, a law school may reward them accordingly if that is what the school wishes to reward. There is no reason why law schools cannot apply different standards of scholarship to different cohorts of the faculty. Scholarship is indeed a legitimate end in itself, but it need not be pursued to the senseless diminution of other legitimate ends of legal education.

writing teachers: "A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members." *Id*.

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⁴¹ See Weresch, supra note 17, at 315–22.

⁴² A.B.A. Standards, supra note 21, Standard 401, at 32 (emphasis added).

⁴³ The implicit caveat, of course, may be a widespread understanding in legal education that legal writing teachers are not faculty in the sense implied by the standard. Until relatively recently, the idea of a tenured legal writing law professor was nearly unimaginable. *See* Kathryn Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 1, 17 (2001).

Until legal writing faculty have full tenure-track faculty status, legal education must be viewed as failing Carnegie's second apprenticeship. That failure, however, is not as egregious as legal education's failure with respect to Carnegie's third apprenticeship: the teaching of "ethical standards, social roles and responsibilities that mark the profession." That failure is addressed below.

III. BUT DO REAL MEN TEACH LEGAL WRITING?

At the first large group meeting at the Legal Writing Institute Conference in Indianapolis, I was taken aback by how significantly the women in the hall outnumbered the men. I was not imagining things. Roughly seventy percent of law school legal writing professors are women.⁴⁵

I had an opportunity to meet a number of these women. Those I met had at least one thing in common: they had substantial legal careers before they started teaching legal writing. The legal experience of most conference participants I met was more significant than that of most doctrinal professors I know (for example, one had been a United States Supreme Court clerk). For most I met, motherhood played some role in the transition from law practice to teaching.

A. Why Are Legal Writing Professors Predominately Women?

Some female writers have suggested that the nature of legal writing pedagogy, when it is done well, makes it attractive or conducive to women.⁴⁷ Whatever the reason for this predominance in the legal writing field, women have not found safety in numbers in what has been referred

⁴⁵ Kathryn M. Stanchi, Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors, 73 UMKC L. REV. 467, 467 (2004).

⁴⁴ SULLIVAN ET AL., *supra* note 24, at 93.

⁴⁶ Again, my imagination was not playing tricks. According to Professor Levine, virtually every legal writing program wants its professors to have substantial practice experience. Levine, *supra* note 16, at 1105.

⁴⁷ Stanchi, *supra* note 45, at 492–93 (footnote omitted) (describing legal writing as "one of the only courses in law school making consistent use of many techniques urged by feminist reformers"). *See* Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562, 583 (2000) (noting that some have suggested that women's teaching, "which may be different in style and content from their male colleagues, invites a closer faculty-student relationship"). This would be a good thing—at least for the students!

to as the "pink ghetto" of legal writing.⁴⁸ Rather, the predominantly female legal writing cohort endures "a version of gender discrimination that no law firm or corporation would dare institutionalize or rationalize, let alone put into print."⁴⁹

I am old enough to remember when Jim Crow ruled a large part of America. I did not then live in that part of the country, and I have sometimes reflected gratefully that I did not. I did not have to choose whether to confront evil squarely or to find it distasteful, but passively accept it because, after all, it was created to benefit people like me.

Unhappily, legal education has a back of the bus, and it is legal writing. But today, those who keep the mostly female legal writing faculty in the back of that bus do not wear pointy white hoods. Mostly, they wear business attire, and mostly they have degrees from good law schools. In a sense, although my law school has placed its legal writing teachers on a tenure track, maybe I have enabled this discrimination by a lack of curiosity about it and by passive acceptance. If you can read this article, maybe you have too, in some way or another. Many scholars have decried it, but mostly they have not been senior doctrinal faculty. It is well past time we did.

Of course, no civilized lawyer (and most are) would intentionally discriminate against women. Some of our best friends are women. It is just that too many of us feel that our lower-paid, lower-status legal writing teachers⁵⁰ do a job that is different from the job we do.⁵¹

Such logic may explain ostensible gender discrimination in some businesses. For example, if airlines pay pilots more than flight attendants, ⁵² one might imagine that they could readily prove that the pilots are not paid more because they are predominantly male and the flight

⁴⁸ E.g., Cory M. Amron et al., *Elusive Equality: The Experiences of Women in Legal Education*, A.B.A. COMM'N ON WOMEN IN THE PROFESSION 33 (1996).

⁴⁹ Stanchi & Levine, *supra* note 43, at 4.

⁵⁰ Some schools are even careful not to call them professors. *See* Durako, *supra* note 19, at 258 (2004).

⁵¹ See supra text accompanying notes 15–19.

⁵² They actually do. According to the Bureau of Labor Statistics, the May 2008 mean annual wages for airline pilots and flight attendants were \$119,750 and \$39,840, respectively. U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupation Employment Statistics*, http://www.bls.gov/oes/current/oes_stru.htm (last visited Nov. 4, 2009).

attendants are predominantly female.⁵³ Pilots play a role in the airline business that is completely different from that of flight attendants, one that requires a greater degree of training and expertise. The same cannot be said of the different "jobs" done by writing and doctrinal professors. When I teach a legal writing course rather than federal income tax, I am teaching a different subject matter, but I am not doing a different job. It would be absurd to treat me differently for purposes of status and compensation because my teaching load includes legal writing than I am treated when I teach only doctrinal courses.

Notwithstanding its patent absurdity, much of legal education has entertained the notion that the work legal writing teachers perform is different from, and less valuable than, work done by doctrinal professors.⁵⁴ The teaching of legal writing has been viewed as *support* for the *real* work done by doctrinal faculty,⁵⁵ much like the work done by flight attendants to placate passengers so that the pilots can fly the plane in peace.⁵⁶

B. Legal Writing Professors Should Be Treated as Doctrinal Faculty

What really permits legal education to perpetuate the notion that there is any essential difference between the work of doctrinal and legal writing teachers is that legal writing teachers were late to the party. This was because it took generations to scold legal education into deciding that legal writing, like the doctrinal curriculum, required full-time professional teachers. ⁵⁷ By the time the need to create this new cohort of teachers had been acknowledged in the 1980s and later, the newcomers were dependent upon the willingness of the entrenched doctrinal hierarchy to share legal

⁵⁶ See Arrigo, supra note 20, at 160 (arguing that functions dominated by women are often denigrated as support functions and consequently undercompensated).

⁵³ U.S. Dep't of Labor, Bureau of Labor Statistics, *Employed Persons by Detailed Occupation, Sex, Race and Hispanic or Latino Ethnicity*, http://www.bls.gov/cps/cpsaat11. pdf (last visited Oct. 9, 2009).

⁵⁴ See Emily Grant, Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession, 27 VT. L. REV. 371, 387–93 (2003).

⁵⁵ See id. at 391.

⁵⁷ See Cramton Report, supra note 28, at 15; MacCrate Report, supra note 28, at 264 (noting deficiencies in law school legal writing programs).

education's bounty. This hierarchy has shared grudgingly, at best.⁵⁸ Legal writing teachers are paid substantially less than their doctrinal colleagues.⁵⁹

As noted above, the ABA standard applicable to compensation of legal writing teachers requires only that they be compensated well enough to attract qualified teachers. While apparently gender-neutral, this "magic of the marketplace" standard has insidiously permitted law schools to exploit the disadvantages of women in the legal employment market to obtain first-rate teachers at bargain basement wages. 61

Although it may be implicitly sanctioned by ABA Standard 405(d), "take it or leave it" is not an appropriate condition of employment when it is applied only to one cohort of the law professoriate. Application of such a standard is suspicious when the group to which it is applied is overwhelmingly female. The inference of gender animosity in the treatment of legal writing teachers is even stronger in light of unequal treatment of women faculty in legal education generally and, remarkably, superior treatment of men within the legal writing community. Whether or not these circumstances ever result in substantial damage awards against law schools, they are unacceptable on several other levels.

⁵⁸ Stanchi, *supra* note 45, at 476 ("Those who occupy the higher ranked doctrinal positions monopolize economic rewards.").

⁵⁹ Ann C. McGinley, *Discrimination in Our Midst: Law Schools' Potential Liability for Employment Practice*, 14 UCLA WOMEN'S L.J. 1, 8 (2005).

⁶⁰ A.B.A. Standards, supra note 21, Standard 405(d), at 36.

⁶¹ See Marina Angel, The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure, 50 J. LEGAL EDUC. 1, 5 (2000). Professors Stanchi and Levine explained that owing to geographic immobility and discrimination elsewhere in the legal job market, highly qualified women were compelled to take legal writing positions "at whatever salary and status they could find." Stanchi & Levine, *supra* note 43, at 9.

⁶² Some commentators have raised the possibility that treatment of legal writing professors may constitute actionable employment discrimination. *See generally* McGinley, *supra* note 59.

⁶³ See Richard K. Neumann, *Women in Legal Education: What Statistics Show*, 50 J. LEGAL EDUC. 313, 336 (2000) (stating that women eligible for tenure attain it at lower rates than men).

⁶⁴ Jenny B. Davis, *Writing Wrongs: Teachers of Legal Prose Struggle for Higher Status, Equal Treatment*, A.B.A. J., August 2001, at 24 (stating that male tenure track legal writing professors outnumber women two to one.); McGinley, *supra* note 59, at 7 (stating that male legal writing teachers are more likely to teach upper level courses than females); Durako, *supra* note 47, at 566 ("The more closely the job of a legal writing director resembles a doctrinal teaching position . . . the more likely it is that the job will be filled by a man.").

First, of course, the denigration entailed in being treated as doing a job that is less worthy than that done by their doctrinal colleagues is harmful to legal writing teachers' sense of self-worth. As Professor Arrigo stated, "[A] LRW (Legal Writing) instructor viewed and treated as a technician, may begin to view herself as little more." The doctrinal faculty's treatment of the legal writing faculty provides a bad example for law students to do likewise. All too often when law students are frustrated with law school, the legal writing teacher is the cat that gets kicked!

Secondly, law schools have a responsibility to encourage their students to respect the law and to behave in a manner that encourages others to do so. The ABA Commission on Women in the Profession has noted the inappropriateness of tolerating unequal treatment of women in the law school community: "Gender bias that affects women students or faculty, at best, starts young male and female lawyers off on the wrong foot and at worst, fails to provide them with the tools they will need to overcome the barriers they will likely encounter during their careers." Although it is difficult to reconcile with Standard 405(d), which essentially enables law schools to treat legal writing teachers unequally, ABA Standard 211 requires law schools to embrace equal opportunity, including nondiscrimination based on sex. 68

Finally, the unequal treatment of legal writing faculty within the legal field represents a departure from an important mandate imposed upon law schools in the Carnegie Report. The third "apprenticeship" embraced by Carnegie is an ethical apprenticeship. ⁶⁹ As the report states: "Professional education is inherently ethical education in a deep and broad sense." ⁷⁰ Employing flimsy rationalizations, or no rationale at all, to treat one faculty cohort in an inferior manner patently does not fulfill legal education's mission to nurture professional ethics among lawyers-intraining. On the contrary, it showcases resorting to sharp practice with a disadvantaged group.

In order to remedy this inequitable treatment of legal writing teachers, ABA Standard 405(d) must be scrapped. Full-time legal writing teachers must be hired on a tenure track and supported in pursuit of promotion and

⁶⁵ Arrigo, supra note 20, at 176.

⁶⁶ *Id.* at 149.

⁶⁷ Amron, supra note 48, at 3–4.

⁶⁸ *Id.* at 4.

⁶⁹ SULLIVAN ET AL., *supra* note 24, at 30.

⁷⁰ *Id*.

tenure in the same manner as their doctrinal colleagues. Additionally, they must be given an opportunity to write. As tenure-track voting faculty, they can share in control of their own destiny, rather than depending on the largesse, vel non, of their doctrinal colleagues. This will require that doctrinal faculty share resources, ⁷¹ but perhaps we will derive equivalent compensation from doing the right thing.

IV. SO HOW DOES IT FEEL TO BE ONE OF AMERICA'S MOST OVERPAID, NOT QUITE DEAD, WHITE MALE LEGAL WRITING TEACHERS?

Honestly, it depends on who is asking. If it is anyone other than my dean, it is just fine. Of course, I am "overpaid" as a legal writing teacher because of my status as a senior doctrinal faculty member. But legal writing teachers should not have to spend the better part of their careers as doctrinal teachers in order to be treated fairly. There are other doctrinal faculty teaching legal writing, but not too many. Most doctrinal faculty are not eager to teach legal writing, which is a shame. It is actually great fun, especially when one teaches it in tandem with a substantive course. It is humbling, even for one who has done it before. There is substantial new pedagogy that I still must master.

Fortunately, there is a lot more help than there used to be. I structured my course around Professor Neumann's fine book on legal writing. ⁷³ My students seemed happy with my choice.

And yes, there was considerably less time to write. But, I decided that it would be alright if I left the paradigm shifting to others, at least for a semester. It is an experience I highly recommend to my doctrinal colleagues.

And why should they accept my recommendation? Legal education's doctrinal faculty unquestionably possess an enormous reservoir of legal writing talent. Diverting at least some of this talent from law review articles and treatises would be great benefit to law students, who, after all, have purchased the services of these professors. But perhaps most importantly, doctrinal professors joining in the enterprise of teaching legal writing would find common cause with the new legal writing professionals. That would make it a great deal more difficult to treat these

⁷¹ Arrigo, *supra* note 20, at 171 ("[S]tatus and salary equity for [Legal Writing] instructors would be costly").

⁷² SOURCEBOOK ON LEGAL WRITING PROGRAMS 104 (Eric B. Easton ed., 2d ed. 2006).

⁷³ RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING (5th ed. 2005).

professionals as the second class citizens of legal education. That would be a significant benefit to all faculty and, most importantly, all law students.