HIERARCHY MAINTAINED: STATUS AND GENDER ISSUES IN LEGAL WRITING PROGRAMS

*Maureen J. Arrigo**

---

* Maureen J. Arrigo is one of two legal writing program directors at California Western School of Law, where she has taught, studied, and written about legal writing for twelve years. Ms. Arrigo received her J.D. degree summa cum laude from the University of San Diego; she is currently an LL.M. degree candidate at Yale Law School. The author wishes to acknowledge her deep appreciation for the assistance and support of the following people during the process of conceiving and writing this Article: Mr. Paul Ward and Professor Vicki Schultz of Yale Law School; Professor Marina Angel and Professor Jan M. Levine of Temple University School of Law; Professor Jackie H. Slotkin and Ms. Linda Weathers of California Western School of Law; Professor Terrill Pollman of the University of Illinois College of Law; and Dr. Martha Siegel of Suffolk University Law School.

I. INTRODUCTION

> [W]e are witnessing a dramatic but relatively unnoticed structural transformation of higher education: the emergence of a quasi-closed elite at the top and a permanent underprivileged stratum of untouchables at the bottom.[1]

This nearly twenty-year-old prophecy has been fulfilled. The 1996 Report of the American Bar Association Commission on Women in the Profession ("ABA Report") recently ended with a call for the legal academy to "represent the highest standards of our profession," and advocated that "[a]s employers, law schools should maintain employment environments that are free of both actionable discrimination and subtle barriers to equal opportunity that operate to create a 'pink ghetto' for women faculty."[2] This recommendation was necessary because an increasing number of American law schools employ a "permanent underprivileged stratum of untouchables."[3] Although they go by a variety of names—such as instructors of legal skills, legal research and writing professors, legal method instructors, visiting assistant professors of lawyering[4]—their existence is relatively new. Twenty years ago, only a few law schools employed full-time LRW instructors.[5] Some schools offered a modicum of instruction via upperclass students who helped first-year students to learn their way around the library and perhaps assigned, reviewed, and critiqued one or two interoffice memoranda. Alternatively, some schools had no formal writing instruction and offered a short introduction to legal bibliography by library staff.

---

1. ARTHUR S. WILKE, THE HIDDEN PROFESSORIATE—CREDENTIALISM, PROFESSIONALISM, AND THE TENURE CRISIS xii (1979) (writing about job insecurity and glut of potential academics caused by overabundance of Ph.D.s in academia generally and in social sciences in particular).

2. ABA COMM'N ON WOMEN IN THE PROFESSION, ELUSIVE EQUALITY: THE EXPERIENCE OF WOMEN IN LEGAL EDUCATION 4 (1996) [hereinafter ELUSIVE EQUALITY].

3. WILKE, *supra* note 1, at xii.

4. For convenience, this Article uses the abbreviation "LRW" to refer collectively to courses in legal writing, research, analysis, method, and so forth, and it uses "LRW teacher," "LRW instructor," "LRW professional," or "LRWs" to refer to those who teach these courses.

5. For a brief overview and critique of the various models of LRW instruction in 1979, see Michael Botein, *Rewriting First-Year Legal Writing Programs*, 30 J. LEGAL EDUC. 184, 188-91 (1979). Professor Botein noted that at least 22 law schools responding to a 1977 survey reported offering no required writing instruction. *Id.* at 193 n.47.

In the early 1980s, LRW instruction mushroomed.[6] Today, pressured by bench,[7] bar,[8] and students,[9] all ABA-accredited law schools offer some sort of writing instruction.[10] Increasingly, the course is delivered not by upper division law students but, rather, by full-time LRW instructors. Typically, these instructors have practiced law for some years after having enjoyed a law school career of some distinction (either having attended a "top" law school or having achieved top grades at a lower-tier law school). These instructors have demonstrated outstanding writing ability. And, in two cases out of three, these instructors are women.

That women predominate may come as a bit of a surprise because, while teaching jobs in the American legal academy, like jobs in the American economy as a whole,[11] are heavily gendered, their gender is not typically female. Data from the ABA Report demonstrate that women held 28% of faculty and administrative positions in law schools but only 16% of the tenured law school jobs.[12] Thus, although women now comprise approximately 44% of

---

6. Terry Carter, *Women Face Hurdles as Professors*, NAT'L L.J. Oct. 24, 1988, at 1.

7. Stanley A. Weigel, *Legal Education and the English Language*, 10 NOVA L.J. 887 (1986) (arguing for writing composition as condition for bar admission or law school graduation); Domenick L. Gabrielli, *The Importance of Research and Legal Writing in the Law School Education*, 46 ALB. L. REV. 1, 4 (1981) ("Without doubt, the development of [strong legal research and writing skills] must be given an important position in the law school curriculum."). Judge Gabrielli expressly lavishes especial praise on the law review experience. However, every school limits law review access; thus, if the judge is correct that law schools must teach research and writing, something beyond law review must be available for this purpose.

8. The "MacCrate Report" of the ABA's Task Force on Law Schools and the Profession outlined dozens of skills that should be taught in law schools, including the key foci of LRW classes: (1) identifying and formulating legal issues; (2) researching the law; (3) identifying facts that frame issues; and (4) effectively communicating the results of the research and analysis in writing. ABA TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, NARROWING THE GAP: LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM 139, 142, 145-51, 161-64 (Robert MacCrate ed., student ed. 1992).

9. Mark Mathewson, *Verbatim: Students Won't Take Legal Writing Courses Seriously Until Professors Start to Teach Legal Writing Courses Seriously*, STUDENT LAW., Dec. 1987, at 10. The author laments that legal writing courses are the "neglected orphans or "stepchildren" of the first-year curriculum and that "legal scholars with the necessary talent and desire [to teach the course well] have been frightened away from teaching legal writing by its reputation as the refuge for, as one legal writing teacher eloquently put it, 'scholars manques [sic], whose inability to think deeply about anything that matters has relegated them to the shallow waters of training students for that supposed least of the practitioner's arts the ability to say clearly what he means.'" *Id.* at 11. Even the students recognized the field was a problem, and as Mathewson concluded: "Indulge your desire to teach legal writing and you could damage your career." *Id.*

10. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 36 n.2 (1994).

11. Natalie J. Sokoloff, *What's Happening to Women's Employment: Issues for Women's Labor Struggles in the 1980-1990s*, *in* HIDDEN ASPECTS OF WOMEN'S WORK 14, 28-31 (Christine Bose et al. eds., 1987).

12. ELUSIVE EQUALITY, *supra* note 2, at 23. A similar situation exists in academia generally. *See* Cynthia F. Epstein, *Constraints on Excellence: Structural and Cultural Barriers to the Recognition and Demonstration of Achievement*, *in* THE OUTER CIRCLE: WOMEN IN THE SCIENTIFIC COMMUNITY 247, 249 (Harriet Zuckerman et al., eds. 1991) (stating that women in

all law students,[13] those women (and their male classmates) are still being taught principally by men.

For the most part, however, men are *not* teaching these students LRW. In fact, the percentages of males and females in legal writing positions and non-legal writing positions are nearly mirror opposites.[14] The most recent survey of legal writing programs conducted for the Legal Writing Institute by Professor Jill Ramsfield of Georgetown shows that, in the 132 schools responding, there are 660 individuals (full-time and adjuncts) teaching LRW,[15] or approximately five instructors per school. As to gender representation, writing programs in 75% of 115 of those schools that responded were staffed by more than 50% females.[16] Forty-one LRW programs (representing 36% of the programs reporting) were staffed with between 51% and 75% females; forty-three of the programs (37% of the programs reporting) were staffed with between 75% and 100% females. Conceivably, over 200 female writing instructors seem to be working in gender-segregated programs.[17]

Moreover, the disproportionately high percentage of women in LRW may have increased over time. Professor Ramsfield's 1992 survey showed only 58% of the 78 schools responding had programs that were more than

---

academia hold proportionately two to three times more non-tenure-line research positions than men).

13. ELUSIVE EQUALITY, *supra* note 2, at 1. *See also* Deborah L. Rhode, *Gender and Professional Roles*, 63 FORD. L. REV. 39, 58-59 (1994) (noting that women are disproportionately missing from all upper echelons of legal profession—full professorships, deanships, partners in large law firms, and federal judgeships).

14. The reasons for the statistically low representation of females in tenure-track ranks (especially at elite law schools) and their statistically high representation in low status non-tenure-track positions are coming under the scrutiny of social scientists. *See, e.g.*, Deborah J. Merritt et al., *Family, Place, and Career: The Gender Paradox in Law School Hiring*, 1993 WIS. L. REV. 395 (study controlling for number of variables shows that white men are disproportionately successful at getting hired into tenure-track positions and at getting hired by elite law schools when compared with non-white males and all women, thus raising implication that discrimination may account for some of the discrepancy); *see also* Barbara F. Reskin & Deborah J. Merritt, Gender, Family Ties, Geographic Mobility, and Career Attainments Among Law School Professionals (unpublished paper presented at Yale Law School Feminist Theory Workshop, Oct. 18, 1996, on file with the author) (exploring similar variables, with focus on women in non-tenure-track positions).

15. Jill J. Ramsfield & Bryan C. Walton, Survey of Legal Research and Writing Programs, question 16 (1994) (unpublished survey on file with author) [hereinafter "1994 Survey"]. For a full exposition on the three surveys conducted by Ramsfield and her associates (1990, 1992, and 1994), including detailed summaries of answers to each large category of question, copies of the survey forms, and charts and graphs, see Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: A Sharper Image*, 2 J. LEG. WRIT. INST. 1 (1996).

16. 1994 Survey, *supra* note 15, at question 60.

17. The 43 law schools indicating that their program contains between 75% and 100% females could all be fully staffed with females. If there are an average of 5 LRW teachers per law school, this would amount to 215 females in female-only positions. Of course, the number is likely higher than this, since there are 178 ABA-accredited law schools, not all of which answered the survey, but all of which have some sort of LRW program.

50% staffed by women.[18] Thus, in the field of legal writing, women *appear* to be gaining academic ground. But what type of ground is being "gained"?

Is this field of legal writing "good ground" in which women can invest their resources of education, intelligence, time, and talents so as to produce a fruitful yield? Conversely, is this a field in which, once women sow their talents, their harvest will be devoured by excessive demands for interpersonal attention, choked by thorns of oppressive workload, or scorched and killed by lack of professional encouragement, low status, and low pay?[19]

This Article suggests that, in far too many instances, women have gained entry into the academy only to languish at the bottom of the academic heap. This is so because the majority of full-time LRW positions do not enjoy full academic status or the professional respect that accompanies it and, functionally, these jobs, like women's jobs generally, suffer from exhausting working conditions, low pay, job insecurity, and low promotional opportunities.[20]

The Article is organized as follows: Part II provides an historical overview of legal education, suggesting that some of the hierarchical components affecting the development of legal education still bear upon the current state of legal writing programs. Part II also provides an historical overview of specific programs. Part III discusses legal writing in today's academy. It first describes the negativity toward legal writing still prevailing on the academy overall, as expressed through structural and functional aspects of legal writing jobs. The discussion shows that, despite institutional negativity, LRW as a field of academic specialization nevertheless offers several sources of intrinsic satisfaction, and argues that, if the academy were to provide a supportive working environment for legal writing specialists, high quality professionals

---

18. Jill J. Ramsfield & Bryan C. Walton, Survey of Legal Research and Writing Programs, quest. 49 (1992) (unpublished survey on file with the author) [hereinafter "1992 Survey"]. *But see* Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 538-39 (1988). Professor Chused noted that in 1988, 63 of 1249 answering his survey offered "contract" (rather than tenure track) legal writing positions, of which 66% were held by females. Therefore, it may be that women have staffed approximately two-thirds of the LRW programs for at least the past eight years. Alternatively, the varying number may result from different schools having answered Chused's 1988 survey and Ramsfield and Walton's 1992 survey.

19. *See Mark* 4:4-8 (parable of the seeds).

20. The analogous field of college composition/rhetoric has suffered from these same difficulties for at least a century. Professor Robert J. Connors of the University of New Hampshire writes: "Rhetoric has changed in a hundred years from an academic desideratum to a grim apprenticeship to be escaped as soon as practicable. Instead of being an esteemed intellectual figure in community and campus, the rhetoric teacher of 1990 is increasingly marginalized, overworked, and ill-paid." Robert J. Connors, *Overwork/Underpay: Labor and Status of Composition Teachers Since 1880*, 9 RHETORIC REV. 108, 108 (1990). As early as 1929, women were teaching thirty-eight percent of the composition classes in colleges, an enormously higher percentage of women than were teaching any other subject. *Id.* at 120. By the 1990s, two-thirds of those teaching composition (like those teaching LRW) were female. Susan Miller, *The Feminization of Composition*, *in* THE POLITICS OF WRITING INSTRUCTION: POSTSECONDARY 39, 41 (Richard Bullock & John Trimbur eds., 1991).

could be interested in making LRW a career. It stresses that major components of a supportive working environment would be status and pay equity with other law teachers.

Part IV challenges the proferred justifications for denying LRW instructors equal status within the academy, suggesting that some of those so-called justifications may be rationalizations designed to uphold the current hierarchy rather than to further the goals of providing the best possible legal education. This Part explores the effects of institutionalized marginalization on those who occupy the majority of full-time LRW teaching positions, discussing some of the special problems for non-tenure-track writing directors.[21] In Part IV, I challenge law schools to restructure these jobs to balance better the schools' needs to provide quality writing instruction with the teachers' needs for professional respect and compensation commensurate with their qualifications and responsibilities.

Finally, in Part V, acknowledging the lack of speed with which law schools are likely to change, the Article sounds a cautionary note, particularly for women. I suggest that, since all women law teachers often experience expanded job demands (especially for unpaid emotional work) and diminished professional respect far more than men regardless of what they teach, women may want to be especially cautious about accepting (or at least about staying very long in) a low-status law teaching job that subjects them to a double dose of bias—both "disciplinary bias"[22] and gender bias—without affording them compensatory opportunities for professional advancement.

---

21. This Article's main focus is LRW programs staffed by full-time instructors with J.D. degrees—the model taking over the academy. This model does not appear to need apologists. It is being adopted as, one by one, schools realize the pedagogical superiority of employing full time LRW teachers. Rather, I expose the personal and professional disempowerment that can face women who stay too long in one of these positions. Other program structures include staffing with adjuncts (typically local practitioners) or with upperclass law students who are, in turn, supervised by a faculty member who may or may not be a writing specialist. Adjunct and student staffing was popular when legal writing programs first developed. One by one, however, schools are abandoning these older models as they seek to staff their writing courses with J.D.s who will devote more time to the students' needs. Within the last two years, for example, even the University of Michigan, one of the nation's top 10 schools in most surveys, has begun to hire full-time LRW instructors, abandoning a prior student-taught model.

22. I am indebted to Professor Theresa Enos for the term "disciplinary bias," which she uses to describe the disdainful attitude of literature professors toward professors of rhetoric and composition. *See generally* THERESA ENOS, GENDER ROLES AND FACULTY LIVES IN RHETORIC AND COMPOSITION (1996).

II. BACKGROUND

A. *Thumbnail History of Legal Education*

In the Holy Roman Empire[23] and in Medieval Europe, law was taught in schools and universities.[24] This was not so in England. England's common law system was taught not in schools but, for the most part, in law offices where aspiring lawyers worked as apprentices. The English colonists brought apprenticeship legal training with them to America.[25]

Under this system, the apprentice paid a practitioner to allow him to "read" the law. He "read" the law until, ready to ply his trade, he left the lawyer's office, fulfilled whatever licensing requirements his jurisdiction imposed, and began his own practice.

Some jurisdictions restricted lawyers to one apprentice at a time.[26] In 1784, a lawyer (and later judge) named Tapping Reeve realized the inefficiency of training apprentices seriatim. In his hometown of Litchfield, Connecticut, he opened a school in which he could efficiently and remuneratively teach several young men at once. His students met with him in the morning, listening to, and copying down his lectures verbatim. They spent their afternoons in Reeve's library, where they read cases he had recommended during his lectures. This was still essentially apprenticeship training, but on a "mass" production, cost-effective scale. Between 1785 and 1823, Judge Reeve (with some help from his friend, Judge Gould), managed to train approximately 1,000 lawyers.[27]

During this same period, other so-called proprietary law schools opened, all operating much like Litchfield. Since the schools were typically run by sole proprietors, the training was only as good as one lawyer-proprietor could make it. Although law schools sprang up, they did not take over the bulk of lawyer training. While it is true that colleges were growing during the late 1700s and early 1800s, only the occasional college had a chair for a law pro-

---

23. "The law was a favourite study of the upper-class Roman citizen . . . ." C.W. PREVITE-ORTON, 1 THE SHORTER CAMBRIDGE MEDIEVAL HISTORY 26 (1979)

24. The University of Bologna began as a law school, around which two universities arose—one for students from Italy (Cismontane University) and the other for students north of the Alps (Transmontane University). ROBERT S. HOYT & STANLEY CHODOROW, EUROPE IN THE MIDDLE AGES 386-87 (3d ed. 1976).

25. Nor has apprenticeship training wholly ended. Eight states, including Alaska (which has no law school), California, Maine, New York, Vermont, Virginia, Washington, and Wyoming, still allow aspiring attorneys to "read law" under a judge or lawyer and sit for the states' bar examinations. Kathleen O. Beitiks, *California Is One of 8 States in the Nation Which Allows Aspiring Lawyers to Study Under Another Attorney*, CAL. BAR J., Dec. 1996, at 1.

26. *See, e.g.*, *Agreement of the Bar of New York City Entered into in October of 1756*, *in* PAUL M. HAMLIN, LEGAL EDUCATION IN COLONIAL NEW YORK 160 (1939) ("[N]o Attorney shall take more than one such clerk at a time, nor a second till the Clerkship of the first is within one year of expiring.").

27. MARIAN C. MCKENNA, TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL 107 (1986).

fessor—sometimes occupied, and sometimes not.[28] For instance, Columbia established a law chair in 1794 that was twice occupied by James Kent.[29] Yale College established a law chair in 1801, to which it appointed Elizur Goodrich;[30] Harvard created a chair in 1816, as did the University of Virginia in 1826.[31] But in no sense did these colleges operate law schools.

Gradually, however, colleges did begin to affiliate with law schools. For example, within the shadow of Yale College in New Haven, a propriety school was opened in 1800 by attorney Seth P. Staples and his professional colleague David Daggett.[32] At the outset, the school was unaffiliated with Yale College. However, in 1824, Yale's catalog listed the fourteen students of the Staples school as Yale students, and the courtship between college and law school began. The initial affiliations were, however, uneasy.

One cause for the uneasiness was that colleges viewed themselves not as places for men to learn trades or crafts but, rather, as places for men to learn to be gentlemen and good citizens. Trades such as law were to be learned in apprenticeships. Thus, college faculty did not view law faculty as their equals. This lack of professional respect was no doubt exacerbated by the fact that the law school "faculty" members were not full-time academics; in general, they were practitioners who took time away from practice to lecture on the law.

True professionalization of legal education did not begin until 1870 at Harvard. By that time, the ideal of the "German university" had taken hold as a model for American higher education.[33] Charles Eliot, Harvard's president, set out to hire personnel who could import this ideal into every branch of learning—not only the traditionally academic subjects, but also the professional subjects like medicine and law. To supervise law training, Eliot hired Christopher Columbus Langdell; and thus began the modern law school. Langdell viewed law as a science, not a craft.[34] He believed that legal train-

---

28. MARTIN L. LEVINE, 5 LEGAL CULTURES: LEGAL EDUCATION xiv (1993). The first college to create a chair in law was William and Mary in 1779. Jacob Blecheisen, *Legal Education—Pre-law and Post-law*, 9 AM. L. SCH. REV. 274, 275 (1939).

29. SAMUEL F. HOWARD & JULIUS GOEBEL, JR., A HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY 11, 18 (1955).

30. Frederick C. Hicks, *Yale Law School: The Founders and the Founders' Collection*, 1 YALE L. LIB. PUBS. 1, 3 (1935).

31. Blecheisen, *supra* note 28, at 275.

32. *See* Hicks, *supra* note 30, at 9-10.

33. It is generally held that the "modern American university" began with the founding of Johns Hopkins and Cornell in the 1870s and Clark, Stanford, and the University of Chicago in the 1880s. John H. Schlegel, *Searching for Archimedes—Legal Education, Legal Scholarship, and Liberal Ideology*, 34 J. LEGAL EDUC. 103, 104 (1984).

34. Christopher C. Langdell, *Harvard Celebration Speeches*, 3 L.R.Q. 123, 124 (1887). Around this same time, an astounding number of fields were discovering that they were "sciences" rather than "mere crafts." *See, e.g.*, Ava Baron, *An "Other" Side of Gender Antagonism at Work: Men, Boys, and the Remasculination of Printers' Work, 1830-1920*, *in* WORK ENGENDERED: TOWARD A NEW HISTORY OF AMERICAN LABOR 47, 66-67 (Ava Baron ed., 1991) (noting development in 1908 of scientific "Course in Printing" that eliminated apprenticeship training. Instead of teaching students how to print, course designed to inculcate "principles" of

ing should come from full-time law teachers, whose connection to actual legal practice could be tenuous or non-existent. In fact, it was under Dean Langdell that Harvard hired its first full-time non-practitioner law professor: James Barr Ames.[35] In Langdell's words,

> [w]hat qualifies a person . . . to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law . . . the experience of the Roman jurisconsult.[36]

Other law schools took somewhat longer to follow Harvard's lead. For example, by 1872 the Staples school had been fully absorbed into Yale University as the Department of Law and the university hired a full-time dean, Francis Wayland, to run the law department. Wayland devoted himself entirely to revitalizing the school, which had fallen onto such hard times during the 1860s that it nearly closed. However, even under Dean Wayland, lectures were given by practitioners, not by full-time teachers. These practitioners performed well. By the end of Wayland's deanship, the school had become quite popular with its students who, in the school's yearbook, the *Shingle*, praised Yale for its excellent faculty[37] and teaching methods.

While the law department may have kept its student consumers happy, it did not particularly impress the other university faculty. During a speech at Yale Law School's Centennial Celebration in 1924, Professor Theodore Salisbury Woolsey reflected upon the school's history. He remarked with pride that by 1895 the school had over 200 students and had grown in "importance, in character, in quality" and the course of instruction had grown from two years to three. However,

> [Yale] College looked askance at [the law school]. Real property is history; evidence is logic; Roman Law is classics; Constitutional Law is politics; yet the College faculty was reluctant to admit that our work had cultural value. Therefore it set its face for a long time against any interchange of students. Our graduate students might get their Philosophy under the elms, but college Seniors might not

---

printing from which students would ultimately be able to reason out how to print.). For a discussion of this movement in medical education, see PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 113-15 (1982).

35. *See* CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL: 1817-1917, 30 (1918) [hereinafter CENTENNIAL HISTORY].

36. Langdell, *supra* note 34, at 124.

37. "The chief reason why the class of Ninety-seven has such a high opinion of the Yale Law School is because of the great reputation and ability of its Faculty;" "[s]ome of us chose the Yale Law School because it was near home, but most of us chose it because we thought it the best;" "[I chose Yale] on account of its method of instruction;" "[o]n account of the system of study used and because the course offered more advantages and practical work than the course of any other school." 1897 YALE SHINGLE 68-73 (N. Candee ed.); *see also* 1900 YALE SHINGLE 53 (Walter L. Bevins ed.) ("Among the questions in regard to matters educational, voted on by the members of the Senior class, was 'What is the strongest point of the Law School?' Twelve of us are united in the belief that of all the good features of the school, the best is the faculty and corps of instructors.").

> get the rudiment of law with us and thereby save a year. Our sweet reasonableness finally won the day, but I think the College faculty never recommended us or approved of us until recent times.... We were . . . pariahs in the eyes of the academic professor.[38]

As of 1895, unlike at Harvard, Yale had not yet established itself as a "scientific" law school. Its instructional method still relied upon textbooks rather than texts of cases and thus would have been deemed unscientific. There still hung about the school the vaguely unseemly ghosts of past practitioners who took apprentices into their offices. Like other law schools, Yale was still struggling to rid itself of the trade school stigma.

Eventually, it succeeded. Yale, like Harvard before it, finally adopted the case method of instruction, professionalized its faculty, began requiring more pre-law education, and ultimately, after 1912, required an undergraduate degree for admission to the law school.[39] Yale instituted a graduate program and hired onto the faculty many of its own graduates—men with their Bachelor or Master of Laws degrees.[40] Once the faculty had established its academic credibility, maintaining that credibility became critical. Thus, the law school had to emulate the "look and feel" of an intellectual academic university graduate department rather than a trade school.

This created a dilemma for the law schools (and, for that matter, for other graduate schools training men for professional life, such as engineering or medical schools). The dilemma was that the men coming to the school were primarily interested in training not to teach law, but to practice. This distinguished the mission of the law school from the mission of most graduate departments, which existed to train Ph.D.s who would then become academics themselves. The dilemma was expressed by students and by the lawyers who would eventually employ them. Both groups wanted law schools to provide *some* practical information if not hands-on legal practice experience. Listed in the 1893 *Yale Shingle* as among the students' choices for the "most needed improvement" of the law school was "more attention to the practical requirements of the law office."[41]

Distinguished late-nineteenth century jurist and Yale Professor Simeon E. Baldwin, who was instrumental in creating the American Bar Association, asserted that law was not only a science but also an art; not only a philosophy, but also a trade; and that graduates needed to be prepared to practice law when they left law school.[42] Langdell's case method of instruction struck Baldwin as an inefficient use of a beginning student's time and energy. By

---

38. Theodore S. Woolsey, *Historical Discourse*, *in* YALE CENTENNIAL CELEBRATION PROGRAM (1924).

39. Frederick C. Hicks, *Yale Law School: 1895-1915; Twenty Years of Hendrie Hall*, 7 YALE L. LIB. PUBS. 1, 41-45 (1938).

40. *Id.* at 46.

41. 1893 YALE SHINGLE 76 (John Q. Tilson ed.). The "most pressing need," however, was for a new building. *Id.* at 75.

42. Simeon E Baldwin, *The Study of Elementary Law, the Proper Beginning of a Legal Education*, 13 YALE L.J. 1, 2 (1903).

1933, when Yale had fully adopted the case method of instruction and was an elite school of jurisprudence, Professor Jerome Frank was asking why law schools could not be the site of clinical legal education the way medical schools were the site of clinical medical training.[43] An article published in the *Columbia Law Review* in 1943 called for law schools to supplement pure study of cases with a problem method of instruction—giving students a chance to apply the law they were learning to the types of problems practitioners must resolve.[44]

One aspect of the struggle over the mission of law schools concerned the question of who deserved to receive a legal education.[45] Law schools (and medical schools) realized that, as they affiliated with universities, they could never hope to be deemed academic elites unless the education they offered was graduate education. To be graduate schools, of course, law schools had to require undergraduate college training.[46] This mandate helped the university law schools maintain their elite stature, because requiring more education had the desired effect of keeping "the poor in general and the immigrant poor in particular out of the legal profession."[47] Columbia trustee George T. Strong forthrightly explained the need for Columbia's entering class to be "at least eighteen years old and have received a good academic education," in order to "keep out the little scrubs . . . whom the School now promotes from the grocery-counters . . . to be 'gentlemen of the Bar.'"[48] As Columbia's doors closed to all but the wealthy and well-connected, some of its professors left to form a more democratic and accessible institution—New York Law School.[49] Similarly, as Harvard grew more expensive and less accessible, Gleason Archer began training lawyers in his parlor, thus starting what was

---

43. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 917-20 (1933).

44. David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449, 449 (1943). Mr. Cavers was well aware that his proposal ran afoul of the academic trend in law schools, and he anticipated that his proposal would be met with the criticism of "trade school stuff." *Id.* at 449 n.1. He rejoined, however, that "[t]his epithet is a very effective substitute for thought. Despite efforts, I haven't been able to think of a counter-epithet with half its stupefacient effect." *Id.*

45. Again, this elitism ran through other disciplines as well as professions and trades. *Compare* STARR, *supra* note 34, at 124 (1910 Carnegie Foundation report on medical education "denied . . . that the 'poor boy' had any right to enter medicine 'unless it is best for society that he should'") *with* Baron, *supra* note 34, at 62 (printers union opposed having "lower-class boys" assigned to printing training schools because they were "not fit" for it).

46. *See, e.g.*, JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 38 (1978) (noting that to transform Harvard Law into graduate school, Langdell made admissions contingent on college degree and entrance exam).

47. Alfred F. Konefsky & John H. Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833, 844 (1982).

48. HOWARD & GOEBEL, *supra* note 29, at 76 (quoting diary of George T. Strong, Dec. 1, 1874). This apparently referred to immigrants in general, and to Jews in particular.

49. James A. Wooten, *Law School Rights: The Establishment of New York Law School, 1891-1897*, 36 N.Y.L. SCH. L. REV. 337, 348-49, 350-51 (1991).

soon to be known as Suffolk Law School, whose students were not wealthy, not socially elite,[50] and not able to attend school full-time.[51]

The debate about how to structure legal education has persisted[52] and may even have strengthened.[53] While the elite law schools have maintained their dominance as purveyors of legal education, producing by far the majority of the nation's law professors, local law schools have arisen catering to a different segment of the country's aspiring lawyers. Some of these schools focus more on rules than on theory; some devote a considerable amount of energy to practical training, offering clinical experiences, either within the school or in so-called externship placements in law firms, government offices, or courts.[54]

Despite the ongoing debate, however, law schools have not adopted the medical school model of training.[55] First, a strictly clinical model is likely to make a law school too closely resemble a trade school—and the legal academics have not yet moved far enough away from their trade school history (when they were marginalized by faculty in other departments of their own universities) to relish once more being viewed as master legal craftsmen training apprentices.[56] Even non-elite schools typically hire as many faculty

---

50. Michael Rustad & Thomas Koenig, *The Impact of History on Contemporary Prestige Images of Boston's Law Schools*, 24 SUFFOLK U. L. REV. 621, 628-31 (1990) ("Irish to a man, they were no strangers to the fight against exclusiveness and privilege.").

51. *Id.* at 628-29. Within 20 years of its founding, Suffolk had become the world's largest evening law school. *Id.* at 633.

52. By 1924, a former Dean of Columbia lamented about the two-tiered system of legal education:

> One type is represented by a relatively small group of university law schools having high entrance requirements and exacting educational standards; the remaining 120 or more schools constitute a distinct class with low admission requirements, low educational standards and on the whole low professional ideals. Most of them give their courses at night or on a part time basis, their students' principal time and energies being devoted to activities other than the study or practice of law.

Harlan F. Stone, *The Future of Legal Education*, 10 A.B.A. J. 233, 233 (1924).

53. For an interesting discussion of the debate, see Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421 (1995).

54. *See id.* Professor Lilly suggests there are at least three distinct approaches to legal training: (1) clinical; (2) doctrinal; and (3) theoretical. *Id.* at 1429-31. The theoretical approach is the rarest, found at the most elite law schools. *Id.* at 1434. Doctrinal teachers tend to feel superior to clinicians; theorists feel superior to all. *Id.* at 1437. Professor Lilly believes the elite theoretical schools will ultimately sever their ties to the practicing bar entirely. *Id.* at 1458-64.

55. *See, e.g.*, John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157 (1993). Modern medical schools rely heavily on clinical education. Aspiring doctors work in hospitals with medical practitioners treating patients with real illnesses. *Id.* at 159 (describing medical "rounds" as clinical training that incorporates "intensive mentoring and the fusion of teaching and patient care" and contributes to students' "emerging sense of professional identity and of professional values"). Yet doctors, like lawyers, originally trained as apprentices, and not in professional schools. For an engaging look at the evolution of medical education, see STARR, *supra* note 34, at 37-47.

56. For a discussion of legal education's resistance to clinical legal education, see Ralph S. Tyler & Robert S. Catz, *The Contradictions of Clinical Legal Education*, 29 CLEV. ST. L. REV. 693, 697-98 (1980), in which the authors note that most law schools are "anxious to preserve

members from elite schools as they can attract—teachers who may have a hard time abandoning the hope that their school could some day rise in the law school rankings.[57] Such ascension into the elite hierarchy will assuredly be blocked if the law school merely teaches lawyering. Second, as a practical matter, law schools cannot afford to run like medical schools for the simple reason that, when law students handle real client cases, they must be closely supervised by faculty members. Only a few students at a time can be closely supervised, yet legal education's design favors not close supervision, but large classes.

Indeed, one of the case method's main attractions was that it enabled professors to teach many students at once. In 1927, the President of the Association of American Law Schools ("AALS") described AALS's "progress" in raising law school standards by focusing on an AALS constitutional provision requiring "at least three instructors [per school] who devote substantially all their time to the work of the school; and in no case shall the number of such full-time instructors be fewer than one for each one hundred students."[58] More students per faculty member translates into more tuition revenues available for faculty salaries. Any movement in the legal academy toward small student-teacher ratios, such as those needed for the delivery of skills training, meets with immediate resistance. Professor Roy Moreland at the University of Kentucky has succinctly identified the problem:

> Law school education has been mass education; in the smaller schools, classes have contained from twenty to fifty students, in the larger institutions from seventy-five to two hundred or so. The cost of this type of training, per capita, is not high. But when classes are broken down into small groups that are necessary for intensive library work and legal writing—and re-writing—the costs of instruction mount tremendously.[59]

---

their hard earned academic legitimacy," *id.* at 698, and that simulated clinical experiences, rather than live-client clinics, may help the schools control the pedagogical soundness of clinical legal education. *Id.* at 709.

57. Lilly, *supra* note 53, at 1453. Professor Lilly notes that the percentage of faculty from the top five to seven "feeder" schools is increasing. *Id.* Adjusted for the size of its graduating classes, Yale supplies the largest percentage of this country's law professors. *Id.* at 1457 (citation omitted).

58. Ralph W. Aigler, *Legal Education and the Association of American Law Schools*, 5 TEX. L. REV. 111, 113 (1927).

59. Roy Moreland, *Legal Writing and Research in the Smaller Law Schools*, 7 J. LEGAL EDUC. 49, 51 (1954). Professor Moreland goes on to point out a second problem with offering professional writing instruction:

> [T]he unwillingness of law teachers to do the "paper work" so vital to most types of legal education which depart from the case system. Law teachers have resisted strenuously any tendency to move them into the well-known position of Freshman English instructors, who are forced by circumstances to become drudges to "paper work." Indeed, law teachers have resisted so strongly the grading and correcting of papers that they have continued to give but a single examination at the end of courses, *when they well know, that there are numerous objections to, and few arguments for, such a procedure!*

Id. (emphasis added).

Unfortunately for those who have relied on providing legal education relatively cheaply, the type of instruction needed for quality legal writing courses requires a lower faculty-student ratio because of the processes involved. Training in legal writing does not conform well with "mass education." Thus, as law schools came to perceive that their students were deficient in the threshold writing skills necessary for effective participation in legal education, they began to struggle with how to resolve the tension between the need to teach writing without sacrificing the mass education paradigm to which they had become accustomed. The next section briefly outlines this struggle.

B. The Legal Writing Problem in Historical Perspective[60]

Even a century ago, the need for legal writing instruction was being mentioned in scholarly literature. In 1905, an article appeared in *The American Law School Review* expounding on the benefits of including brief-making as a regular part of the law school curriculum—at least if a law school's function was to prepare students to practice law.[61] Although the author was a lecturer in legal bibliography at the University of Minnesota Law School, and thus not unbiased in his opinion of the value of legal research and writing, his article quoted several federal circuit and state supreme court judges, each of whom lamented lawyers' deficiencies in brief writing and expressed their desire for law schools to teach students to write. Three decades later, noted scholar William Prosser decried law students' lack of writing ability but despaired of the law schools' ability to remedy the problem.[62] After quoting a variety of errors in grammar, spelling, and analysis that had disturbed him as he graded examinations, Dean Prosser lamented:

> [T]here is very little that the law schools themselves can do. I am still quite certain that for the protection of the public these poor unfortunates should never be allowed to graduate from any law

60. Perhaps it would be more accurate to say "modern" historical perspective. The key components of a legal writing course are training and practice in logical analysis and persuasive argumentation (and, of course, grammar if needed). These subjects—the classical *trivium* of grammar, rhetoric, and dialectic—were the cornerstones of education in Greece, Rome, and Western Europe for hundreds of years. *See* Gordon Less, *The Trivium and the Three Philosophies, in* 1 A HISTORY OF THE UNIVERSITY IN EUROPE: UNIVERSITIES IN THE MIDDLE AGES 310-15 (Hilde De Ridder-Symoens ed., 1992). Less argues that "[b]y the sixth century . . . rhetoric was the dominant subject in the arts, studied as a preparation for a career in law and public life . . . . [G]rammar was regarded as 'the' preliminary study [giving] knowledge of the forms of language on which other arts of expression depended." *Id.* at 312. *See also* Jean D. Moss, *Dialectics, in* ENCYCLOPEDIA OF RHETORIC AND COMPOSITION: COMMUNICATION FROM ANCIENT TIMES TO THE INFORMATION AGE 183-90 (Theresa Enos ed., 1996); James F. Stratman, *Legal Rhetoric, in* ENCYCLOPEDIA OF RHETORIC AND COMPOSITION: COMMUNICATION FROM ANCIENT TIMES TO THE INFORMATION AGE 383-85 (Theresa Enos ed., 1996).

61. Alfred F. Mason, *Brief-Making in Law Schools*, 1 AM. L. SCH. REV. 294 (1905). Since Mr. Mason was a lecturer on legal bibliography, it comes as no surprise that he would favor "systematic instruction as to where and how [students can] find what they need [in law books]." *Id.* at 295.

62. William L. Prosser, *English as She Is Wrote*, 7 J. LEGAL EDUC. 155, 162 (1954) (republication of Prosser's essay originally appearing in 28 ENG. J. 38 (1939)).

school; and that the professional gates should continue to be guarded well.[63]

In a 1945 University of Chicago symposium on legal education, and echoing somewhat Dean Prosser's dismay about students' writing competence but not his pessimism about law schools' abilities to intervene, Professor Max Rheinstein, wrote that:

> Training in the use of English is, primarily, the task of elementary, secondary and college education. Law schools *should* be able to assume that these agencies have fulfilled their task. Unfortunately, time and over again we have to make the sad experience that that assumption is unjustified. Time and over again we encounter students who are inarticulate in spoken language and unable to express themselves properly in writing. *Much as we may dislike it, we have to continue—or should we say, to begin—the future lawyer's education in the proper use of good English. There is only one way to achieve this end; to assign term papers in considerable number—and to grade, correct and discuss them, too, not only for content, but also for style. That task is formidable,* so formidable, indeed, that we, at the University of Chicago, have found it necessary to hire special tutors to guide the first year students in the art of writing.[64]

After 1948, the need for some type of training in legal writing having become more or less established, articles began to appear regularly in the *Journal of Legal Education* concerning ways to deliver it. For instance, during the 1950s, Northwestern University experimented with a research and writing program using three teaching fellows to teach approximately 180 students legal writing during the first year.[65] The article describing this program outlined problems that have become common themes for legal writing programs—a teacher workload pulling against the kind of intense instruction that writing courses require and a short-term teacher contract that resulted in students always being confronted with inexperienced teachers who are able only to criticize but not to assist very much in helping students improve. Northwestern found a 60:1 student-faculty ratio precluded both adequate interpersonal contact with students and a sufficiently rapid turnaround time on graded papers.[66] In addition, because the fellows were employed for only one-year terms, they "lacked consistent grading and evaluation skills."[67] They could identify mediocre writing but often lacked the ability to commu-

---

63. *Id.* at 162.

64. Max Rheinstein, *Education for Legal Craftsmanship*, 30 IOWA L. REV. 400, 421 (1945) (emphasis added). Three years later, in the first volume of the *Journal of Legal Education*, Chicago's special writing program, the Bigelow Fellows Program, was described in detail. *See* Harry Kelven, Jr., *Law School Training in Research and Exposition: The University of Chicago Program*, 1 J. LEGAL EDUC. 107 (1948).

65. Jerome J. Shestack, *Legal Research and Writing: The Northwestern University Program*, 3 J. LEGAL EDUC. 126, 127 (1950).

66. In support of the proposition that students need individualized contact for effective writing instruction, see Stewart Macaulay & Henry G. Manne, *A Low-Cost Legal Writing Program—The Wisconsin Experience*, 11 J. LEGAL EDUC. 387. 387 (1959).

67. *Id.*

nicate to students what specific steps to take to improve the work.[68] A follow-up article on the Northwestern program profiled other themes for legal writing programs: Inexperienced teachers had trouble designing effective assignments and sequencing workload.[69] Yet, despite these problems, the program was better than nothing and, since it gave students a small-group experience, it had "orientation value."[70]

Not all schools were able or willing to devote the type of resources to legal writing required to hire teaching fellows. Thus, they looked for alternative program models. For instance, Drake Law School, unable to afford teaching fellows, instituted a program taught by its regular faculty members.[71] Themes emerging from Drake's experience included concerns that the work of teaching writing should not impose "too great a burden" on the faculty, as well as concerns about "student resistance" to the required writing course.[72]

Rutgers Law School, concluding that "the post-war law student often lacks the ability to express himself in writing either accurately or adequately[,]"[73] instituted a legal practice course sequence that used a hybrid staffing model. Full-time staff members taught legal bibliography, elemental jurisprudence, and constitutional law, while "young practicing lawyers with law review training" (who were apparently adjuncts) were added to the faculty to supervise research problems. A new theme emerging from Rutgers' experience was the need for a centrally-coordinated program so that even though multiple sections of the course were being taught by multiple instructors, the course retained a curricular and methodological consistency across sections.[74] Old themes, previously mentioned as arising in connection with other programs, included the stress caused to both students and faculty by a workload that slowed down the turnaround time of assignments and the

---

68. *Id.*

69. William R. Roalfe & William P. Higman, *Legal Writing and Research at Northwestern University*, 9 J. LEGAL EDUC. 81, 90 (1956). Professor Roalfe was the law school's librarian; Mr. Higman was a teaching associate during 1955-1956.

70. *Id.* As will be discussed more fully, *infra* Part IV.B, legal writing teachers continue to serve as student "orientation specialists," and can be required to spend a considerable amount of energy helping students with a variety of issues unrelated to legal writing.

71. Daniel R. Mandelker, *Legal Writing—The Drake Program*, 3 J. LEGAL EDUC. 583 (1951). Drake offered a two-credit course to second-year students (its first-year students having already been exposed to legal bibliography and appellate arguments). The writing course focused on case synthesis and objective analytical exposition. Faculty came to realize that teaching writing was a challenge: writing skills were hard to teach; achievement hard to measure; objectives hard to set. *Id.* at 583-84. Today, Drake no longer uses regular faculty to teach writing. Like most law schools, it employs full-time, non-tenure-track LRW instructors. E-Mail message to the author from Drake Legal Writing Program Director, Dec. 10, 1996.

72. So high was student resistance that Mr. Mandeleker recommended having legal practitioners come to class to inform the students to "shock students into a better attitude." Mandelker, *supra* note 71, at 583-84.

73. Donald Kepner, *The Rutgers Legal Method Program*, 5 J. LEGAL EDUC. 99, 99 (1952).

74. *Id.* at 102.

weakness of evaluative ability in inexperienced teachers.[75] Other law schools attempting to structure ambitious legal writing programs as early as the 1950s included the University of Southern California,[76] University of Montana,[77] and Stetson Law School.[78]

Other schools, realizing the widespread need for writing instruction but unable or unwilling to allocate faculty resources, economized by using upper class students to teach the first-years.[79] For instance, the University of Wis-

---

75. *Id.* at 103.

76. *See* Harold Horowitz, *Legal Research and Writing at the University of Southern California—A Three Year Program*, 4 J. LEGAL EDUC. 95 (1952). To keep the program suitably limited, it was restricted to five units of credit, spread across three years. Great concern was expressed that the projects not take up too much faculty work time. Therefore, upperclass students were used to give oral feedback to first-year students on their large memorandum projects. No instruction was given in brief writing, since it was felt that the student-run moot court program could handle that aspect of the students' education. Finally, the "third year" legal writing course was "not a 'course' in the strict sense, since no organized class activity is contemplated." *Id.* at 99. Indeed, the third-year writing course apparently was simply independently supervised scholarly writing. No doubt some faculty supervised more closely than others, though the article offered no description of anyone's version of supervision. But the school did congratulate itself on the fact that "[t]his integrated program of research and writing at Southern California does not give undue importance to the place of such material in the curriculum." *Id.* Evidently, the course *was* "kept in its place." Until, that is, it lost its place entirely. In 1980, Mary Ellen Gale, by then the writing program director at the University of Southern California, evaluated the state of legal writing programs and noted that even programs that begin with enthusiasm can "disappear, unceremoniously abandoned by the faculty." Mary E. Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 318, n.68 (1980). Concerning the writing program that existed before her directorship, Gale wrote:

> When Professor Harold Horowitz described the University of Southern California's three-year legal writing program in 1951, he wrote as though it all (first year—learning legal bibliography and writing legal memos; second year—drafting contracts or leases, or writing briefs; third year—researching and writing individual projects equivalent to law review notes, each under close faculty supervision) were here to stay. It wasn't. . . . By 1976 all that was left was a first-year course, taught by a former assistant law librarian, and dispiritedly entitled Basic Research Techniques.

Id.

77. Mortimer Schwartz, *Legal Method at Montana*, 6 J. LEGAL EDUC. 102 (1953). Montana's program sought to use legal method to introduce students to library work, writing, and ethics, as well as orient them to law. Named "Orientation, Ethics and Bibliography," the course ran for two hours per week for two semesters and was actually "three separate courses." One facet of the course that came as a pleasant surprise to its instructors was the students' tendency to use the instructors as "mother confessors" for counsel and guidance on their law school careers, even though formal counseling was available elsewhere in the school. *Id.* at 102-03. This experience is typical for LRW teachers. See *infra* notes 187-205 and accompanying text for a discussion of the counseling role allocated to writing teachers.

78. Louis C. James, *Legal Writing at Stetson*, 7 J. LEGAL EDUC. 413 (1955). Another approach to legal writing was implemented at Stetson Law School—Stetson's approach was to offer the upper division writing elective, a three unit course limited to 10 students per term. Even with only 10 students, the class format was largely lecture rather than tutorial, as individual tutoring was deemed to place "too great a burden on the faculty." *Id.* at 104-07.

79. For examples of such programs, including discussion of the need for writing instruction as well as the need to keep costs to a minimum, see Stewart Macaulay & Henry G. Manne, *A*

consin set up a student-taught program in 1959.[80] Wisconsin viewed student instructors as less expensive than teaching fellows and far more malleable to the direction of a faculty program director. With students, the student/teacher ratio could be kept very low (seven to ten students per student teacher), enabling writing students to get the needed individualized attention that other schools had noted was needed for effective writing instruction.[81]

In 1985, Allan Boyer surveyed the state of legal writing programs country-wide.[82] Boyer's results indicated that the same problems and concerns plaguing legal writing programs in the 1940s and 1950s had not yet been solved.[83] Writing courses still required "steady work over the semester by both teachers and students," "close correction of papers" and "one-to-one oral teacher-student involvement," demanded "an extremely difficult type of teaching," and triggered academic disgruntlement and frustration. At the same time, the importance of legal writing continued to be recognized, especially by practitioners, who were, after all, the consumers of the product of law schools.[84] The course would not "go away;" it had to be taught.

In 1985, Professor Boyer had identified three principal models for staffing legal writing programs:

> 1) Use of regular faculty members who teach the class either separately or in conjunction with a first-year substantive course;
> 2) Use of graduate students or associates in law who are hired for a short period of time and devote their exclusive energies to teaching the course; and
> 3) Use of second or third year students to teach writing, often with librarians assisting in the delivery of information on legal bibliography.[85]

Low-Cost Legal Writing Program—The Wisconsin Experience, 11 J. LEGAL EDUC. 387 (1959); Moreland, *supra* note 59, at 51.

80. Macaulay & Manne, *supra* note 79. By the time Wisconsin began to realize it needed a writing program, journal articles had described programs running the following schools: Columbia, Drake, Harvard, NYU, Northwestern, Rutgers, Stanford, Stetson, University of California, Berkeley, Chicago, Illinois, Indiana, Kentucky, Michigan, Pennsylvania, Southern California, Western Reserve, and Yale. *See id.* at 387-88, and sources cited therein. The authors did not necessarily believe that student-taught programs were pedagogically ideal. Better pedagogy would have included all faculty members devoting a major portion of their time to teaching writing, research, and analytical skills to each student individually. However, as the authors pointed out, "this would be a more time-consuming program than most faculties would tolerate." *Id.* at 388. Graduate teaching assistants were thus seen as a good cheap alternative, given the faculty's unwillingness to undertake the work.

81. At Wisconsin, the student writing instructor met with his or her group of students in a seminar format. With only seven to ten students, the interaction level would have been high. As needed, writing instructors also met with students in individual sessions, although these were not mandatary and, since they were time consuming, apparently were not especially encouraged. *Id.* at 396-98.

82. Allen Boyer, *Legal Writing Programs Reviewed: Merits, Flaws, Costs, and Essentials*, 62 CHI.-KENT L. REV. 23 (1985).

83. *See id.*

84. *Id.* at 23.

85. *Id.* at 24.

Almost as an afterthought, Professor Boyer also mentioned a model that used adjunct teachers, and included it as a variation upon model number two. In fact, however, the adjunct model has its own advantages and drawbacks.[86] Some schools consider use of adjunct teachers an improvement from the use of students; others do not. Moreover, while eleven years ago the "graduate student model" and "associates in law model" may have been two names for the same model, today they are distinct models. This is so because, in graduate teacher models, the instructors typically teach for only one or two years while pursuing a graduate law degree. Then they must leave the institution to make room for the new teaching fellows. Associates in law, however, have typically been temporary full-time legal research and writing instructors who are neither on the road to tenure nor on the road to a graduate degree. As will be discussed more thoroughly below, this model of full-time, non-tenure-track writing instructors has become the dominant model in the legal academy. And while originally these associates stayed at institutions for a limited period of time (typically a year or two), they now generally can stay longer. In some schools they may have a limited number of possible contract renewals—for instance, they start on a one-year contract that can be renewed no more than four times; in other schools, however, they can stay indefinitely in a non-tenure-track position.

Professor Boyer argued that "having full-time, tenure-track faculty teach legal writing is an ideal, and a real option for schools which choose to make a substantial commitment."[87] Since he perceived that few schools were willing to make such a commitment, however, he indicated that the next best option was any model using full-time instructors, either graduate students or associates in law. He skillfully set forth the case for the superiority of this professional staffing method over the lowest-cost method of staffing with students. Professor Boyer was correct: A full-time instructor model is superior from the law students' perspective to a model using adjuncts or students, since the problems with adjuncts or students are legion.

For example, using student teachers will typically mean that the course cannot be graded, because first-year students deeply resent being given grades by other students, especially when grades weigh so heavily for job prospects in non-elite law schools in a tight job market. Any time that students perceive they are not being treated equitably with other first-year students, tensions and bitterness arise. Perceived inequities in the competence, commitment, or fairness levels of student teachers can raise anxiety to a fever pitch.

Another problem with student staffing can be lack of qualified personnel. Student teachers, having many competing demands on their time, need to teach many fewer students than can be assigned to a full-time professor.

---

86. As noted above, adjuncts might, in some situations, be cheaper than students. See *supra* notes 79-81 and accompanying text for a brief description of difficulties with student-taught and adjunct-taught programs.

87. Boyer, *supra* note 82, at 49.

One student typically teaches only eight to ten first-year students. Thus, most schools will need to hire numerous student teachers to cover their first-year class—in most schools probably twenty to twenty-five. At some law schools, there are unlikely to be that many upperclass students who have both the technical writing competence, the teaching competence, the personality, the time, and the commitment to teach first-year students. Some students will have jobs; some will prefer to devote their time and energies to their school's law review or entering moot court competitions.

Even assuming that enough students show interest and promise, student teachers need to be carefully trained how to teach in the classroom, how to evaluate papers, how to give written and oral feedback and perhaps even how to design assignments. Someone must provide this training and must do it effectively. If the training responsibilities are given to a non-LRW faculty member, that faculty member may resent the time involved since to do the job well requires time taken away from scholarship. Moreover, a non-LRW specialist is more likely to leave the students on their own as much as possible, since the faculty member him/herself may not be especially skilled at pedagogy or possess the appropriate practical skills.

A LRW specialist can be hired to do the training and supervision, of course. And, if she is, this person should be as entitled to tenure track faculty status as the full-time LRW professor who is personally teaching the first-year class. She will be teaching the student teachers in some sort of teaching seminar. At some point, however, this training is likely to become burdensome, since there is no bonus for training—every single year new teaching assistants ("TAs") must be taught all over again.

If the programs are staffed with adjunct professors, different concerns arise, although certainly adjunct-staffed programs have some advantages. Like student-staffed programs, they are inexpensive because adjunct pay at law schools is notoriously low.[88] And unlike student-staffed programs, those taught by adjuncts can take advantage of teacher experience, since the capable adjunct may be willing to teach more than once. This benefits students, who are not constantly being taught by teachers in their first and only teaching year, and it benefits the faculty program director who can reduce the amount of time and energy spent on teacher training. If adjuncts are unwilling to return (or if they are not sufficiently successful for the school to want them to return), then more institutional resources must be allocated for hiring, training, and supervision. These resources can be considerable in the best adjunct-staffed programs (as in student-staffed programs), a director sets up the basic course structure, selects books, designs a syllabus, trains the adjuncts, keeps in close touch with them, and makes sure that, at least for the most part, all the students are getting equal treatment.

88. In fact, Wisconsin has abandoned the use of student instructors in favor of adjuncts because, with Wisconsin graduate students now unionized, they command a higher wage than do adjuncts. *See* Internet Message from Aviva M. Kaiser, Clinical Assistant Professor of Legal Writing, University of Wisconsin School of Law, posted on Internet mailing list, dircon95, Dec. 6, 1996.

Some directors have found that working with student TAs, for all its difficulty, is preferable to working with adjuncts. Adjuncts cannot be as closely supervised as students. They are busy; they are off campus; and some resent the director's control. Students are frustrated at adjuncts' inaccessibility. This is a particular problem if the LRW instructor is supposed to be filling the student-counselor role mentioned above.

As with student-taught programs, staffing can also be a problem. Unless the school is located in a major metropolitan area, there may simply not be enough qualified practitioners to serve as adjuncts. And the student-consumers may still feel that they are getting shortchanged with writing teachers who are not full-time faculty members. The message continues to be clear: The writing program is not as important as other classes.

In light of these problems, schools have been abandoning *both* student-staffed and adjunct-staffed models, having concluded that staffing with full-time professionals is best. They have not, however, concluded that those full-time writing professionals should have full academic status. Because of this, even though I believe the full-time instructor model *is* "best" for the students, I am not convinced that it is "best" for the instructors, *except* when the full-time legal writing instructor shares the same opportunities as other full-time faculty for promotions in academic rank, security, and income. These opportunities are the exception rather than the rule. LRW instructors are rarely on equal academic footing with other law teachers. As a result, they can become isolated in the academy, where they become "tokens" and risk the lowered self-esteem and diminished career opportunities common among marginalized workers.

III. LEGAL WRITING TODAY

One might imagine that, having for more than fifty years experienced the critical need to provide quality instruction in legal writing, the academy would take this need for granted, viewing legal writing as part of today's core curriculum and treating the specialists in this field as full equals in the educational endeavor. One would be wrong. Rather, law schools continue to exhibit at best, ambivalence, and at worst, outright hostility toward the need to teach writing. The ambivalence takes a variety of forms. For instance, some traditional-minded law teachers still believe that law schools should not HAVE to have writing programs. The college graduates in a first-year law class should already possess basic literacy skills.[89] Students lacking them should get privately tutored, perhaps by an English teacher.[90] In arguing

89. They used to be required to have them. In 1894, students applying to Columbia law school were required to pass an examination proving their competency in "English Grammar, Rhetoric, and the principles of composition." HOWARD & GOEBEL, *supra* note 29, at 77. Students also had to pass examinations in Greek and Roman history, history of England and the United States, Caesar's *Gallic War*, six books of Virgil's *Aeneid*, and six orations of Cicero. Enrollment declined! *Id.*

90. Willard Pedrick, *Should Permanent Faculty Teach First-Year Legal Writing? A Debate—No*, 32 J. LEGAL EDUC. 413, 414 (1982).

against using "regular" faculty to teach legal research and writing, Professor William Pedrick flatly denied the existence of any specialized need for law school training in written discourse. In a stunning but hardly unique display of elitism, he states:

> Writing is writing. The ability to write an organized, persuasive argument is in no way peculiar or special to the legal profession. It follows that law teachers are no better and indeed perhaps less equipped to teach writing skills than would be those persons in the university who approach that task as their specialty and approach it with some enthusiasm.

Others may wonder, along with Professor Pedrick, whether it is wise to hire relatively high-salaried legal specialists to teach basic writing skills when not all composition teachers are trained very well to teach writing either. Those in the university who regularly teach writing may be specifically trained for that task and are commonly rewarded at a much lower level of compensation than are law teachers.[91]

United States District Judge Stanley Weigel addressed the first notion—that law schools should not have to teach their students how to write.[92] He pointed out that, even if law students *should* already have mastered good writing in college, many of them have not. Without formal training, they *will* not.[93] Therefore, law schools must assume the burden of making sure that by the time students graduate, they can write clear, unambiguous, grammatically correct English.[94]

Educational traditionalists might still assume that the law firms can teach law school graduates their required practical skills. This assumption is outdated. In 1918, the unnamed author of a Centennial History of Harvard Law School brushed off practitioners' criticisms that graduates did not have certain practical knowledge by pointing out that "these defects are easily remedied by a few days' experience."[95] Perhaps graduates of elite schools like Harvard could (or still can) graduate without practical skills and find good jobs in well-heeled firms willing to spend substantial amounts of money

---

91. *Id. Accord* Michael Botein, *Rewriting First-Year Legal Writing Programs*, 30 J. LEGAL EDUC. 184, 187 (1979). Botein suggested that basic English composition "is a waste of limited resources" and recommended that graduate students or high school teachers should be used for remedial purposes if student lacked fundamental skills that ought to be possessed by college graduates. He later admitted, however, to the problems involved with using non-lawyers, including the perception that "too many graduate English students . . . sacrifice writing for flair," so that qualified English professionals might be hard to come by, and the anticipated disgruntlement of law students toward being taught by non-lawyers. Botein concluded by recommending some type of program totally handled by law students since this would be cheap and, most importantly, it would "lift all menial chores from the faculty." *Id.* at 195.

92. Stanley A. Weigel, *Legal Education and the English Language*, 10 NOVA L.J. 887 (1986).

93. In fact, funds for writing instruction at the university level continue to dry up despite the need for such instruction even for graduate students. *See* Amy Wallace, *Writing Wrongs: Funding Cuts Threaten UCLA's Composition Courses for Struggling Students*, L.A. TIMES, June 24, 1996, at B-1.

94. Wiegel, *supra*, note 92, at 887-88.

95. CENTENNIAL HISTORY, *supra* note 35, at 84.

to train them. Perhaps the graduates of the elite schools, being the cream of the educational crop, learn so quickly and lend so much cachet to a firm resume that the content of their education is essentially irrelevant.[96] But such is most assuredly not the case with the "product" of most law schools. As practitioner Stuart Handmaker points out, training new lawyers is an expense for a law firm—an expense the firm wishes to minimize. Firms expect graduates to possess certain basic practical skills as well as the elusive ability to "think like a lawyer."[97]

Given the diverse ethnic, racial, socioeconomic, and educational backgrounds of today's law students, an enlightened approach to professional education requires that law schools help their students overcome any basic analytical deficiencies before throwing them into the job market to fend for themselves. Law students without basic communication skills reflect poorly upon the law school and upon themselves, causing the law school to suffer a diminished reputation, and the student to suffer diminished self-esteem.

Even students blessed with strong writing backgrounds, however, can profit from a well-structured course in legal writing.[98] Exciting new legal scholarship reveals the dynamism of legal writing as a field of academic theoretical inquiry.[99] For instance, Professors Jill Ramsfield and Chris Rideout analyzed legal writing courses from a "process" perspective and a "social" perspective rather than from the "formalistic" perspective used by disdainful traditionalists.[100] While the formalists think of writing training as a pedagogy focusing purely on format, organization, word choice, and style, the process perspective emphasizes the intricate mechanisms involved in learning to write for a given audience. In the case of law students, the audience could be a judge, a client, or another lawyer, each of whom may have differing reading habits that require a writer to call upon differing communication techniques.[101] Moreover, the process perspective recognizes that writing is part of the thinking process itself. Thus, assisting students to write is assisting them in the critical lawyering skills of "constructing the law—describing and synthesizing . . . law, applying legal rules, drawing analogies and [finding dis-

---

96. Even elite schools, however, come under pressure to take the training load away from future employers. *See* Lilly, *supra* note 53, at 1450 (noting that most firms depend upon schools to train their students as lawyers because most firms lack time and money for training).

97. Stuart A. Handmaker, *The Law School Product from the Buyer's Point of View*, 29 VAL. U. L. REV. 897, 904-07 (1995).

98. The American Bar Association apparently thinks so, too. ABA Standard 302(a)(2) requires a law school to design its curriculum to provide students with "basic competence in legal analysis and reasoning, legal research, problem-solving, and oral and written communication." ABA STANDARD 302(a)(2). Unfortunately, each school is left to its own devices to decide what curricular design will provide "basic competence." One fears that, too often, the non-LRW experts who dominate the legal academic hierarchy will be determining what amounts to basic competence in LRW.

99. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994).

100. *Id.* at 48-62.

101. *Id.* at 54.

tinctions], and developing legal argument[ ]."[102] Finally, the social perspective emphasizes the lawyer's need to relate effectively to the legal discourse community—to be able to "write within the conventions and practices of a particular professional group."[103]

Ramsfield's and Rideout's work supports the conclusion that, regardless of any individual law student's pre-law-school writing strengths or weaknesses, his or her education in writing cannot be "finished" prior to law school, since effective legal writing requires sophisticated levels of critical analysis, writing, and thinking skills that would generally be learned only within an environment in which professional teachers who are themselves trained in legal reasoning skills pass those skills along to their students. Legal writing is, therefore, truly an interdisciplinary field that students would not have encountered in college.

Moreover, a comprehensive 1996 study on Women in Legal Education by the Law School Admission Council ("LSAC") underscores the importance of legal writing instruction for both genders.[104] Using a sample of approximately 28,000 law students, the study evaluated numerous aspects of hypothesized gender differences in law school expectations, experiences, and performance. Two chapters are devoted to differences between predicted performance in law schools (based upon undergraduate grade point averages) in women and men respectively. For men and women both, the study found that

> [a]mong the more striking differences between [the groups that performed higher than predicted and the groups that performed worse than predicted] are the differences in their experiences with and their perceptions about their first-year legal writing program. Women [and men] who performed worse than predicted found every aspect of the writing program to be more difficult. . . . Those [students] who performed worse than predicted did not rate themselves significantly lower on writing ability at the time they started law school, but legal writing proved to be a major source of difficulty once they got to law school. To the extent that difficulty with legal writing is reflected in the writing of final examinations in other first-year law school courses, this difficulty may account for a significant portion of the overprediction evidenced among these women [and men]. As was discussed more extensively in a previous chapter, reported problems with legal writing should be a major focus of future research in legal education.[105]

---

102. *Id.* at 55. See Philip C. Kissam, *Thinking (by Writing) About Legal Writing*, 40 VAND. L. REV. 135 (1987), which explains in detail how instruction and practice in legal writing are critical parts of the process of developing expertise in legal thinking and noting the law schools' institutional bias in favor of oral instruction and exchanges despite the unquestioned importance of writing to law practice. *Id.* at 136-46.

103. Rideout & Ramsfield, *supra* note 99, at 58-60.

104. LINDA F. WIGHTMAN, LAW SCHOOL ADMISSIONS COUNCIL, WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN 73, 113, 153 (1996).

105. *Id.* at 153; *see also id.* at 113.

These findings bolster the argument that law schools can ill afford to dismiss strong legal writing instruction as an annoying curricular frill. The LSAC study suggests that underachievement in some law students who had been statistically identified as having the greatest potential for success can be attributed directly to the students' needs for more enriched legal writing assistance. If this is true, failure to provide such assistance short-changes the students and the schools themselves. Presumably the students whose past performance predicts success in law school would normally be the students with the most opportunities for good job placements after graduation. Particularly at non-elite schools, a student's grade point average is critically important to the job search. Students who, with proper help, might have performed outstandingly and obtained an excellent job in which they could reflect well upon their law school, provide an alumni network to assist future graduates to get good placements, and (so important to deans) contribute funds toward future school endowments, may, instead, end up with lackluster grades and disappointing jobs (not to mention decreased self-esteem) because they did not get adequate assistance with legal writing skills.

Two remaining concerns are those expressed by Professor Boyer a decade ago—the cost of a good program and the need for competent teachers.[106] The two, of course, are related. Even underpaid full-time teachers are more expensive than adjuncts or students. The consensus in the literature seems to be that, ideally, an outstanding LRW program would be staffed by dedicated specialists in legal writing, research, and legal analysis who are sufficiently supported by institutional resources to be able to devote substantial amounts of attention, time, and energy to each law student being taught. There is no dearth of literature or experience concerning how to deliver the product of an outstanding writing course,[107] and the institution willing to dedicate resources to a fine program can have one. Conversely, as discussed above, failure to dedicate the resources now may ultimately reflect poorly on the institution later.

The final question, then would be whether there are competent, dedicated teaching staff available to deliver the course, since even a solid text and course structure cannot compensate for untrained, uninvolved teachers.[108] Traditionalists suggest that, even if the law school *should* take some responsi-

---

106. *See generally* Boyer, *supra* note 82.

107. *See, e.g.*, LAUREL C. OATES ET AL., THE LEGAL WRITING HANDBOOK: RESEARCH, ANALYSIS, AND WRITING (Professor's Anno. ed. 1993); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE (2d ed. 1994); *id.* TEACHER'S MAN. Each of these texts provides ample reading material, lesson plans, and exercises for an ambitious multi-semester class in LRW.

108. The argument that there were "no qualified" applicants was similarly used 20 years ago to justify law schools' failures to hire women faculty. *See* Marina Angel, *Women In Legal Education: What It's Like to Be Part of a Perpetual First Wave, or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799 (1988). As Professor Angel notes, however, whoever makes up the qualification criteria, white men, theorists, etc., can always define "qualified" to mean "just like me." *See generally id.* at 827 (stating that committees doing law school faculty hiring are composed overwhelmingly of males).

bility for teaching writing, it is hard to deliver and staff a truly outstanding program, since no intelligent J.D. with academic aspirations really wants to teach a subject like LRW that is beneath the dignity of a law professor[109] and, if anyone does initially want to teach LRW, she will soon wish to abandon the field to teach something "really interesting."

As to initial staffing, it happens that law schools have been in luck for the past ten years. Law jobs are scarce,[110] many lawyers who have been in practice are unhappy and want to leave,[111] and sometimes as many as a thousand people a year seek jobs in law teaching.[112] I direct a LRW program in San Diego, California. Whenever I advertise LRW job openings, I am deluged with resumes from qualified applicants.[113] Current staffing patterns of law schools indicate that hundreds[114] of talented legal professionals—the majority of whom are female—have come forward to teach LRW. It thus appears that, in today's legal employment market, finding people to accept sub-optimal employment terms is quite easy and law schools deciding to base staffing decisions purely on market efficiency rather than on equity considerations, are in a favorable position to do so.

---

109. *Id.*

110. David Segal, . . . *and Aren't, Lawyers Losing Positions, Facing Pay Cuts as Large Corporations Shrink Costs*, WASH. POST, Oct. 11, 1996, at A1.

111. Paul Ciotti, *Unhappy Lawyers*, L.A. TIMES, Aug. 25, 1988, at V-1.

112. Elyce H. Zenoff & Jerome A. Barron, *So You Want to Be a Law Professor?*, 69 A.B.A. J. 1712, 1712 (1983).

113. It is somewhat paradoxical that so many people are interested in entering this field, especially since it is so poorly regarded by academics generally. It may be, however, that the practitioners who typically apply for such positions know from their own experience how important LRW skills are for practice. *See, e.g.*, Robert L. Clare, Jr., *Teaching Clear Legal Writing-The Practitioner's Viewpoint*, 52 N.Y. STATE BAR J. 192 (Apr. 1980) (explaining that his law firm had hired a writing specialist to help associates because they needed the help and the more senior attorneys—even if they could write well themselves—did not feel they were experts in teaching writing). In addition, many attorneys are unhappy practicing law and the prospect of teaching anything—even something with low status—may appeal to them. *See also* Judy Klemesrud, *Women in the Law: Many Are Getting Out*, N.Y. TIMES, Aug. 9, 1985 (quoting Manhattan career counselor as saying lawyers are "the most dissatisfied professional group"). Another factor could be at work, however: that is, lack of knowledge about how low one's status is likely to sink. One former full-time non-tenure track LRW professor mentioned being stunned at the lack of institutional respect from non-LRW faculty. This person assumed that not being a tenure track academic might be analogous to being an associate, rather than a partner, in a law firm. It was a shock to be treated something like a paralegal—not a professional at all. For a discussion of the professional disrespect accorded paralegals (who are primarily female) by lawyers, see JENNIFER L. PIERCE, GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS 83-102 (1995).

114. The precise number of people teaching LRW is not calculable, since programs tend to be in flux. However, approximate numbers can be extrapolated from the Ramsfield surveys. Question 17 on the 1994 LRW survey is: How many full-time LRW teachers (total) are employed by your school? 1994 Survey, *supra* note 15. One hundred twenty-five schools responded as follows:

A. Institutionalized Negative Attitudes

1. As Shown Through Structure of Jobs as Low-Status

The American Bar Association Law School Accreditation Standard 405(a) states that "law schools employing full-time legal writing instructors or directors shall provide conditions sufficient to attract well-qualified legal writing instructors or directors."[115] On their face, the current conditions do not seem particularly well-designed to attract or retain well-qualified LRW instructors. Institutional negativity toward LRW manifests itself both structurally and functionally. Most LRW programs with full-time LRW teachers are structured so that the LRW teachers are not regular tenure-track faculty. Although the teachers may receive renewable contracts offering a degree of job security,[116] they are still at-will employees who receive substantially lower pay and fewer privileges than tenure-track faculty. Institutions justify their program structures (and the resource allocation decisions supporting those structures) by denigrating LRW as a field of legitimate academic interest and, by implication, criticizing and belittling anyone finds the field worthy of her full professional attention. This attitude sometimes spills over into directly belittling the importance of their legal writing classes to the students, a behavior that only adds to the difficulties inherent in teaching the class.[117] Less overtly "hostile," but arguably just as destructive, is the institutional negativity revealed by schools' decision to keep their full-time LRW professionals in a marginalized professional status rather than making them full-fledged members of the law school faculty.

# of responding schools	% of responding schools	# of full-time LRWs reported per school	Total - # of schools × number of LRWs reported
30	24	1	30
28	22.4	2-3	56-84
29	23.2	4-5	116-145
19	15.2	6-7	114-133
3	2.4	8-9	24-27
4	3.2	10 or more	40 +?
12	9.6	None	0
125	100		380-459

The table reveals that at least 380 and as many as 459 LRW instructors were teaching in 1994 at the 125 schools responding. Of course, there are now 178, not 125, ABA-accredited schools, some of which undoubtedly also employ at least one, and likely more than one, full-time LRW instructors.

115. ABA STANDARDS 405(a).

116. Then again, they may not. Several schools (although a declining number) put a cap on the number of years a LRW instructor can stay in her position—typically the cap is three or four years.

117. Discretion prohibits me from giving explicit details, but anecdotal evidence abounds concerning doctrinal faculty commenting to students that they should put their legal writing class in its (insignificant) place and devote relatively little time and energy to it.

Today, LRW programs employing full-time teachers tend to fall into one of three models.[118] The first is the tenure-track model, but this is rare. The 1994 LRW survey shows that *regular* (that is, non-legal-writing specialist) tenure-track faculty teach LRW at seven of 132 schools responding, while at six of the responding schools, the course is taught by tenure-track LRW teachers confined—either by choice or by institutional requirement—to LRW only. Schools that have made the decision to put LRW teachers on tenure track are not the focus of this Article, since at least the LRW teachers have professional status parity (and presumably salary parity) with teachers of other subjects. Indeed, schools at which tenure-track faculty teach LRW would seem to be the ideal employer for anyone wishing to specialize in the LRW field.[119]

Another model for full-time LRW staffing is the graduate fellowship model, such as that used at the University of Chicago for nearly fifty years.[120] Typically, this model is used at more elite law schools. Fellows[121] are well-credentialed, recent graduates of other elite law schools, willing to spend one or two years teaching legal research and writing. The payoffs for the fellows include teaching at a prestigious law school, gaining valuable professional academic contacts and, at some schools, having the opportunity to pursue coursework toward a Master of Laws or Doctor of Juridical Science degree while earning a modest salary and paying no tuition. For the fellow, this type of system may provide excellent benefits. Bigelow Fellows, for instance,

> shall have sufficient time to do writing on their own during the year, and to attend courses of interest in the Law School or elsewhere in the University. It is also intended that fellows shall have, whenever practicable, an opportunity during the year to conduct a joint seminar with some member of the faculty in a field of special interest to them. One major objective of the program is teacher training.[122]

This model can be a good entry point to law teaching. It provides an opportunity to experience life in a law classroom and gain professional contacts. In some programs, it may also lead to a Master or Doctor of Laws degree—a

---

118. There are, of course, variations of program structure and design within these models. However, these are by far the most common *staffing* models today.

119. One potential problem inherent in creating "dedicated LRW tenure-track slots" in which LRW teachers never teach anything but LRW is the possibility of foreclosing future professional opportunities should the professor's interests broaden or shift to other legal topics. But more information would have to be gathered for this problem to be properly evaluated.

120. *See generally* Kelven, *supra* note 64, at 108-22 (describing Bigelow Fellows program). The Association of American Law Schools Placement Bulletins for Fall 1996 listed advertisements for several other law schools offering fellowships in conjunction with LRW teaching responsibilities and a chance to pursue LL.M. studies. These included Temple and Dickinson. AALS PLACEMENT BULL., Sept. 27, 1996, at 12. Two other schools advertised positions in which one could study for an LL.M. while teaching legal writing but does not call them "fellowships." Columbia calls its LRW teachers Associates-in-Law and University of Illinois calls them Visiting Assistant Professors. AALS PLACEMENT BULL., Oct. 11, 1996, at 10.

121. The use of the masculine term "fellows" to denote talented entry-level teachers underscores women's historical exclusion from the academic community.

122. Kelven, *supra* note 64, at 109.

helpful credential in the academic job market.[123] So, although the pay may be relatively low, such a program provides enough of a *quid pro quo* to transcend criticisms suggesting that it exploits its teaching staff.

The most problematic staffing model for the LRW teachers themselves is the one now predominating—a model to which I will refer as the "contract-LRW model." The contract-LRW model seems to have evolved from the associates-in-law model described by Boyer in 1985.[124] In the early 1980s, schools began abandoning student-staffed or adjunct-staffed programs in favor of staffing with full-time LRW teachers with J.D. degrees. It was expected that these instructors would only wish to teach LRW for a year or two and then would move on since, as stated earlier, the entrenched viewpoint was that no self-respecting intelligent lawyer would be able to endure the job for long. Naturally, some found they did NOT want to stay in these jobs very long. Others, however, found that teaching LRW had its rewards. They enjoyed it; because they did, the students' enthusiasm rose and their resistance diminished. So, when some LRW teachers indicated that they wished to continue in the job past their initial one- or two-year commitment, schools looked at the appealing prospect of "solving" the LRW problem and allowed the full-time LRW instructors to stay longer. But this did not mean making them regular members of the faculty. Instead, the LRW teachers were typically offered some sort of contractual arrangement that was renewable either yearly or, as time went on, every two, three, or five years.[125]

The 1994 LRW survey details the job status of these contract-LRW instructors. Seventy-three percent are on one-year contracts.[126] While virtually all LRW contracts are renewable,[127] 25% of the schools limit the number of times they can be renewed, thus capping the number of years that

---

123. There is some reason to question whether this is the best model from the students' perspective. If the teaching fellow aspires to leave the field of LRW as quickly as possible and therefore spends his or her time pursuing independent research, attending classes, co-teaching seminars of interest, and perhaps satisfying the requirements for a graduate degree in law, it is questionable how much expertise she can develop in the theory or pedagogy of LRW and how well served the students will be. *See, e.g.*, Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs,* 45 J. LEGAL EDUC. 530, 531 n.7 (1995) [hereinafter Levine, *Voices*]; Jan M. Levine, *"You Can't Please Everyone, So You'd Better Please Yourself": Directing (or Teaching in) a First-Year Legal Writing Program*, 29 VAL. U. L. REV. 611, 627-28 (1995) (discussing particular challenges for LRW program director supervising LL.M. candidates who need to devote substantial attention to their own academic pursuits) [hereinafter Levine, *Directing*].

124. *See* Boyer, *supra* note 82.

125. The prevalence of this model shows up in the 1994 LRW Survey, *supra* note 15, at question 41. Seventy-two schools out of the 132 that responded indicated that at their institution LRW is taught by full-time faculty. Fifty-eight of those 72 schools (81%) use full-time, (contract-track rather than tenure-track) faculty to teach LRW. *Id.* The other schools use adjuncts (11.4%), students teaching only (1.5%), a combination of full-time contract LRW faculty (8.3%), a combination of adjuncts and full-time tenure track non-LRW faculty (1.5%), and an unspecified "other" (22%).

126. *Id.* at question 47.

127. Almost all of the responding schools (98.9%) reported that contracts were renewable. *Id.*

a LRW teacher can remain at the school. The caps range from two years to six.[128] Sixty-three percent of the schools employing contract-LRW teachers afford these teachers no vote at faculty meetings. In contrast, 100% of the tenure-track faculty and 76% of clinical faculty have voting rights.[129] At only 21% of the responding schools are LRW faculty eligible for sabbaticals.[130]

Besides lacking parity of status or security, LRW teachers are also paid considerably less than other faculty members. Fifty-one schools among those responding to the 1994 survey pay their LRW teachers at least $30,000 less per year than they pay their non-LRW/non-clinical faculty.[131]

At one-half of the law schools responding to the 1994 LRW survey, LRW teachers teach LRW and only LRW. At 40% of the schools, they are not *permitted* to teach anything else; at 13% of the schools, they choose to teach nothing else.[132] This can retard future academic opportunities. As regular tenure-track faculty, visitors, and even adjuncts who teach non-LRW courses increase their repertoire of course offerings, they increase their human capital value, since they learn more about the pedagogy of teaching various types of courses and learn more about the subject matter they are teaching. This increases potential job mobility, since they can present themselves as teachers with a broader range of expertise to other law schools seeking to fill their curricular needs. They gain exposure to a wider range of topics that might spark their interest in scholarship. To LRW instructors, this possibility is generally foreclosed.

A few LRW programs acknowledge this dynamic and actively assist their contract-LRW instructors to prepare to move into tenure-track teaching. For instance, one job announcement for Chicago-Kent College of Law's legal writing program advertises for LRW teachers who will be

> visiting assistant professor[;] will teach one [first year writing] section of . . . (approximately 30-35 students), [plus] one substantive course or seminar of his/her [choice]; . . . receive student teaching assistance . . . and a research stipend to be used in helping them to develop as teachers and scholars.[133]

---

128. *Id.* at question 50.

129. *Id.* at questions 51-53.

130. *Id.* at question 54.

131. *Id.* at question 55. LRW teachers also get paid less than clinicians, who themselves frequently receive lower salaries than law teachers who teach all doctrine or theory and no skills. Question 56 of the 1994 LRW survey indicates that for 40% of LRW faculty, the difference between their earnings and those of clinicians is less than $10,000 (and may be zero). There does not appear to be any gender difference among LRW instructors themselves, however. This contrasts with clinical faculty pay, which tends to be higher for men even when men and women are at the same status level. *See* Robert F. Seibel, *Do Deans Discriminate: An Examination of Lower Salaries Paid to Women Clinical Teachers*, 6 U.C.L.A. WOMEN'S L.J. 541, 547-51 (1996) (women in long-term contract clinical teaching positions are paid 15.01% less then men; women in tenure-track clinical positions are paid 10.16% less than men).

132. 1994 Survey, *supra* note 15, at question 59.

133. AALS PLACEMENT BULL., Sept. 6, 1996, at 10-11.

Again, one benefits greatly from a job offering this much growth potential, even if there are no long-term job prospects within the employing institution.

In contrast, a LRW job prohibiting its holder from ever teaching anything but LRW can be particularly deleterious to non-tenure-track LRW teachers. Some literature suggests that teaching LRW may be of little to no value as "law teaching experience" for one wishing to move on to non-LRW teaching.[134] Thus, an LRW teacher could become professionally immobilized staying in a job that changes little from year to year and offers little opportunity to enhance her human capital value, if she does not teach classes other than LRW.[135]

As will be developed below, the job's functional demands further restrict chances to increase human capital value. For example, the demand for constant, intense interaction with students and virtually non-stop grading throughout the semester (rather than only at the end of it) can diminish or effectively eliminate time for traditional types of scholarship. LRW teachers who can demonstrate to prospective academic employers neither a wide range of teaching experience nor some tangible proof of scholarly production or potential will be at a grave disadvantage in job hunting. Moreover, staying in one position could limit an employee's vision of her own potential, resulting in lower professional aspirations and ultimately in less vertical and horizontal mobility.

---

134. This conclusion that teaching LRW proves one's unworthiness to teach other subjects is, of course, unsound. Teaching LRW focuses one on the process of teaching—something about which many law professors know very little. Moreover, an LRW teacher tends to have a broad base of knowledge in several doctrinal areas, because he or she must regularly design new writing problems which generally cover a range of topics. Moreover, since students resist being taught LRW, the LRW teacher must be exceptionally creative and flexible to be successful. One who succeeds at teaching LRW is likely to be able to succeed at teaching anything. Nevertheless, the institutional bias against LRW teaching experience is real. *See, e.g.*, Elyce Zenoff & Jerome A. Barron, *So You Want to Hire a Law Professor?*, 33 J. LEGAL EDUC. 492, 503 (1983) ("Present practice indicates that less credit is given [by faculty recruitment committees] for non-tenure-track teaching in legal writing programs and clinics."); *see also* Marjorie D. Rombauer, *Regular Faculty Staffing for an Expanded First-Year Research and Writing Course: A Post Mortem*, 44 ALB. L. REV. 392, 408 n.34 (1980). Professor Rombauer relates a conversation with a young male law professor who enjoyed teaching LRW but who stopped teaching the course on advice of a senior faculty member to the effect that he would never get tenure if he continued to teach LRW.

135. I want to make clear that I do not agree that LRW is a dull teaching assignment, or that it is a subject unworthy of specialization. In fact, both the subject matter and the teaching process are dynamic and fascinating to many who teach LRW. *See, e.g.*, Kissam, *supra* note 102. However, while a torts teacher may be fascinated by torts for years, this does not foreclose him from deciding he might enjoy biotechnology law and offering a seminar in it. Ultimately, he may then continue to teach torts and his new field or, if curricular needs permit, he may move out of torts totally. No one would use this hypothetical professor's behavior to suggest, however, that torts was never interesting in the first instance. Rather, this would be evidence that the professor was continuing to progress as a legal academic rather than allowing himself to stagnate.

2. As Shown Functionally Through Direct and Indirect Expression of Hostility and Disrespect

Legal periodicals are replete with references to the unsavory nature of the job of teaching legal writing. Non-LRW teachers persist in viewing LRW as a course that is stultifyingly dull to teach, of no possible serious academic interest even to those actually teaching it, and something to evade or escape as quickly as possible.[136] When Professor William Pedrick opined that permanent faculty should not teach first-year legal writing, he argued that legal writing is just plain good writing; instruction in writing is an elementary task so far beneath the dignity of full-time faculty as to present a "threat to the self image" of a "real" law faculty member. Functionally, it would also pose a threat to a young faculty member's chances for tenure because of the need to devote energy to "classroom" teaching (a category from which LRW was apparently excluded) and to scholarship. So, Professor Pedrick denigrated LRW as a second-rate assignment that should be left to those (second-rate teachers?) at the university level who are "specifically trained" to teach it and who are "commonly rewarded at a much lower level of compensation than are law teachers."[137]

Even Professor Marjorie Rombauer, a pioneer in the field of legal writing and one of its strongest proponents, when discussing an ill-fated program at the University of Washington that aspired to have "regular" faculty teach legal writing, admitted: "[I]t must be conceded that individuals who have a long-range interest in teaching research-and-writing based offerings particularly for first-year students, are rare."[138] She continued:

> [L]ack of status, unusual teaching patterns, the large per-credit-hour time demands are negative factors [in teaching a LRW course]. To say that the subject matter of the course is "nonstimulating," however, is like saying that the subject matter of a tax course or of a property course is unstimulating. The "truth" of the statement is dependent on who is speaking.[139]

Professor Rombauer's point is well taken. It may be no accident that Professor Rombauer, one of the earliest proponents of devoting significant institutional resources to LRW, is a woman, for the notion of what is suitably "stimulating" material worthy of inclusion in the law school curriculum arguably is gendered. Until very recently legal education (and, indeed, virtually all higher education) has been a white male preserve.[140] The most elite

---

136. "Nearly everyone who writes about legal writing duly records faculty disdain for the subject matter and administrative dislike of the expense." Gale, *supra* note 76, at 317-18.

137. Pedrick, *supra* note 90, at 413. Professor Pedrick ominously predicted: "In the end, a law school that invests a heavy segment of faculty time in legal writing instruction will pay a price in terms of the productive scholarship of its faculty. It risks losing ground in the recognition accorded that faculty in the world of legal education." *Id.* at 414.

138. Rombauer, *supra* note 134, at 397-98.

139. *Id.* at 409.

140. For a discussion of the early abortive attempt of a woman to be admitted to Harvard Law School, see CENTENNIAL HISTORY, *supra* note 35. When a woman applied for admission in

law schools struggled to keep themselves untainted by students other than middle to upper class white males. Immigrants, women, and minorities were either barred or implicitly discouraged by the admissions criteria.[141]

Even if women had been permitted to enter the legal academy, few of them would likely have been prepared educationally to embark upon legal studies. The study and creation of abstract legal doctrine had long been appropriated by men,[142] who dominated educational institutions and prevented women from acquiring the requisite foundational knowledge to be able to join them in this type of intellectual endeavor.[143] In Virginia Woolf's words, women for centuries were spectators at the "procession of educated men."[144] Thus, the construct that legal education as theoretical abstract inquiry was legal education at its "best," is a male construct.

As noted above, although women faculty have recently increased their numbers in the legal academy, many of them are still untenured, and men continue to maintain control.[145] Thus, institutionally-entrenched, traditional opinions about how intellectually interesting it is to teach a practical skill in a hands-on fashion are likely to be primarily male opinions. Regardless of whether these opinions are gendered, one thing about these opinions is certain—they are not lost upon students. Students could well use the realization that one or more of the "real" faculty members view LRW negatively to justify shortchanging the subject and dismissing, if not harassing, its teacher; this response would create for the LRW instructor a functionally negative working environment. As Professor Angel noted, people will attempt to dominate those they perceive as weaker than themselves.[146] Students, feeling dominated by doctrinal faculty, will often seek out targets for their frustrations—targets that too often are women, minorities, and legal writing faculty.

1899, the law faculty reluctantly agreed to admit her if she could obtain admission to Radcliffe as a graduate student. However, Harvard University refused her graduate status. Harvard Law Professor Ezra Ripley Thayer must have been relieved, having said "he should regret the presence of a woman in his classes, because he feared it might affect the excellence of the work of the men; but he could not deny the inherent justice of the claim" that women should be admitted. *Id.* at 55. For a somewhat more heartening account of women's ultimately successful legal battle for admission to Hastings College of the Law (University of California), see THOMAS G. BARNES, HASTINGS COLLEGE OF THE LAW: THE FIRST CENTURY 47-61 (1978).

141. See *supra* notes 42-51 and accompanying text. For a more detailed discussion of women's early struggles to obtain legal education, see chapters 2-4 in KAREN B. MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA: 1638 TO THE PRESENT 39-107 (1986).

142. Men appropriated learning long before the rise of German universities. Indeed, in feudal times, clerics appropriated learning and writing, cloistered themselves in monasteries, and cut themselves off completely from women. *See* Jacques Dalarun, *The Clerical Gaze*, *in* 2 A HISTORY OF WOMEN IN THE WEST 15 (Christiane Klapisch-Zuber ed., 1992).

143. For instance, in Germany, the site of the modern scientific university that served as a model for American universities, women were not even allowed to acquire the baccalaureate degree, which was "the ticket to university admission," until 1900. Marie-Claire Hoock-Demarle, *Reading and Writing in Germany*, *in* 4 A HISTORY OF WOMEN IN THE WEST 145, 149 (Geneviève Fraisse & Michelle Perrot eds., 1992).

144. VIRGINIA WOOLF, THREE GUINEAS 62-63 (1938).

145. *See generally* Lilly, *supra* note 53.

146. *See* Angel, *supra* note 108, at 832-33.

In especially disheartening institutions, LRWs are subject to ongoing petty indignities. Anecdotes abound. For instance, LRWs may be denied even the "honorary" title of "professor" that is accorded other members of the faculty. Thus, while all the other law teachers are addressed as "Professor So-and So," LRWs are addressed as "Mr./Ms. So-and-So," or, more commonly, by their first names. LRWs may be denied faculty office space, or are relegated to windowless cubicles in the basements or libraries where they remain separated physically from ongoing intellectually-sustaining interactions with the "real" faculty. One LRW reported being chastised for taking a donut from the law school's faculty lounge. LRWs typically have no vote at faculty meetings. Voting or not, they frequently feel they are denied real voice because, having little to no power, their views are deemed unworthy of notice by the voting faculty. They may find themselves being ignored, interrupted, or attended to with benign tolerance bordering on indifference. At worst, they lack not only vote and voice at faculty gatherings, they lack any *presence* at all. Some faculties will not even deign to allow the LRW teachers to attend faculty meetings as mute spectators.

These institutional pressures against people who select (or find themselves in) the field of LRW can be debilitating. As Professor Rombauer noted, "interest—even strong interest—[in teaching LRW] may not be enough [to keep someone from leaving LRW]. A strong self-image is necessary to prevail against the insecurities generated by marching to this different drummer."[147]

The structural and functional pressures brought to bear on LRW teachers are more likely over the long term to weigh *against* their being able to maintain their adherence to a different cadence. Professor Rombauer stated that law schools needed to invest special energy into nurturing and sustaining interest in teaching LRW. Most schools, however, have done the opposite. Instead, they have taken advantage of a large applicant pool—a pool most likely created by large numbers of women pouring into law schools starting in the late 1970s[148] combined with the economic downturn of the 1990s[149] which resulted in attorney layoffs and fewer entry-level positions—to fill LRW positions primarily with women.[150] Far from being professionally nurtured and sustained, these women must find ways to nurture and sustain

147. *See* Rombauer, *supra* note 134. Like the field of LRW, the academic field of composition studies also suffers from institutional confusion about, and hostility toward, its values and pedagogy. *See* Susan Hunter, *The Dangers of Teaching Differently*, *in* WRITING OURSELVES INTO THE STORY: UNHEARD VOICES FROM COMPOSITION STUDIES 70-85 (Sheryl I. Fontaine & Susan Hunter eds., 1993). Professor Hunter describes writing pedagogy as "inherently liberatory and political." *Id.*

148. Between 1972 and 1978, the number of women in law schools tripled from 11,878 to 35,775. LORRAINE DUSKY, STILL UNEQUAL: THE SHAMEFUL TRUTH ABOUT WOMEN AND JUSTICE IN AMERICA 21 (1996).

149. *Id.* at 174-75.

150. In this, of course, law schools resemble industrial capitalists who benefit by being able to employ women cheaply. *See, e.g.*, Sokoloff, *supra* note 11, at 16-20. The analogy between law school administrators and capitalists is not purely rhetorical. One law school dean was quoted

others and themselves while handling a complex job. It is to the complexities of this job that the Article now turns.

B. A View from the Inside—The Positive Aspects of Teaching Legal Writing (Known Only to Those Who Try It)

Whatever else can be said about the drawbacks of teaching legal writing (and these will be discussed below), one attributed drawback is a myth—the notion that the job is dull. Teaching legal writing—like teaching writing at any level—is anything but boring and unstimulating to a committed and trained writing professional.

As taught today by dedicated LRW professionals, "legal research and writing" is a complex, multi-faceted and, indeed, interdisciplinary course. Professor Lucia Ann Silecchia of Catholic University evaluated programs at 111 schools responding to a 1995 survey to determine course content.[151] In all programs the three skills of legal writing, research, and analysis predominated.[152] These were not, however, the only skills taught. Others include oral advocacy, professional responsibility, client interviewing, fact investigation, ADR, law office management, study skills, negotiation, case planning, exam preparation, citation form, document drafting, introduction to law, pleadings, depositions, and relationship skills.[153] The literature on critical reading and writing theory and pedagogy alone could occupy the professional development time of any LRW instructor. Add to that the need to keep abreast of legal bibliography and the scope and use of electronic databases and the Internet (a specialty of law librarians), current developments in appellate advocacy (a specialty of appellate practitioners, judges, and court clerks), and perhaps one or two of the other items listed above (each with its own body of literature), and the specter of "lack of stimulation" vanishes.

Presumably, every law school class is in some manner designed to teach or strengthen skills of critical thinking and analysis. The difference between LRW and other courses is not that LRW is non-substantive while the other courses are "substantive."[154] Rather, the key difference is that in LRW

(anonymously) as saying, "We can get education for cheap because we can hire people on the mommy track [to teach LRW]." ELUSIVE EQUALITY, *supra* note 2, at 33.

151. Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245 (1996).

152. *Id.* at 256.

153. *Id.*

154. The author acknowledges problems in the terminology of categorization. At conferences of legal academicians, one commonly hears references to "legal writing instructors" juxtaposed with "substantive teachers." Occasionally, LRW professionals are contrasted with "stand-up teachers" or "classroom teachers"—dichotomies that arose to differentiate between clinicians and non-clinicians. The terms made some sense in the context of clinical educators since many clinicians taught in their offices or courtrooms where they were guiding students through actual legal cases. Since LRW professionals "stand up" in classrooms to teach, this dichotomy makes no sense in relation to them. LRW professionals reject the notion that they are not "substantive" teachers—since the field of LRW is indeed substantive. LRW professionals have come to

classes, EACH STUDENT'S ability to engage in the above-mentioned processes is individually evaluated numerous times throughout the semester, rather than once on a final examination[155] and perhaps—very briefly—once or twice during a classroom recitation. This difference is not substantive but, rather, procedural. This procedural difference may very well make the job of teaching LRW more demanding than the job of teaching some other courses. But demanding is not a synonym for dull.[156]

Dozens of articles by LRW professionals bespeak the excitement and stimulation LRW provides to those who immerse themselves in its literature and creatively apply its pedagogy.[157] At least four professional associations exist specifically for legal research and writing professionals: the Legal Writing Institute; SCRIBES—The American Society of Writers on Legal Subjects; the Association of Legal Writing Directors ("ALWD"); and the Association of American Law Schools Section on Research and Writing. These organizations hold regular conferences, publish journals pertinent to writing theory and pedagogy, and network through Internet mailing lists. LRW is a "real" academic field with substantive content.

Pedagogically, the field is dynamic, for it concerns itself not only with substance, but also with process. Assisting a student to become competent in a basic practical skill requires drawing on multiple strategies and techniques. The instruction must be individually tailored for each student and it must blend the practical with the theoretical. In this regard, some theorists believe it may hold special appeal for women. After studying women faculty, researchers Nadya Aisenberg and Mona Harrington noted that women in the

---

prefer referring to non-LRW/non-clinical teachers as "doctrinal" teachers. This creates a contrast that is comfortable to the LRW professionals but may be uncomfortable to highly theoretical non-LRW teachers who shun the notion that they teach doctrine. Be that as it may, the ball is now in the non-LRW teachers' court to come up with a terminology that does not elevate them at the LRW teachers' expense. Better yet, perhaps all categories could be abolished and all professionals teaching in law schools could be referred to as what they are—professors of law.

155. Most first-year law school courses do not have mid-term examinations, but rather one final examination at the course's end. *See* Philip C. Kissam, *Law School Examinations*, 42 VAND. L. REV. 433, 456 (1989); Janet Motley, *A Foolish Consistency: The Law School Exam*, 10 NOVA L.J. 723, 750 (1986).

156. Of course, LRW teaching may be viewed as dull because it is done by women. Feminist scholar Cynthia Fuchs Epstein notes that women's contributions to knowledge have frequently been devalued, seemingly for no better reason than that they were not men's contributions. For instance, Rosalind Franklin's research on DNA was viewed as "dull." though similar research later done by men was hailed as groundbreaking. Cynthia F. Epstein, *Constraints on Excellence: Structural and Cultural Barriers to the Recognition and Demonstration of Achievement*, *in* THE OUTER CIRCLE—WOMEN IN THE SCIENTIFIC COMMUNITY 240, 242 (Harriet Zuckerman et al. eds., (1991).

157. *See, e.g.*, Kissam, *supra* note 102, at 152-60; Rideout & Ramsfield, *supra* note 99. For a lengthy (but still not exhaustive) listing of articles on the subject of legal writing, see George D. Gopen & Kary D. Smout, *Legal Writing: A Bibliography*, 1 J. LEG. WRIT. INST. 93 (1991). For a list of texts and reference books in the field, see Maureen Arrigo-Ward, *How to Please Most of the People Most of the Time: Directing (or Teaching in) a First-Year Legal Writing Program*, 29 VAL. U. L. REV. 557, 607-09 (1995).

academy are heavily involved in integrating knowledge.[158] Often, their scholarship blends theory and reality in a variety of ways so as to creatively transcend disciplinary boundaries. Rideout and Ramsfield's vision of legal writing identifies LRW as the type of multi-faceted field that would likely appeal to those who are drawn to such integrated approaches to knowledge and scholarship, since teaching legal writing requires, at the very least, knowledge of law as well as composition and rhetoric.[159] So, if Aisenberg and Harrington are correct to conclude that integrated approaches resonate more with women, this could partially explain the predominance of women in the LRW field.[160]

Another aspect of LRW that could appeal to women is the opportunity it affords for intensive interaction with students in a way that can inject into the students' law school experience key factors that women may have found missing from their own law school experience. For instance, in *The Legal Education of Twenty Women*,[161] the authors chronicle the discomfort experienced by a group of women students during their three years at Yale Law School. The concerns of these women included a sense of alienation and disconnectedness and a reluctance to speak in class, since they perceived their classroom contributions as being discounted by their professors and by other students.[162] The piece ends with recommendations that teachers pay more attention to students, listening to them even when listening requires first encouraging them to speak.[163] Since a significant component of LRW work involves close individual work with students, some women may find

---

158. NADYA AISENBERG & MONA HARRINGTON, WOMEN OF ACADEME: OUTSIDERS IN THE SACRED GROVE 94-96 (1988). This view is not without its problems. Some will resist it as "essentializing" the nature of women and over-simplifying their interests. Nevertheless, the view seems to have some intuitive appeal and the Aisenberg and Harrington analysis is worth noting.

159. *See* Rideout & Ramsfield, *supra* note 99, at 66-68.

160. Of course, it is also possible that women find themselves in LRW jobs more or less by accident. For instance, perhaps women needed to take jobs wherever they happen to live, rather than being able to relocate for a tenure-track position. This thesis is currently being explored by Professors Barbara Reskin and Deborah Rhode at Ohio State University.

161. Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1359 (1988).

162. *Id.* A more comprehensive study conducted at the University of Pennsylvania also found women alienated by their experiences in law school, to the point of needing more mental health care and counseling, feeling silenced in the classroom, and suffering from lowered self-esteem. Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 3, 59-62 (1994). *Accord* Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 325, 331 (1994); Taunya L. Banks & Leonard Gross, *Gender Bias in the Classroom*, 14 So. ILL. U. L.J. 527, 530-31 (1990); Suzanne Homer & Lois Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1, 8 (1990).

163. Weiss & Melling, *supra* note 161, at 1359. For a portrait of one school's successful efforts to create a more nurturing environment for all of its students, see Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 U.C.L.A. WOMEN'S L.J. 81 (1996) (discussing legal education at Chapman University School of Law in Irvine, Cal.).

themselves enjoying the process of transforming legal education for their students into an educational experience more positive than their own.[164]

For instance, helping students write is in large measure helping them find their own voices as members of the legal discourse community. Women who felt silenced during their own legal educations may find healing in helping students express themselves. As one composition professor expressed,

> [w]hen I became a teacher myself . . . I found that . . . composition, with its process orientation . . . had laid theoretical foundations that could help me with the kinds of students, women in particular, who were handicapped, as I had been, by a fear of being exposed in the classroom.[165]

Aisenberg and Harrington's work suggested that women have a "strong commitment to transformation through teaching."[166] Thus, they concluded that at least part of the reason female academicians are more drawn toward liberal arts and humanities than toward sciences is that the former, being less abstract and more clearly related to the human condition, may enable women to more vibrantly express their belief in the possibility of personal transformation through education.[167]

This is not to say, of course, that women alone perceive and value the transformative potential of academia. In a beautiful exposition on the meaning and value of legal writing courses to the new law student, Professor Frank Pommersheim of the University of South Dakota states:

> The early law school experience, despite appearances, is not grounded in misanthropy, but is, instead, rooted in a radical personal and professional *transformation*. This process involves learning and mastering a new language—the language of law and legal analysis. . . . [V]oice, values and community . . . are part of a student's personal fulfillment in law school.[168]

---

164. During my initial interview for the position of LRW instructor, I told the program director that one of my goals was "reducing the stress of first-year law students." I did, indeed, expend tremendous amounts of time and energy that first year trying to accomplish that goal. I notice a similar commitment toward students expressed by many LRW colleagues.

165. Irene Papoulis, *Appearance as Shield: Reflections About Middle-Class Lives on the Boundary*, *in* WRITING OURSELVES INTO THE STORY: UNHEARD VOICES FROM COMPOSITION STUDIES 269, 278 (Sheryl I. Fontaine & Susan Hunter eds., 1993). *See also* Hunter, *supra* note 147, at 72 (discussing how writing teachers aim to empower, rather than dominate, students by showing them the "power language gives [students] to shape and reshape [their] worlds").

166. AISENBERG & HARRINGTON, *supra* note 158, at 98.

167. *Id.* at 105. Men have also acknowledged the benefits of intense interaction with students, the pedagogical benefits of feedback, and the overly elitist attitudes that have created the law school as we know it. *See, e.g*, Howard A. Glickstein, *Law Schools: Where the Elite Meet to Teach*, 10 NOVA L.J. 541 (1986) (criticizing law schools for focusing more on academic credentials like law review participation than on prior practical experience as lawyers when hiring faculty); Henry Weihofen, *Education for Law Teachers*, 43 COLUM. L. REV. 423, 423-48 (1943) (explaining that students learn best if they understand why they are being given certain material and what they are expected to do with it; arguing that problem method is of higher pedagogical value than strict case method approach).

168. Frank Pommersheim, *Voice, Values, and Community: Some Reflections on Legal Writing*, 12 J. LEGAL STUD. 477, 477 (1988) (emphasis added). Professor Pommersheim's insight into

So, the LRW field has characteristics that can make it an interesting academic career specialty. Law schools have, however, been exploiting the availability of people who enjoy the work by failing to afford them appropriate professional recognition and support. Some of the justifications for this failure are set forth and challenged in the next section.

IV. THE ASSERTED JUSTIFICATIONS FOR LOW STATUS AND PAY

This section focuses on five asserted justifications for keeping LRW teachers in a marginalized status and for paying them less: (1) LRWs lack academic-quality credentials; (2) LRWs do not have the same demands upon them as regular faculty and do not deserve the same compensation; (3) LRWs are not scholars because they do not publish; (4) LRW teachers have no need for the academic freedom guaranteed by tenure; and (5) Even if, theoretically, equality for LRW teachers were a good idea, it is too expensive.[169]

A. Justification No. 1: LRW Instructors Lack Academic-Quality Credentials

Considering that the job of teaching LRW is deemed unworthy of full faculty status or full faculty pay, one might assume that such a position can be obtained with lackluster professional credentials. In fact, however, when viewed as a "total package," required credentials for LRWs are often the same as and sometimes higher than those for a non-LRW teaching position. To the extent that the required credentials are "lower," this typically trans-

---

the value of legal writing is particularly impressive because he does not teach the course nor, according to his biographical data in the 1995-1996 AALS Directory of Law Teachers, has he ever taught it.

169. The discussion focuses on academic tenure because, today, and for much of the twentieth century (although certainly not during most of America's history) tenure has been *the* symbol of full professional recognition in the academy. *See* Walter P. Metzger, *Academic Tenure in America: A Historical Essay*, *in* FACULTY TENURE: A REPORT AND RECOMMENDATIONS 93-115 (Comm'n on Academic Tenure in Higher Educ. eds., 1973). Recently, tenure has undergone a particularly virulent attack. For instance, faculty at the University of Minnesota threatened to unionize to combat the regents' plan to eliminate many incidents of tenure. *See* Constance Holden, *Furor over Minnesota Tenure Proposals*, SCI., Sept. 20, 1996, at 1653. Other schools are also bringing tenure under serious review. *See, e.g.*, Norman Draper, *The New Bottom Line of Higher Ed*, STAR TRIB., Dec. 9, 1996, at 1A, *available in* 1996 WL 6939943; Brent Israelsen, *Legislators to Tenure Lovers: Prove It Works or We'll Fix It; Tenure's Job Security in Question*, SALT LAKE TRIB., Dec. 9, 1996, at A1, *available in* 1996 WL 13845256; Ralph Reiland, *Q: Should Colleges and Universities Abolish Academic Tenure? Yes: Let the Magic of the Marketplace Invigorate the Sheltered Elites in the Ivory Tower*, INSIGHT MAG., Nov. 25, 1996, at 24, *available in* 1996 WL 11224946. I express no opinion on the merits of tenure per se. Perhaps abolishing tenure would improve higher education. My argument is that, whatever the law school's organizational structure, LRW instructors should be full members of the faculty with comparable opportunities to vote and control the future of the institution, comparable salary, titles, or other privileges (such as, sabbaticals, research assistance, release time) as every other professor. Of course, the LRW instructor with such privileges would have to assume correlative responsibilities.

lates to one being able to get a LRW teaching position even if one did not attend one of the top twenty "professor feeder schools."[170]

To get a somewhat broader perspective on the current requirements for LRW positions, I conducted an informal survey of legal writing professionals. I posted a message to two Internet mailing lists asking for information on academic, professional, and interpersonal qualifications for LRW positions.[171] My goal was to get a sense from LRW professionals—primarily LRW directors—of the characteristics of the people *they had known* who had successfully taught LRW. Thus, I was asking not for a "wish list" but for a sense of real experience. I received twenty-four responses from program directors across the country. While the survey makes no pretensions to scientific methodology, it does represent a fairly good cross-section of programs in terms of geographical location, particularly since many of the responding directors have taught LRW and often directed programs at one or more schools in addition to the school at which they currently work. The overall conclusions of the survey confirm my own personal experiences and impressions and reinforce anecdotal information gathered over twelve years in the LRW field concerning who succeeds.

1. Academic Qualifications

As to academic qualifications, it is true that one may well be able to obtain a LRW job with a degree from a less elite law school than would be required for a tenure-track job. The majority of non-LRW/non-clinical faculty are graduates of elite law schools. An American Bar Foundation study in 1980 showed that almost 60% of the nation's faculty had graduated

---

170. *See* Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. BAR FOUND. RES. J. 501, 507. In no particular order, the top 20 feeder schools would be: Harvard, Yale, Columbia, Michigan, Chicago, N.Y.U., Georgetown, Texas, Virginia, Berkeley, Pennsylvania, Wisconsin, Northwestern, Stanford, Iowa, Illinois, Minnesota, Cornell, Duke, and George Washington. *Id.*

171. The survey asked the following questions, which were not designed to elicit a "wish list" for the perfect LRW instructor, but rather to elicit information about the types of people who had been successful at teaching LRW. Author's Survey [hereinafter "1996 Survey"].

1. What have you *found* to be the ideal academic qualifications for a successful LRW professor?
2. What have you *found* to be the ideal professional background for a successful LRW professor?
3. What have you *found* to be the most important interpersonal qualities or skills of a successful LRW professor?
4. Are there any particular personality characteristics or interpersonal styles that tend to work against a LRW professor?
5. *In your experience*, are LRW professors expected to have more interpersonal skills—diplomacy, tact, niceness—than doctrinal faculty and, if so, could you give an illustration (for example, are complaints about LRWs treated as more serious by the administration than complaints about non-LRW faculty?)
6. If any of the above questions have led you to want to make any other comments about LRW characteristics, please insert them here.

Id. (survey and results in possession of author).

from fewer than 15% of the ABA-accredited law schools.[172] Ever since Professor Langdell of Harvard set out to professionalize law teaching and eliminate the taint of apprenticeship from legal training, actual practice as a lawyer historically has not been an important credential for full-time law teachers. Fossum's study indicated that 18% of the 3850 law teachers in her sample went into tenure-track teaching either directly from their J.D. or LL.M. program, or after clerking for a judge. The other 82% had engaged in some combination of practice, non-tenure-track teaching, and clerking for a median of five years before entering tenure-track teaching.[173]

Although law schools seem less concerned about their LRW applicants having graduated from an elite law school, this does not mean that LRWs do not need outstanding academic credentials. Usually they do. Seventeen out of twenty-five respondents in the 1996 Survey stated that the successful LRW teachers *either* had a high class rank *or* graduated from an elite law school, with four indicating that, in reviewing new applicants, they balance the rank of the school against the class rank. Nine respondents said law review or moot court participation was an important qualification. Four respondents found successful LRWs had some previous academic training in a writing-intensive field like English, composition, or journalism, in addition to the J.D.

2. Practical Experience as a Lawyer

Conversely, while having spent time practicing law tends to be a relatively unimportant job qualification for doctrinal faculty (especially at elite schools), it is important for LRW applicants. Twenty-one out of twenty-five respondents to the 1996 Survey indicated that experience as a practitioner was preferred; several indicated they would require anywhere between two and five years of practice.[174] Seven respondents prefer a background including law practice and a judicial clerkship. One director specifically commented that more practice was required of LRW teachers than of doctrinal

---

172. The top five "teacher producer schools" were Harvard, Yale, Columbia, Michigan, and Chicago, from which 33% of the nation's law professors had graduated. *See* Fossum, *supra* note 170, at 507. While these statistics are dated, there is little reason to believe that they have significantly changed, especially in light of the glut of teaching applicants and the dearth of teaching positions. *See generally* Richard White, *The Gender and Minority Composition of New Law Teachers and AALS Appointments Register Candidates*, 44 J. LEGAL EDUC. 424 (1994) (indicating 19.1% decline in number of law professors hired from 1991-1992 to 1993-1994).

173. *See* Fossum, *supra* note 170, at 510-11.

174. 1996 Survey, *supra* note 171. This job qualification was also found in a 1995 survey by Nancy Wright of Santa Clara University. Twenty schools out of 31 responding to Professor Wright's survey employed full-time LRW instructors. For the 1995-1996 school year, none of those schools were hiring 1995 graduates. Rather, all newly-hired LRW instructors had experience in the practice of law. Of 89 LRW instructors already employed at 18 of the responding schools, only three had as little as one year of practice. Most had between two and five years of practice; eight had six years or more. *See* Nancy Wright, Survey of First-Year Legal Analysis, Research & Writing Programs Taught by Full-Time Writing Faculty (1995) (unpublished survey in possession of author).

teachers, indicating that the low status of LRW in the eyes of the students was ameliorated somewhat by the added credibility an LRW teacher gained from having been in practice. Presumably, the students could rationalize that their teacher might not be scholarly, but at least she had succeeded at something—practicing law—and therefore was worthy of a certain amount of respect (though not necessarily as much respect as their doctrinal teachers).

3. Previous Experience as an Academic

Some directors found prior teaching experience had been a helpful qualification for a LRW teacher. Nine of the respondents preferred hiring LRWs with prior teaching experience; one said she would be willing to hire someone with a large amount of teaching experience and no time in practice. Another said that teaching was a plus, while she had found that litigation experience simply tended to make a person stubborn. Since, as discussed in the next section, many directors indicated that "flexibility" is an important personality trait for LRW teachers, stubbornness apparently would be unhelpful.

4. Personality Qualifications

Academic and professional qualifications may be only minimum threshold requirements, however, for an LRW candidate. Respondents to the 1996 Survey noted a wide range of *interpersonal qualities* were required for the highest chance of success as a LRW teacher—qualities that one cannot imagine being emphasized by a faculty hiring committee evaluating a non-LRW tenure-track faculty member. When asked what interpersonal traits they had found were ideal for a LRW teacher, respondents listed a sense of humor (7 responses); good people skills (4); good ability to work collaboratively with others (4); good listening skills or empathy (9); enthusiasm (5); accessibility (4); niceness, caring (4);[175] patience (6); and creativity (4).[176]

The successful LRW instructor must not only *possess* certain interpersonal traits; he or she must also be *devoid* of others. The traits most commonly mentioned as working against success as a LRW instructor included

175. 1996 Survey, *supra* note 171. One respondent indicated she had been criticized for not being "warm and fuzzy enough" because LRW teachers—especially women—were expected to be nicer than other faculty members.

176. *Id.* A review of the qualifications listed in three Placement Bulletins of the Association of American Law Schools ("AALS"), dated Sept, 6, 1996, Sept, 27, 1996, and Oct. 11, 1996, revealed no notices for tenure-track teaching positions listing or even intimating that interpersonal skills in relating to students would be employment criteria. Two notices for LRW teachers did refer to this aspect of the job. Columbia's LRW notice solicited people "drawn to the intensive work with students that characterizes a legal writing and research course;" the University of San Diego's notice included in its LRW job duties "counseling individual students." AALS PLACEMENT BULL., Oct. 11, 1996, at 10-11. A notice from Suffolk University Law School, although not specifically mentioning the need to work intensively with students, characterized their three-year-and-out LRW position as "demanding and requiring a full-time commitment." AALS PLACEMENT BULL., Sept. 6, 1996, at 11. Anyone familiar with the LRW field would decode this to mean "requires intensive work with students."

arrogance or an inflated ego (9),[177] and rigidity or inflexibility (8). Others, however, included having a short temper, being too wishy-washy, not being interested in students or in the job, being overly critical while not tempering the criticism with praise, and lacking confidence. Thus, "qualifications" for LRWs begin but do not end with academic competence. LRWs must also possess a high level of social skills.

B. Justification No. 2: LRW Instructors Do Not Have the Same Demands upon Them—They Do Not Work as Hard as Regular Faculty

Although non-LRW faculty may view LRW as a "lightweight" assignment, data on what LRW teachers actually do suggest that they work at least as hard as, and in many ways harder than, non-LRW faculty. The 1996 Survey results suggest that LRW teachers are expected to do far more than teach students correct grammar, punctuation, citation form, use of research tools, and perhaps some organization and analytical skills. They are expected to do all these things and, at the same time, walk a fine line on which they carefully balance a variety of possibly contradictory behaviors. They must be caring and accessible but still maintain control of their classes so that they preserve some professional credibility with their students. This line is made all the harder to walk because LRWs, lacking institutional status, may also be afforded a weaker presumption of professional competence by their law school administration and, while needing strong institutional support, they may receive weaker support than that given to non-LRW teachers.

Seventeen out of twenty-five people responding to the 1996 Survey answered affirmatively when asked whether LRW teachers are expected to have stronger or more interpersonal skills than non-LRW faculty. Apparently, any student complaints about LRW teachers suggested lack of those skills and thus the complaints were cause for administrative alarm. Some respondents suggested that the low status of LRW faculty made them targets for enhanced administrative scrutiny. Complaints about LRW teachers were sometimes treated as valid by an administration likely to minimize identical complaints about a doctrinal professor. Some respondents indicated that complaints about LRW teachers were not necessarily taken "more seriously," but that it would be easier to fire an LRW who drew student complaints. Several respondents commented that the administration would be relatively unconcerned if a doctrinal faculty member was inaccessible or did not show up for office hours, whereas such behavior from a LRW professor could be cause for serious concern.[178]

---

177. 1996 Survey, *supra* note 171. One can only imagine how many non-LRW teachers would be looking for new jobs if ego or arrogance disqualified them from teaching. One feminist journalist recently suggested that "[a] fair percentage of [elite law schools'] faculty could be characterized as full-blown egos on parade." DUSKY, *supra* note 148, at 117.

178. 1996 Survey, *supra* note 171. The worst anecdote came from a LRW professor (since moved on to tenure-track at another institution) about a complaint to the administration from a young first-year law student. The student, age 22, wrote to the administration explaining what was wrong with the LRW program. The administration's response was to call together all the

One gathers from this information, then, that a significant portion of a LRW teacher's *work* involves caring, flexible, creative, enthusiastic interaction with students, inside of the classroom and out. Work of this sort takes time and effort—time and effort that tenure-track faculty may dedicate to their own scholarly activities. Indeed, Professor Rombauer's full-time tenure-track colleagues at the University of Washington withdrew from their commitment to the LRW classes because the work was harder and more time-consuming than teaching their doctrinal courses.[179] A job requirement for "more effort" by a LRW teacher is consistent with research analyzing other types of women's work indicating that women reported exerting more effort than men while doing similar jobs.[180]

Since the status and wage differentials are not attributable to LRWs actually doing less work, what could account for the misperception that they are not really working? It may be that LRW work shares a characteristic common to work generally assigned to women—that is, the work comes to be viewed as a "support" function of the "real work" being done by men;[181] it may even be viewed not as "work" at all, but as "behavior" reflecting essential characteristics of women.[182] Once the work has been thus essentialized, the "work" becomes invisible and either under-compensated or not compensated at all.

Some insight into the attitudes toward LRW teachers can be gleaned from scholarship by and about academicians in the field of composition. An essay by University of California Professor Cynthia Tuell entitled *Composi-*

LRW instructors, who collectively had 16 years of teaching experience, and demand that they devise a solution to the law student's problems. The person relaying this story characterized the incident as professionally humiliating. This institutional posture of affording less credibility to those who lack a powerful position has been noted in other contexts. Rosabeth Moss Kanter has noted that "power begets power" and mentions that the external status of an employee can distort other (more powerful people's) perceptions. ROSABETH M. KANTER, MEN AND WOMEN OF THE CORPORATION 168 (1977). For instance, workers who come into a group already possessing higher external status were better liked. Also, they spoke (and were spoken to) more often. In contrast, those with lower external status were perceived as talking more than they actually did. Of course being of a minority race has almost paradigmatically subjected even professionals to humiliation as a matter of course. *See, e.g.*, Derrick Bell, *The Price and Pain of Racial Perspective*, *in* THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT 1038 (Michael Olivas ed., 1989) (describing how other Constitutional Law professors at Stanford took it upon themselves to give Bell's students "enrichment" lectures because they assumed that his unconventional approach to constitutional material evidenced not lack of a traditional point of view but, rather, lack of competence).

179. *See* Rombauer, *supra* note 134, at 407-09.

180. Denise D. Bielby & William T. Bielby, *She Works Hard for the Money: Household Responsibilities and the Allocation of Work Effort*, 93 AM. J. SOC. 1031, 1050 (1988).

181. *See* THE EXPERIENCE & MEANING OF WORK IN WOMEN'S LIVES 3 (Hildreth Y. Grossman & Nia L. Chester eds., 1990) (historical perspective on women's unvalued, silent work).

182. Ronnie J. Steinberg, *Social Construction of Skill: Gender, Power, and Comparable Worth*, 17 WORK AND OCCUPATIONS 449, 452-53 (1990) (indicating that employers will take advantage of skills women gain through domestic work by hiring them for low paying jobs in caretaking and housekeeping).

tion Teaching as "Women's Work,"[183] reveals parallels between the treatment of composition teachers and that of LRW teachers. Professor Tuell points out that composition teachers are not considered "normal" or "real" faculty. Rather, the course is a service course; thus, its teachers are tantamount to university "handmaids." As handmaids or housekeepers, the composition teachers clean up the comma splices, organize student discourse, and generally "unclutter" the students' writing so that the literature professors can be provided with papers that are well written and no trouble to read.[184] No authority is needed for the proposition that housework commands neither respect nor high wages.[185]

Moreover, those who reap the benefits of others' housework typically do not wish to view the effort involved in the work itself. Husbands traditionally have expected to come home to find "appropriately cooked food, charmingly served; clean clothes; clean, orderly, and refreshing spaces for bathing, sleeping, eating and socializing."[186] The "labor of love" behind this work was not in view at the end of the day. Businesses hire their janitorial staffs to work at night—in the morning, all is clean as if by magic. Likewise, it is far more pleasant to see the tidy results of a student's well-researched, well-organized, and well-written research paper than to be involved in the process of that paper's production.

According to Tuell, another facet of the composition teacher's low professional status is that composition teachers fill a "motherly" role.[187] Just as mothers nurture the biologically young, writing instructors nurture the "developmentally" young in the sense that they are in need of very basic instruction. Once that basic instruction is given, the skills must be practiced, evaluated, practiced again. During this process, the teacher/mother must stand aside and let the student/child shine.[188] Helping a student work through drafts of papers is indeed laborious and frequently requires that one sublimate her own ego.[189] It involves watching the student's struggle and pain; seeing the chaos of partially-formed thoughts in early drafts; and working with the student to help him/her figure out what he/she really thinks and

---

183. Cynthia Tuell, *Composition Teaching as "Women's Work": Daughters, Handmaids, Whores, and Mothers*, *in* WRITING OURSELVES INTO THE STORY: UNHEARD VOICES FROM COMPOSITION STUDIES 123 (Sheryl I. Fontaine & Susan Hunter eds., 1993).

184. *Id.* at 126.

185. For another discussion of writing teachers being viewed as the analogue of "household drudges," see ENOS, *supra* note 22, at 54 (commenting that "all teachers, regardless of gender, who primarily teach basic writing are classified the 'women' of the workplace . . . because, regardless of one's actual gender, everyone 'knows' that basic writing teachers are the ones who *only* 'clean up'").

186. PHYLLIS PALMER, DOMESTICITY AND DIRT: HOUSEWIVES AND DOMESTIC SERVANTS IN THE UNITED STATES, 1920-1945, 41 (1989).

187. *See* Tuell, *supra* note 183, at 129.

188. Hildreth Y. Grossman & Abigail J. Stewart, *Women's Experience of Power over Others: Case Studies of Psychotherapists and Professors*, *in* THE EXPERIENCE & MEANS OF WORK IN WOMEN'S LIVES 13 (Hildreth Y. Grossman & Nia L. Chester eds., 1990) (comparing "helping professions" to motherhood).

189. *Id.*

how best to express that so that the reader will be enlightened or persuaded. By the time the student has learned well, the work of the teacher has become invisible. The student simply produces coherent work for other teachers—teachers who never need to see the effort put into the finished product. Just as the composition professors can get students ready for the important work of writing papers for their literature professors, so can the LRW teachers get students ready for the important work of writing essay examinations or seminar papers for their doctrinal teachers.

The labor of composition and LRW teachers also evaporates from another standpoint. It qualifies as emotional labor—a type of labor that often lacks recognition as actual work, being seen instead as the effortless by-product that emanates from people who possess certain inherent qualities. This view enables an employer to avoid compensating for the work, since employees as a general rule are paid not for who they "are," but for what they "do." Professor Arlie Hochschild, in her book *The Managed Heart*, challenges the notion that emotional labor is not work. She defines emotional labor as work that "requires one to induce or suppress feeling in order to sustain the outward countenance that produces the proper state of mind in others."[190] Professor Hochschild illustrates emotional work's demands primarily through the job of flight attendant. Flight attendants, hired for their charm, are required to smile through fatigue, boredom, and even outright abuse, so that the passengers will feel calm and reassured throughout the flight and be happy enough with the airlines to fly with them again.

Because LRW teachers typically teach students in small groups, and because LRW teachers hold two or three times the number of office hours held by doctrinal teachers, they become more personally familiar with the students as individuals and often become de facto counselors. LRW has been analogized to a "home room" class for law students. This additional counseling role adds to the time and energy demands on the LRW teacher. Thus, just as flight attendants are asked to be positive, upbeat and endlessly reassuring to passengers, all the while making this appear effortless,[191] LRW teachers are supposed to make students feel comforted, understood, listened to, reassured that they are in competent hands and that the school cares about them as people.

Recall that qualifications of successful LRWs included the ability to *be* patient and enthusiastic. Patience and enthusiasm are not necessarily states of being; they can be characterized as activities that require energy. Invisible effort must be mobilized for one to appear, act, and sound patient when three students in a row have asked exactly the same question; to be enthusiastic even when the class is unenthusiastic or hostile; to listen carefully and empathetically while students are complaining about school, life, or, worst yet, one's class. Indeed, the time and effort required to engage in these activities

190. ARLIE R. HOCHSCHILD, THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING 7 (1983).

191. *Id.* at 8.

very well may rival that required for intellectual work like engaging in scholarship.[192] Scholarship, however, is visible, acclaimed, and compensated; student counseling is not. Indeed, counseling is likely to be rendered all the more invisible when students seek assurance that their concerns will be held in strict confidence.[193]

Emotional work aside, LRW teachers also have responsibility for what the administration would call their "real" work: the work of designing research and writing problems, teaching classes in writing, research, analysis, organization and citation form, and carefully evaluating their students' writing not only to assign grades but also to provide meaningful feedback that the students can use to improve their future work. As Professor Jack Achtenberg noted in his aptly-entitled piece *Legal Writing and Research: The Neglected Orphan of the First Year*,[194] "[t]he written work-product requires close correction and one-to-one, oral teacher-student involvement. This is an extremely difficult type of teaching. It is very time consuming, enervating and sometimes fruitless."[195] Typical LRW programs include four to eight writing assignments over the course of two semesters.[196] The workload in LRW has been described as "enormous, tremendous, backbreaking, incredible."[197] To illustrate the work in concrete terms, LRW professor and program director Jan Levine reported that during 1994-1995, while teaching thirty-two students and concurrently concentrating on his administrative responsibilities,[198] he reviewed at least 3,000 pages of student writing and met with students in scheduled conferences for more than 100 hours.[199]

In contrast, a doctrinal professor typically has one or two sets of final examinations to grade per semester, or one set of examinations and one set of seminar papers (with seminar classes usually limited to between ten and twenty students). In an especially good semester, she may have no sets of examinations from large classes but, rather, two sets of seminar papers. This grading load bears little resemblance to that of a LRW instructor. In the

---

192. "[N]ontenure-track faculty often shoulder heavier teaching loads and lack institutionalized rewards for publication . . . . " Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299, 2319 (1992).

193. For a discussion of the idea that first-year LRW teachers should not be placed into a counseling role, see Margit Livingston, *Legal Writing and Research at DePaul University: A Program in Transition*, 44 ALB. L. REV. 344, 349 (1980).

194. Jack Achtenberg, *Legal Writing and Research: The Neglected Orphan of the First Year*, 29 U. MIAMI L. REV. 218 (1975).

195. *Id.* at 223.

196. *See generally* Gale, *supra* note 76 (describing first-year writing programs and calling for expanding writing offerings beyond first year); Silecchia, *supra* note 151, at 253-57 (describing multitude of skills covered in first-year legal writing courses and citing numerous articles describing LRW courses at variety of schools).

197. *See* Gale, *supra* note 76, at 321, and sources cited therein.

198. Thirty-two students comprised a lighter teaching load than the more typical 50-65 students per LRW teacher. A reduction in teaching load is common for a writing program director whose administrative duties consume a considerable number of hours each week.

199. Levine, *Voices*, *supra* note 123, at 545 n.60.

interests of improving her approach to teaching, Truro Law School Professor Louise Harmon conducted an experiment. After studying learning theory, Professor Harmon hypothesized that some students who were performing poorly on examinations actually had a grasp of the material but could not demonstrate this under examination conditions. Therefore, she assigned a ten-page paper to her ninety property students, intending to use the grade on this paper plus the grade on an examination to assess her students' performance. When she evaluated the papers she found her hypothesis had been proved. The paper assignment did give some students who lacked typical examination skills a chance to succeed at presenting their knowledge and analytical ability. She writes:

> But for me as a person, and particularly as a writer, it was a resounding failure. The *grading almost crushed me.* I already had twenty long papers to critique and grade from my Jurisprudence class, and forty short reflection pieces from the same course, plus the ninety blue books from Property. The additional weight of ninety ten-page papers was more than I could bear. . . . Unlike the mind-numbing, routine, and rhythmic grading of blue books, these papers required *my full attention.* Each one represented hours of human effort. I *could not approach them with indifference.* I did not know how to take their words lightly, and so had to bear them heavily, subject to the earth's terrible pull of gravity. . . . It was a *desperate feeling, to watch the hours of each day slip away, paper by paper.* I felt as if I were moving through molasses, and no matter how diligent I intended to be, the time allowed was never enough. . . . When I raised my head to look around, I found myself angry, senselessly angry—about anything in my profession that I could find to be angry about.[200]

After only *one* encounter with intensive, exhausting, emotionally-draining paper grading, Professor Harmon found herself questioning why law teachers were subjected to so much grading. Why did law teachers have to correct their own bluebooks? Why couldn't teaching assistants do some of the correcting, as they so often do in other disciplines? Yet, this intensive paper grading, of hundreds of papers per semester—this crushing work, harder than bluebook grading, this work requiring full attention—is precisely the work done by LRW instructors for every law school that employs them. Every semester many LRW instructors "hit the grading wall" the way Profes-

---

200. LOUISE HARMON & DEBORAH W. POST, CULTIVATING INTELLIGENCE: POWER, LAW, AND THE POLITICS OF TEACHING 96-97 (1996) (emphasis added). To her credit, Professor Harmon (and her co-author, Professor Post) show real concern for the impact upon students of many aspects of typical legal educational practices. Professor Harmon's exhaustion from paper grading, for instance, is compounded by the seriousness with which she also grades her students' bluebook exams. She believes that "any grader should make up a model answer for an exam, draft an assessment sheet that reflects what is being tested for . . . [and] make written comments, and be able to justify each grade . . . . Every semester, it takes me several weeks to grade my exams . . . ." *Id.* at 98-99. Apparently, her grading takes more time than does that of several of her colleagues.

sor Harmon did this one time. Professor Harmon can choose to change her assessment techniques; LRW instructors cannot.

Without institutional power available for self-protection, teachers may find themselves assigned by default to undertake special challenges for which they are not specifically qualified, trained, or compensated. For instance, they may be assigned to "academic success" or "diversity enrichment programs;" coaching moot court teams; in short, just about anything that needs a residual dumping ground. One commentator recently suggested yet another task the LRWs might handle: meeting the needs of learning disabled law students ("LDs"). Some LDs have writing problems that may initially resemble the routine non-LDs but that will actually require extra corrective measures. A recent article in the *Journal of Legal Education* discussed these special needs and indicated that LRW teachers are the likely preliminary diagnosticians of learning disabilities that manifest themselves as writing problems.[201] If the institution does not have a special writing center to accommodate special writing disabilities, the LRW teacher may also become the de facto treatment provider. While the author of the article believes "[l]egal writing teachers should not be put off by the idea of yet another grading task,"[202] it may be hard for many LRWs to imagine dishing yet another responsibility onto their already overfilled professional plates.

Even as an institution officially ignores or devalues emotional work, the faculty and administration reap enormous benefits from delegating so much of it to the LRW faculty. First, in providing student counseling services, LRWs become unrecognized and uncompensated assistants to the Dean of Students, who would normally be expected to handle student complaints. Second, these de facto counseling services relieve non-LRW faculty from their jobs as de jure student mentors/advisors—the students get to know the LRW faculty best and often seek them out for guidance on aspects of their education and future careers that would normally be sought from their designated faculty advisor. Third, the LRW faculty can be serving an important public relations function for the school. Law school enrollments have been declining for the past five years.[203] As schools compete for students, prospective students become more demanding. When asked to evaluate schools, students tend to rate more highly those schools in which they feel they receive personalized attention.[204] The more of this personalized attention the

---

201. Susan J. Adams, *Because They're Otherwise Qualified: Accommodating Learning Disabled Law Student Writers*, 46 J. LEGAL EDUC. 189, 206 (1996).

202. *Id.* at 207-08.

203. *See, e.g.*, Frances A. McMorris, *Number of Law Graduates Slips; Schools Reduce Seats in Classes*, WALL ST. J., Nov. 29, 1996, at B-5, *available in* 1996 WL 11807765 (discussing several schools that have cut back on size of their entering class and noting that some schools are "aggressively" competing for top students).

204. Indeed, one new law school specifically aims to create a more humane, personalized environment for its students. *See* Fischer, *supra* note 163, and articles cited therein concerning Chapman University School of Law's mission. The importance of personalized attention can be seen by flipping through any edition of the *Princeton Review of Law Schools*. While these "survey" type publications are disdained by many faculty members and deans, prospective law stu-

LRW faculty can provide, the less needs to be provided by other members of the faculty and administration. To the extent that providing for these needs simply gets "tacked on" to the unarticulated and uncompensated duties of an LRW instructor, the school can continue to hold itself out as being highly responsive to students' emotional, as well as educational, needs without having to mobilize additional resources. The LRWs bear the costs; other faculty receive the benefits.

Not only does this work of LRW instructors have an institutional financial payoff, it also has an emotional payoff that enables faculty and administrators to take partial credit for things they are not actually doing. Consider this analogy: Two exceedingly busy parents with high-powered, demanding jobs hire a nanny to care for their children. The nanny is an outstanding surrogate parent, providing love, time, and attention. The child is well-adjusted, well-behaved, well-groomed. If the parents receive compliments on what a wonderful child they have, are they likely to say "yes, my nanny does a terrific job with him?" Or is it more likely that the parents will simply take the child's stellar development as a sign of their own excellent parenting, regardless of how hands-off it may have been? Similarly, even if the emotional work is primarily handled by the LRW faculty, the rest of the faculty and administration are likely to take credit for the students' sense of contentment—"look what a great job WE are doing for our students."[205]

---

dents, particularly those who know they are not candidates for elite schools, are likely to give them some weight in decision where to apply and where to attend.

205. Beyond the scope of this Article is a discussion of the ethical and political concerns suggested by women and minority non-LRW faculty either actively espousing or passively accepting the marginalized status and uncompensated work of LRW faculty. Their failure to protest inequality is reminiscent of middle-class women using the labor of lower-class (often minority) women in order to better themselves. *See* Evelyn N. Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 SIGNS: J. WOMEN IN CULTURE & SOC'Y 1 (1992). As Professor Glenn puts it,

> [i]n the domestic sphere, instead of questioning the inequitable gender division of labor, [middle-class women] *sought to slough off the more burdensome tasks onto more oppressed groups of women . . . . If the heavy parts of household work could be transferred to paid help, the middle-class housewife could fulfil her domestic duties, yet distance herself from the physical labor and dirt and also have time for personal development.*

Id. at 7, 8 (emphasis added) (citation omitted). A similar dynamic might be at work in law schools, making it to the advantage of non-LRW female or minority teachers not to work toward advancing the status of the LRWs. Since academic women and minorities have been called upon to do more than their share of the emotional work, it could be beneficial to have people with less institutional power onto whom they can "slough it off," freeing their time for the scholarship that is likely to count toward one's own professional advancement in the institution. For a similar point concerning the self-interest of English faculty members in keeping composition teachers marginalized, see Kristine Hansen, *Face to Face with Part-Timers—Ethics and the Professionalization of Writing Faculties*, *in* RESITUATING WRITING: CONSTRUCTING AND ADMINISTERING WRITING PROGRAMS 23, 26 (Joseph Janangelo & Kristine Hansen eds., 1995).

C. Justification No. 3: LRW instructors Do Not Publish and Thus Could Not Satisfy the Requirements for Tenure

While it is true that many LRW instructors do not write, this does not mean that they could not or would not write given institutional demands and support for scholarship. Most full-time LRW teachers are hired off the tenure track. Thus, writing is not their job. Moreover, their workload is structured to make writing prohibitively costly, both financially and personally. They may not receive institutional support such as research grants or research assistance to help them write. Their pay scale is such that they may have to use summers to work at other jobs to supplement their income. And, finally, without an obligation to write, they are unlikely to receive faculty mentoring or encouragement for scholarship.

Comparable work theorists have described a workplace phenomenon known as an "expectancy confirmation sequence,"[206] in which members of the workplace's dominant class decide on the "worth" of a job, then ignore data that contradict their preconceived notion of the job's value. Expectancy confirmation sequence may be at work in many law schools. When law schools create LRW jobs that overload their occupants with intensive work that leaves no time for scholarship, they set up an environment that will result in their expectations being satisfied. They see teaching LRW as non-intellectual work and its teachers as non-intellectuals. Making scholarship a practical impossibility enables the institutions to maintain their stereotyped vision of LRW teachers' value to the institution.[207]

In contrast, when someone is hired for a non-LRW position, the institution makes clear that writing is a key component of the job. It is expected. It is required. The senior faculty take seriously their responsibility to nurture the scholarly efforts of junior faculty. Senior faculty will encourage—if necessary, even hound—junior faculty to keep up with their scholarship. The administration structures salaries so faculty members can spend summers writing, not moonlighting. During the school terms, non-LRW teachers are not expected to spend inordinate amounts of time with their students. Nor are they expected to grade papers more than once a semester. Naturally, LRW jobs could also be structured to support and encourage scholarship, but they are not. If comparatively few LRW instructors write, the law schools may be far more to blame than any deficiency in the LRW instructor themselves.[208]

---

206. William T. Bielby & James N. Baron, *Undoing Discrimination: Job Integration and Comparable Worth*, *in* INGREDIENTS FOR WOMEN'S EMPLOYMENT POLICY 211, 221 (Christine Bose & Glenna Spitze eds., 1987).

207. *See, e.g.*, Steinberg, *supra* note 182, at 451 (describing employer control over production as result of unilateral choice by employer).

208. Arguably, the school can also take blame for the permanent "brake" that this lack of support for scholarship puts on the careers of those in non-tenure track positions. Reskin and Merritt, having noted that minority women had the highest percentage of non-tenure track starting positions in law schools, commented that "since the number of years in a particular rank can affect both salary and seniority, minority women are likely to carry *a lasting legacy* of their low-

As mentioned earlier, a few LRW positions are tenure-track. Holders of these positions, like holders of any tenure-track position, write. However, LRW instructors should not have to write *before* getting tenure-track jobs to prove that they merit being put on tenure track.[209]

D. Justification No. 4: Tenure's Purpose Is to Protect Academic Freedom; LRW Instructors, Being Mere Technicians, Have No Controversial Ideas Needing Protection

The need to preserve academic freedom has been a key factor in the development of the concept of academic tenure. It is not, however, tenure's sole purpose. Writing for the Commission on Academic Tenure in Higher Education, Professor William McHugh of American University mentions two other major features of tenure.[210] First, in addition to preserving academic freedom, tenure represents a kind of communal acceptance by one's peers, acceptance into the professorial guild.[211] "Rooted in the medieval guild, it entails a vow akin to the ministry or priesthood; hence, the very term 'professor.'"[212] Second, tenure provides job security as a way to promote institutional stability and loyalty and to reward professional service.[213]

It seems beyond cavil that LRW teachers would deserve and desire the peer acceptance, job security, and reward for service aspects accompanying tenure. But what about the contention that LRW teachers have no academic substance worth protecting? Perhaps LRW teachers propound no controversial academic ideas because they are institutional automatons? Perhaps the LRW's subject matter lacks any substance that could be deemed academic?

As to the first possibility, far from being devoid of controversial ideas, LRW instructors may be more subversive and controversial than many other faculty members.[214] Professor Duncan Kennedy argues that legal education, as traditionally conceived and delivered, is "ideological training for willing service in the hierarchies of the corporate welfare state."[215] LRW instructors

---

status starting positions" and "the years minority women spend off the tenure tack may unfairly depress their scholarly achievements." Merritt & Reskin, *supra* note 192, at 2319 (emphasis added).

209. Unless, of course, every member of the faculty has to write and publish before being put on the tenure-track rather than being hired on tenure-track based on their *promise* of future scholarship and then, upon production of scholarship, receiving tenure. Although non-tenure-track LRW instructors "should not have to write," it is worth noting that many of them have written. The LRW literature continues to grow, much of it written by LRWs not on tenure-track.

210. William F. McHugh, *Faculty Unionism and Tenure, in* COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE 194 (1973).

211. *Id.* at 195.

212. *Id.*

213. *Id.*

214. At most law schools, the head librarian is a tenure-track or tenured faculty member even though many of them do not teach at all and their scholarship may be more related to research technology, resources, and processes than to esoteric legal theories.

215. DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY—A POLEMIC AGAINST THE SYSTEM 1 (1983).

(along with clinicians) are among those most likely to challenge the hierarchical viewpoints of the doctrinal law faculty. First, LRW instructors are somewhat less likely than doctrinal teachers to have attended elite law schools and to have internalized those school's upper middle-class values. Additionally, LRW instructors know and care about precisely what the students are thinking and feeling about their legal education. And what the students are thinking and feeling is often at odds with the deeply held values of the doctrinal faculty concerning ideal legal education.[216] Thus, lack of controversial ideas does not justify granting LRW instructors tenure. Indeed, it may be quite the opposite—the ideas LRW instructors are likely to espouse may be *so* controversial as to be supremely threatening to the members of the entrenched academic hierarchy, making those members eager to keep the power that comes with tenure out of LRW instructors' hands.[217]

In the classroom too, LRW instructors regularly promulgate ideas through their selection of course material.[218] LRW instructors create hypothetical problems in which students often become immersed for an entire semester. Some of these problems raise difficult legal issues with profoundly disturbing moral, social, or ethical implications. Helping students identify and wrestle with the discomfort inherent in representing certain clients or espousing certain legal positions is an important part of a legal education and the LRW instructor, like every law school faculty member, needs to be able to make the difficult pedagogical choices necessary for navigating through these topics without fearing repercussions.

Writing instructors, in law schools and in universities, may view and value pedagogy differently than do faculty in many other disciplines. Much of the LRW literature (like much of the clinical education literature) focuses on learning theory, teaching techniques, and critiques of the traditional law school curricular structure and teaching methodology.[219] Again, these ideas can be threatening to old-line faculty members. The notion that law teachers should know more than they do about learning theory and teaching methods may, in itself, be politically sensitive. Some traditionalists might prefer to get

---

216. Former Yale Law School Dean Harry H. Wellington deplored the deprecation of law practice by ivory-towered academics, stating "students find themselves—or at least many do—much less interested than their instructors in the subject of their courses and worried, as a result of their mentor's disdain, about their own professional future." Harry H. Wellington, *Challenges to Legal Education: The "Two Cultures" Phenomenon*, 37 J. LEGAL EDUC. 327, 329 (1987). Dean Wellington goes on to suggest that tenure is what protects professors' positions despite their lack of sensitivity to students' needs to learn how to be a lawyer. *Id.*

217. "'In strong universities, assuring freedom from intellectual conformity coerced within the institution is even more of a concern than is the protection of freedom from external interference.'" Perry A. Zirkel, *Personality as a Criterion for Faculty Tenure: The Enemy It Is Us*, 33 CLEV. ST. L. REV. 223, 230 (1985) (quoting Kingman Brewster, *On Tenure*, 58 AM. ASS'N UNIV. PROFS. BULL. 381, 382 (1972)).

218. One former LRW instructor—long since tenured at another institution—recalls telling a former non-LRW professor, who indicated that LRWs did not need tenure because they did not need the academic freedom it protected, that she had not sought nor had she found a way to keep ideas out of her classroom.

219. *See* Hunter, *supra* note 147, at 72.

rid of the LRW instructor rather than face the difficult challenge of considering whether the "old way" is the best way.

The argument that the absence of rigorous academic content in LRW classes makes LRW teachers unworthy of tenure track status, seems insupportable in light of the fact that entire university departments are devoted to training doctoral students in just the academic areas that are the core of LRW instruction: composition and rhetoric.[220] The faculty in these departments are full members of their universities' academic communities. In 1993, there were 567 men and women on rhetoric and composition faculties at seventy-two colleges and universities. Only seventeen of these faculty members were non-tenure-track teachers.[221] Certainly, there are controversial aspects of the study of rhetoric and linguistics.[222] Linguists debate the politics of language standardization and its tendency to enable society's elite, with access to the best educational opportunities, to usurp the best career opportunities, thereby cementing their hold on the lion's share of society's rewards.[223]

For example, a controversial language issue arose at the end of 1996 concerning the Oakland, California school district's decision to designate "Black English" ("Ebonics") as a distinctive language with which school teachers were required to become familiar.[224] Within days of Oakland's decision, the Clinton Administration issued a notice refusing to consider Black English to be a second language.[225] LRW teachers are imposing on their students a requirement for "legal discourse written in Standard English." At one time this might have been a non-controversial aspect of the job; in today's diverse educational climate, it may not be. Moreover, perhaps an argument can be made that law students, or lawyers, should not be restricted to such a narrow range of expression in their legal documents. Without tenure, no LRW scholar could likely promote this position.

The essential point is that, with rare exceptions, full-time teachers in institutions of higher education are generally tenurable members of those institutions. The American Association of University Professors ("AAUP") guidelines recommend that all full-time teaching staff be tenure-track aca-

---

220. *See* Stuart C. Brown et al., *Doctoral Programs in Rhetoric and Composition: A Catalog of the Profession*, 12 RHETORIC REV. 240 (1994) (providing overview of 72 doctoral programs in rhetoric and composition studies).

221. *Id.* at 242. As might be predicted, 15 of the 17 non-tenure-track faculty members were female.

222. For a provocative analysis of how the science of linguistics is analogous to that of law, see PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC & LEGAL ANALYSIS 11-12 (1996) (noting that "it is logical to view linguistics as the precedent or more fundamental science of which jurisprudence would be but one instance, a species of the genus language").

223. *See generally* JAMES MILROY & LESLEY MILROY, AUTHORITY IN LANGUAGE: INVESTIGATING LANGUAGE PRESCRIPTION & STANDARDIZATION (2d ed. 1992).

224. Peter Applebome, *School District Elevates Status of Black English*, N.Y. TIMES, Dec. 20, 1996, at A18.

225. James Bennet, *Administration Rejects Black English as a Second Language*, N.Y. TIMES, Dec. 25, 1996, at A22.

demics.[226] This would include instructors. Indeed, in a 1969 statement expressing concern about universities hiring full-time teachers who were not eligible for tenure, the AAUP stated that:

> [A]ny person whom an institution appoints to a full-time teaching position should be treated as a candidate for tenure. . . . If an institution wants to exclude a doctoral candidate (or any other person whom it considers inadequately qualified for regular faculty membership and status) from tenure candidacy, it should not appoint him as a full-time teacher. . . . *[A]nyone who does an instructor's work should be given appropriate rank and privileges.* . . . In short, the special committee wishes to . . . refuse to grant that, for purposes of the 1940 statement, there is any such thing as a full-time teacher at a rank below that of instructor.[227]

AAUP's position is simple: Once an institution of higher education decides that a course is sufficiently important to its educational mission that someone must be hired on a full-time basis to teach it, that person is a member of the academic profession subject to its responsibilities and worthy of its privileges.

E. Justification No. 5: We Cannot Afford to Put LRW Instructors on Tenure-Track

There is no doubt about it—status and salary equity for LRW instructors would be costly, particularly if the instructors were given a workload with a low enough faculty-student ratio that they could satisfy all the requirements of tenure, including scholarship, committee work, and community service. LRW teachers are sometimes confronted with otherwise socially-aware, liberal-minded, but sad-eyed tenured or tenure-track colleagues who tell them: "It's such a shame that we cannot make all the LRW instructors equal, because you deserve to be; but it's just too expensive."

Of course, this is nonsense. It is not *impossible* to pay LRW teachers more money, but doing so requires a reallocation of resources. Resource reallocation typically causes some pain to those who must share what they previously hoarded. "We cannot afford to pay LRW instructors more" is a subterfuge for "we have chosen to have LRW instructors bear a disproportionate share of the school's financial burdens." Keeping LRW instructors off tenure track and defining them as "less than" the non-LRW faculty is a way of rationalizing and avoiding guilt about the *choice* that has been made to benefit from LRWs' continued undercompensation.[228]

---

226. AMERICAN ASS'N OF UNIV. PROFESSORS, ACADEMIC FREEDOM AND TENURE, 1940 STATEMENT OF PRINCIPLES AND INTERPRETIVE COMMENTS 3 (1967) (emphasis added). The principles indicate that any person who teaches full-time in an institution of higher education, regardless of her rank, should have permanent or continuous tenure after the expiration of a probationary period which should not exceed seven years.

227. AMERICAN ASS'N OF UNIV. PROFESSORS, REPORT OF THE SPECIAL COMMITTEE ON ACADEMIC PERSONNEL INELIGIBLE FOR TENURE 44 (1969).

228. Indeed, the LRW surveys indicate that law schools are going backward when it comes to LRW compensation. In the 1992 survey, only 12% of schools reported their regular faculty on average earned over $30,000 more than their LRW faculty. 1992 Survey, *supra* note 18, at 18. In

More creative solutions could be found for allocating a law school's financial burdens. Different distribution decisions are possible. For instance, schools could elect to stop hiring any new tenure-track faculty, regardless of the legal specialty, choosing instead to fill all new jobs with faculty on short-term, non-renewable contracts. LRW instructors who have been at institutions for some years could be given priority for tenured slots as they became available. This would spread the cost of providing high quality LRW instruction throughout the faculty, while still allowing faculty with no interest in teaching LRW to avoid doing so. They could not, however, avoid paying someone else to do the work—and paying what the work is worth. Thus, the LRW course could cease to be evaluated as an insignificant, tangential subject and its specialists could slowly take their rightful place as academic peers.

V. THE WARNINGS

> Is my viewpoint idiosyncratic, distorted, subjective? Had some warning arrived too late for me to heed . . . ? I find that the writers I read did not warn me about the dangers of teaching differently. More often than not, it was not their purpose to do so . . . perhaps unwittingly they downplay the actual experiences of real teachers, joining with the rest of the academy in causing us to lead "lives under cover."[229]

A. Warning No. 1: Prolonged Teaching of LRW May Be Hazardous to Your Emotional Health and Career Prospects

Vermont Law School's legal writing program director, Philip N. Meyer, has written a moving narrative describing his legal career, fourteen years of which have been spent teaching LRW at five law schools.[230] Nothing written about the role of the LRW instructor so exquisitely captures its bittersweet nature—on the one hand, the pain of second-rate status,[231] the exhaustion of grading papers,[232] the frustration at knowing there must be a better way to

---

1994, 51% of schools reported that high of an earnings gap. *See* 1994 Survey, *supra* note 15. Professor Ramsfield also points out the paradox of LRW salaries declining proportionate to that of regular faculty since LRW instructors typically have been practicing law for a number of years. While regular faculty salaries historically have been based on "years out of law school," that formula seems to evaporate when the salary of a LRW instructor is being constructed. Ramsfield, *supra* note 15.

229. Hunter, *supra* note 147, at 78.

230. Philip N. Meyer, *Confessions of a Legal Writing Instructor*, 46 J. LEGAL EDUC. 27 (1996). Professor Meyer's gypsy-like existence was required because the schools at which he worked had caps on the number of years one could teach LRW.

231. Writing about his experience during an interview for a non-LRW teaching job, Professor Meyer says, "I felt that, at least in this man's eyes [a law professor at the hiring law school] I was merely a mock-teacher, a pretender, completely second-rate. . . . I knew . . . that every year I had less chance of securing a tenure-track slot." *Id.* at 28.

232. *Id.* at 38 ("[I]t was painful work. . . . The same thing over and over and over. Like penance.")

teach writing but not having the institutional support to do it;[233] on the other hand, the joy of helping students gain power and confidence in their ability to write, of giving them some structure during what might otherwise be a chaotic first year; of comforting the psychologically afflicted,[234] of knowing how much one's work will ultimately count once students have become lawyers.

LRW instructors are often denigrated for being too practical. I plead guilty—I am a realist. Law schools *should* change; a few law schools *have* changed; maybe more law schools *will* change.[235] In the meantime, however, I remain particularly concerned about the number of women in dead-end LRW jobs and the potential hazards for them of remaining in such jobs for any significant period of time. Some women may have "settled" prematurely on a career in LRW without having had any opportunity to try their talents in other arenas. The question is whether the schools can change before the negative aspects of being in a low-status job takes an irreversible toll.

Literature on women in the workplace highlights significant dangers to self esteem and professional opportunity that can exist or develop for some LRW instructors. These personal dangers may not concern law school faculty members who adequately benefit from some of their colleagues remaining subordinated. They may not concern law school deans, who keep their eye on the bottom line. But they concern me; they should concern LRW instructors. Therefore, I outline them here.

As noted above, teaching LRW makes emotional and physical demands. Regardless of how rewarding the LRW teacher may find the general field of LRW and the specific teaching and counseling activities of LRW instructors, the question remains whether jobs in LRW have a negative impact on professional development. I am using the term "professional development" in the sense of affording opportunities for vertical movement or horizontal movement within academia—opportunities either to broaden the range of one's

---

233. *Id.* at 39 (discussing author's anguish over teaching principles and processes in which he did not fully believe).

234. "With some students, the conferences were deeply psychological, like therapy sessions with the lost, the desperate, and the confused (a good title, perhaps, for a paper about legal writing: 'The Lost, the Desperate, and the Confused.')" *Id.* at 38.

235. Though, along with long-suffering Job, one may well ask "how long [Lord] will ye vex my soul?" *Job* 19:2. Ironically, one factor that may slow down change is recent action by the American Bar Association that afforded some professional recognition to LRW instructors. ABA-accredited law schools may now "count" LRW instructors who are not on tenure track or "its equivalent" as 0.7 of a full-time faculty member for purposes of calculating faculty-student ratios. ABA STANDARDS—INTERPRETATION 402(4)(1)(A)(ii) (1996); *cf.* U.S. CONST. art. I, § 2, cl. 3 (deeming "free persons" as one person and slaves as three-fifths of a person). If schools are paying LRW instructors less than 70% of the salary of a tenure-track entry-level professor, which is not uncommon, then it may be in the schools' economic interests to bolster their faculty-student ratio with cheaper LRW bodies. Previously, when LRW faculty could not be "counted" at all, there was political pressure to completely allocate money out of the LRW program and pour it into a tenure-track position. If the school needed to offer LRW instruction, this political pressure could have tipped the scales in favor of making an LRW slot itself tenure-track so LRW could be taught *and* those who taught it could be counted.

teaching interests or to attain more status within one's own law school or another.

In my view, teaching LRW can seriously undermine professional opportunities for LRW teachers in schools when the jobs are not tenure-track, and afford neither the opportunity for obtaining a graduate degree nor the opportunity ever to teach any courses other than the required first-year LRW course. If one teaches LRW year after year, one is gaining experience in nothing but teaching LRW. One can therefore get stigmatized, categorized, and locked in. I do not deny that professional goals, needs, and interests vary. I know LRW teachers who have taught non-LRW classes and prefer LRW; I know non-LRW teachers who have taught LRW and would never want to teach it again; I know teachers who combine LRW teaching with non-LRW teaching and enjoy the unique challenges of each. But I also know LRW teachers who occasionally think it would be interesting to try their hand at teaching another subject but who are prohibited from doing so by the structure of their school's LRW program and the way the LRW teachers' functions are defined. Some law schools' policies are so rigid that they would deny the chance to teach a non-LRW subject to a LRW teacher with outstanding student evaluations in favor of turning the class over to a neophyte adjunct professor.[236] This prohibition keeps the LRW instructor in her place; if she doesn't experience anything but teaching LRW, she cannot desire to do anything else (and may become convinced she is incapable of doing anything else).[237]

While it is true that many people wholeheartedly assert they enjoy teaching LRW and have absolutely no desire to teach anything else, studies have shown that aspiration can be shaped by more than internal factors.[238]

---

236. This professional debasement can sink to low depths indeed. I have known women who, after leaving LRW, talked of having been "battered" by the institutional hostility toward the subject and lack of respect afforded its teachers. Another wondered how her former tenured and tenure-track colleagues "dared" to look down upon her. An environment this debilitating arguably could be characterized as a "hostile working environment." Feminist theorist Annette Kolodny, writing about hostility toward feminism in the academy, recently coined the phrase "antifeminist intellectual harassment to designate policies or behaviors that, inter alia, create 'an environment in which research, scholarship, and teaching pertaining to women, gender, or gender inequities are devalued, discouraged, or altogether thwarted.'" Annette Kolodny, *Paying the Price of Antifeminist Intellectual Harassment*, *in* ANTI-FEMINISM IN THE ACADEMY 3, 10 (VeVe Clark et al. eds., 1996). It may be time to coin a new phrase: "anti-LRW intellectual harassment."

237. It is worth asking why law schools are so resistant to allowing their LRW teachers, many of whom have experience as practicing attorneys, to get out of the LRW classroom and into another. One reason might be for non-LRW teachers to maintain their own sense of superiority. Each professor is likely to be convinced of the superiority of his own specialties and worried that once an LRW instructor sampled the Parisian delights of teaching, say, securities regulations, she could nevermore be kept "down on the LRW farm." It might be quite a blow to a doctrinal professor's ego to realize that someone else found his choice of subject matter dreary or useless.

238. I am aware of the dangers of using the term "aspiration" in discussing the possibility of an LRW's interest in moving out of LRW into a doctrinal field or in combining the two. I do not wish to imply that, objectively, doctrinal specialization is superior to specializing in LRW. It is,

Actual or perceived opportunities for advancement play an enormous role in shaping aspirations.[239] Women, having traditionally had fewer and narrower professional opportunities, may enter the academy with a narrower vision than men of their own potential.[240] Thus, someone who has taught only LRW may very well imagine she would like to teach LRW—and nothing but LRW—forever. No doubt some people DO want to teach LRW, and nothing but, forever. But how is one to know whether teaching other courses would be as satisfying as, or even more satisfying than, teaching LRW if one never has any opportunity to experience teaching another course? Studies have shown that a significant number of women, when given a chance to pursue non-traditional work, have found it suits them.[241] For instance, during World War II many women left their homes or their traditional women's jobs, such as food service or domestic work, to become factory workers. After the war, not all were eager to return to their former jobs, which commonly were less intrinsically rewarding and certainly far less remunerative.[242] The same might occur[243] if LRW teachers were given the chance to teach other subjects, especially subjects that not only cover different material from LRW but also subjects requiring a different type of pedagogy from LRW. LRW is, after all, process-oriented. Many other courses are more focused on content.

When faced with attitudes of academic colleagues indicating that one is dedicating oneself to a dull, inferior field, it would be easy for one to internalize the message that perhaps the field *is* somewhat less intellectually rigorous than other areas of legal specialization and, since it appeals to her, she must somehow be similarly inferior and not cut out for these other positions that the "academic experts" have deemed more intellectually stimulating. Even the United States Supreme Court has acknowledged that experiencing

---

however, different. Moreover, most law teachers view doctrinal specialization as superior to LRW teaching. My concern is that LRW teachers may suspect that perhaps LRW *is* somehow a lightweight task and begin to think that, even if they wanted to teach something else, they would be incapable of doing it.

239. *See* Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1816-24 (1990), and sources cited therein (discussing how preferences for various jobs can be shaped by opportunities to apply for and actually perform those jobs).

240. *See generally* SHIRLEY S. ANGRIST & ELIZABETH M. ALMQUIST, CAREERS AND CONTINGENCIES: HOW COLLEGE WOMEN JUGGLE WITH GENDER 125-45 (1975).

241. See the discussion of the stabilization of work role identity in MARY L. WALSHOK, BLUE COLLAR WOMEN: PIONEERS ON THE MALE FRONTIER 115-53 (1981). For an impressive personal narrative of the effects of opportunity on aspiration and achievement, see KATHARINE GRAHAM, PERSONAL HISTORY (1996). Ms. Graham, the renowned publisher of the *Washington Post*, who was responsible for the paper's national prominence, lived for years as a dutiful unassuming and voiceless woman, silenced by the emotionally-disabling attitudes of her husband and mother, both of whom viewed and treated her as inconsequential. When her husband died, she assumed control of the newspaper "temporarily," while she found someone to run it. Instead, she found she enjoyed and excelled at the work. The rest, as they say, is history.

242. *See* RUTH MILKMAN, GENDER AT WORK: THE DYNAMICS OF JOB SEGREGATION BY SEX DURING WORLD WAR II 101-04 (1987).

243. And then, again, it might not. One cannot help but wonder what fears fuel doctrinal faculty's resistance to allowing LRW professors to teach even the most basic non-LRW courses.

lower status and being viewed and treated as inferior can affect one's self-perception.[244]

One female full professor, a Ph.D. in rhetoric and composition, described the erosion of her sense of self-worth that followed her being subjected to the kind of "academic battering" by her literature professor colleagues that LRWs commonly receive at the hands of doctrinal faculty. Although she had a distinguished academic record; although she finished her doctorate in fewer than three years, passing anonymous doctoral prelims with distinction; although she had published in major composition journals; and although she created and ran a writing center at a university, she was assigned to masters level courses, rather than doctoral level theory and research courses. These latter courses were given to the male composition teachers, on the ground that they were "more rigorous."

> I did begin to wonder whether I might not be as rigorous as other faculty. Perhaps I had lost something in all those years of directing the Writing and Learning Center. . . . I would think to myself "perhaps it's just me. Many other women have great power in their departments. . . ." Now I don't think so. I had reason to be paranoid.[245]

Similarly, a LRW instructor viewed and treated as a mere technician, may begin to view herself as little more.

Law school teachers increase their human capital value by gaining experience in teaching a variety of subjects and also by producing publishable scholarship. Law schools, however, structure the typical LRW job so that it consumes significant amounts of the time and energy one could otherwise use for producing the type of in-depth analytical scholarship traditionally respected by the academy. A LRW teacher with responsibility for creating teaching materials is already researching and writing each semester in order to produce new course materials.[246] Once the semester is underway, the LRW teacher grades papers and consults with students for countless hours. These demands persist year after year, regardless of how many times the course has been taught. A doctrinal teacher, with fewer required office hours and little to no grading during the semester, can devote time left over after classroom teaching and lesson preparation to his or her own scholarly activities. Few LRW instructors know the meaning of "leftover time."

While the cautionary comments in this section apply to men and women alike, one factor suggests that women may wish to exercise special caution in accepting a LRW position. Women frequently report feeling different, infer-

---

244. Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954) (discussing impact of segregation on African-American children; concluding that separation denoted inferiority which retarded educational achievement).

245. ENOS, *supra* note 22, at 35-36.

246. A more expansive and creative definition of scholarship could, of course, be instituted—a definition that would enable anyone producing course materials to "count" them as scholarship. *See* ERNEST BOYER, SCHOLARSHIP RECONSIDERED: PRIORITIES FOR THE PROFESSORIATE (1990).

ior, incompetent, and disempowered even while still in law school.[247] Thus, women law graduates may begin their professional careers already "disadvantaged." A non-supportive working environment can only exacerbate these women's doubts and fears. If, however, women doubting their competence can position themselves in jobs where they receive every opportunity to use their full range of abilities combined with support and encouragement for doing so, their personal recognition and use of their full abilities may increase.

Unfortunately, academia is not an especially supportive working environment for women. The ABA Report on Women in the Profession noted that women in law schools continue to experience "debilitating gender bias."[248] Women faculty members, regardless of their discipline or their institutional status, encounter credibility problems with students and are subject to more demands than their male counterparts.[249] Students are more likely to treat female faculty with disrespect.[250] Women using the Socratic method are likely to be labeled "bitchy" or "ball busting" when the men using it would simply be considered tough or smart.[251] Women faculty receive more negative evaluations from students, who apparently expect them to be nicer than men and who penalize them with harsh evaluations if they frustrate these expectations.[252] Because there are fewer women on law faculties, they may be asked to undertake more committee work or more nurturing tasks like mentoring students, since men and women students may view women faculty as more accessible.[253] Not uncommonly, female teachers' intellectual abilities and contributions are denigrated, for instance by a discounting of their scholarship as being overly experiential or as (apparently inappropriately) dealing with female issues.[254]

Just as women law professors tend to be evaluated more harshly than men, LRW teachers tend to be evaluated more harshly than non-LRW teachers. Thus, women teaching *anything* in a law school and men *and* women teaching LRW are held to higher standards of nurturing, caring, and niceness, receive harsher criticism,[255] and may be subject to higher institutionally-sanc-

---

247. *See* Banks & Gross, *supra* note 162, at 529-34; *see also* Guinier et al., *supra* note 162.

248. ELUSIVE EQUALITY, *supra* note 2, at 1.

249. For a moving essay on the academic career of a now-retired female law professor, see Ellen K. Silencer, *The Story of a Self-Effacing Feminist Law Professor*, 4 J. GENDER & THE LAW 249 (1995) (explaining how she "fell into" a law career and describing her painful struggle to achieve academic equality and respect within the legal academy).

250. This problem is not unique to law teaching. *See* AISENBERG & HARRINGTON, *supra* note 158, at 75 (discussing women's concerns about negative student reactions to them as teachers).

251. ELUSIVE EQUALITY, *supra* note 2, at 25.

252. *Id.* at 32.

253. *Id.* at 27.

254. *Id.* at 31-32; *accord* AISENBERG & HARRINGTON, *supra* note 158, at 105; Carl Tobias, *Engendering Law Faculties*, 44 U. MIAMI L. REV. 1143, 1150 (1990).

255. For a discussion of women faculty members' extra difficulties in overcoming the presumption that they are incompetent to teach law, see Christine H. Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333 (1996).

tioned demands on time and energy than a male doctrinal teacher.[256] But, while male LRW teachers who move into doctrinal teaching should be able to escape these extra burdens, women cannot, or at least not entirely. Thus, a woman may wish to consider seriously whether to undertake a compound burden of being both female (and therefore presumptively less able) and also a woman in a conspicuously lower power position—both for her own sake[257] and also for the sake of the female law students for whom she is a professional role model.[258]

Besides being subject to the various challenges of LRW outlined earlier in this paper, an LRW instructor, as a member of a marginalized "academic minority" will be called upon to do yet one more type of work in order to preserve her personal dignity. University of California Professor Angela Harris has called this additional type of work "education work."[259] Education work is defined as "the private, interpersonal work of fostering empathy for minorities."[260] While Professor Harris focused on educating non-minority academics about their stereotyping and disrespectful attitudes toward racial and ethnic minorities, anyone who has spent much time as a non-tenure track LRW instructor will recognize the process she describes. Every time a non-LRW professor tells a LRW professor that

- he must surely get bored in a field that offers so little intellectual stimulation;
- she is good enough to get a "real" law teaching job and should go out and look for one;
- his work is remedial and repetitive;
- there is no variety in LRW; or
- there is no scholarship concerning LRW,

256. *See, e.g.*, Shirley N. Garner, *Transforming Antifeminist Culture in the Academy*, *in* ANTIFEMINISM IN THE ACADEMY 201, 212 (VeVe Clark et al. eds., 1996) ("Regardless of their positions, women tend to feel overworked, undervalued, and peripheral in their departments or units . . . [t]here are persistent problems of 'hidden' workloads for women. . . . Average female teachers are sometimes judged more harshly than their average male counterparts . . . .").

257. Women in the legal profession can ill afford jobs threatening to their self-esteem. Studies have shown that women's self esteem begins to suffer during law schools. Forty percent of women but only 16% of men reported feeling less articulate and intelligent after attending law school. ELUSIVE EQUALITY, *supra* note 2, at 12; *see also* Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 334 (1994) (reporting on survey of women law students and showing women exhibited greater erosion in self-confidence as result of legal education than did men).

258. ELUSIVE EQUALITY, *supra* note 2, at 7 (expressing opinion that women must become more prominent in academy partially because of their important position as role models for future lawyers).

259. Angela P. Harris, *On Doing the Right Thing: Education Work in the Academy*, 15 VT. L. REV. 125 (1990).

260. *Id.* at 125.

the LRW instructor feels the alienation and exhaustion[261] that, according to Harris, accompanies the task of educating colleagues.[262] After all, when expressed directly to a LRW teacher, preconceived negative ideas about LRW are not experienced as theoretical musings about the field. Someone who has been teaching LRW for a decade and is then told how dull the field is can only interpret this to mean that "You, too, must be incredibly dull to have stuck this out for so long." Non-LRW instructors frequently make comments like, "You know, I have no idea what you people do over in the legal writing department." When asked, "Would you like to know, because I'd be happy to tell you?", a common reaction includes glazed eyes and rapid retreat. The LRW then faces a choice whether to squander "education energy" trying to defend herself and her field or to retreat once more into the silence common to women and minorities in the academy. After all, the academy places a premium on collegiality. Anyone who is given the strong mandate to "make nice" that LRW instructors receive will undoubtedly find herself reluctant to upset collegiality by being confrontational about her own professional debasement.

It would be misleading to leave the reader with the idea that there is absolutely no external support for LRW professionals. There is some. LRWs are starting to organize politically. In 1995, a group of LRW directors met for the first time to discuss ways to mobilize group strength to fight for better professional recognition and working conditions for LRW instructors. The result of that gathering was the creation of The Association of Legal Writing Directors ("ALWD"). The leaders of this organization have taken up arms in the battle on behalf of LRWs. But make no mistake—a battle it is and will continue to be. Teaching LRW is a battle; directing a program is a battle.[263] One needs to evaluate how many battles she can or wishes to wage.

B. Warning No. 2: Salvation May Not Lie in Program Administration (and See Warning No. 1)

If a non-tenure track LRW teacher has a good teaching record, she may aspire to the one remaining rung on the job ladder—the job of a LRW Program Director. While exact figures are not available, it seems likely that at least 135 law schools have some sort of legal writing program director.[264]

---

261. *Id.* at 133. Indeed, since the job of writing this Article itself has been educational work on behalf of LRWs, I can personally attest to the alienating and exhausting nature of the enterprise.

262. Again, the same need for "education work" occurs in the relationship between rhetoric/composition professors and literature professors in university English departments. One tenure-track female professor told Professor Theresa Enos that it is "'demoralizing' . . . when comp people must defend the view that composition is a legitimate element in English departments. It's tiring and discouraging to be seen as a 'stepchild' of literature. The division between composition and literature is counterproductive to collegiality . . . ." ENOS, *supra* note 22, at 39.

263. *See* Warning No. 2, *infra*.

264. THE POLITICS OF LEGAL WRITING: PROCEEDINGS OF A CONFERENCE FOR LEGAL RESEARCH AND WRITING PROGRAM DIRECTORS 12 (Jan M. Levine et al. eds., 1995) (comments of Professor Levine in Plenary Session: Status and Salary). Professor Levine notes that about 83

Professor Levine noted that the directors were tenured or on tenure-track at approximately 40% of the schools. Thus, one's statistical chances of being on a tenure-track increase if one lands a director position. While the job of tenure-track program director is complex and has some significant burdens not found in doctrinal tenure-track jobs,[265] it at least affords status parity and presumably wage equity with other faculty members.[266]

More problematic are the majority of director positions, which are not tenure-track. Commonly, directors in these positions continue to have full responsibility for teaching LRW classes and counseling students. In addition, the director must hire and train LRW teachers, cope with the low morale of the LRW teachers, mediate between LRW teachers and their students and between LRW teachers and the administration. Most disturbing, the director may have to do all of these things without wielding any real power or authority in the institution.

In her landmark study of organizations, Rosabeth Moss Kanter analyzed the dynamics of organizational power.[267] Kanter defines power as the ability to "mobilize" institutional resources[268] and notes that managers without power are typically held in low esteem by subordinates, even if the managers have excellent people skills. Having a nice, caring, powerless boss who listens empathetically is not as satisfactory as having a boss with power.[269] Kanter defines powerlessness as having a "right to command" but lacking "informal political influence, access to resources, [and] outside status."[270] A manager is powerless if she cannot help those she manages to advance; if her position does not allow her to take risks; and if her authority can be undermined.[271] Moreover, "[p]eople who reached dead ends in their [own] careers

---

schools of the 130 responding to the 1994 LRW survey have program directors. Assuming that this 63% would be accurate for the 178 ABA-accredited law schools, then about 114 schools would have legal writing directors. *But see* Ramsfield, *supra* note 15, indicating that 83% of the schools responding to the survey have program directors. This percentage would suggest that as many as 147 schools could have program directors.

265. *See* Levine, *Voices*, *supra* note 123, at 544-48 (discussing particular problem of having to meet all tenure criteria of non-LRW/non-administrator faculty while being given no credit toward tenure for administrative work).

266. If not wage equity, then at least a substantially higher salary than non-tenure-track LRW teachers. The 1994 LRW survey results showed salaries for full-time tenure track LRW teachers as follows: Two were paid between $40,000 and $50,000; seven between $50,000 and $60,000; three between $60,000 and 70,000; two between $70,000 and $80,000; and one over $80,000. In contrast, most full-time non-tenure-track LRW teachers earned $40,000 or less. Fourteen earned between $25,000 and $30,000; 40 earned between $30,000 and $40,000; 14 earned between $40,000 and $50,000; four earned between $50,0000 and $60,000; and one earned over $60,000. 1994 Survey, *supra* note 15, at questions 43 & 44. Directors' salaries tended to be higher, with 47% of directors earning $40,000 or more and 33 directors earning $60,000 or more, with 11 directors earning over $80,000. Since 43 of the directors responding were tenure-track, it seems likely that the highest salaries were paid to them.

267. KANTER, *supra* note 178.

268. *Id.* at 247.

269. *Id.* at 170.

270. *Id.* at 186.

271. *Id.* at 187-88.

also rapidly lost power, since they could no longer promise gains to those who followed them and no longer had the security of future movement."[272] Kanter found that, as leaders, the powerless were handicapped. Subordinates directed their institutionally-caused frustrations at the powerless leader and resented the boss benefitting from having the "better" job of "boss" while being unable to assist the subordinate in moving up the organizational ladder.

The non-tenure-track LRW program director is likely to fit the powerless leader paradigm. She will be at a dead-end in the institution. Unlike full tenured teachers, who dead-end at the top of the academic hierarchy, the director dead-ends on a sidebar, where she works in stranded isolation.[273] Even in his book criticizing the tenure process, sociologist Jon Huer acknowledges how valued is tenure by those having or seeking it:

> For a typical professor, the pinnacle of academic life is the achievement of tenure. His success or failure is no more singularly expressed than through his tenure status. Through tenure he defines his career milestone and secures his elementary economic comfort. It is no overstatement to say that he lives for tenure and dies without it.[274]

Or, as another commentator remarked: "Tenure is so important because it connotes acceptance by one's peers at the school."[275] Thus, the non-tenure track director is truly out-of-step. This can create or exacerbate the director's isolation and ineffectiveness.

She is isolated inside the institution because she lacks similarly-situated professional colleagues. She is not a true peer of untenured tenure-track faculty. They are "living for" tenure and preoccupied with satisfying its prerequisites; she is preoccupied with a myriad of administrative tasks.[276]

---

272. *Id.* at 188.

273. *Id.* at 168. Isolation is an especially potent stress factor. Kanter notes that being a "token" in the organization (for instance, a director with a long-term contract while the rest of the LRW staff are on short-term contracts that have a limit on the number of times they can be renewed) can create such stressful interaction that the token can feel more stress when socializing with the dominant group (which should be the time to relax) than when working. *Id.* at 238.

274. JON HUER, TENURE FOR SOCRATES: A STUDY IN THE BETRAYAL OF THE AMERICAN PROFESSOR 3 (1991).

275. DUSKY, *supra* note 148, at 85.

276. One can analogize the LRW director's position to that of a university department chair, a position that involves exercising numerous skills and juggling competing demands. For a discussion of the need for real institutional power in order to handle the demands of chairing an academic department, see ALLAN TUCKER, CHAIRING THE ACADEMIC DEPARTMENT: LEADERSHIP AMONG PEERS 1-26 (1984). Tucker lists the following 28 possible roles that chairpersons are likely to assume at one time or another in handling their responsibilities: teacher, mentor, researcher, leader, planner, manager, advisor-counselor, mediator-negotiator, delegator, advocator, representer, communicator, evaluator, motivator, supervisor, coordinator, anticipator, innovator, peacemaker, organizer, decision maker, problem solver, recommender, implementor, facilitator, entrepreneur, recruiter, peer-colleague. *Id.* at 4. LRW directors, too, must juggle some or all of these roles. For more details of a director's job, see Arrigo-Ward, *supra* note 157, at 571-75; Levine, *Directing*, *supra* note 123, at 613-38.

Though she may stay at an institution so long that she has more seniority than some of the tenured faculty, she is not one of them and therefore lacks the informal networking that occurs when tenured faculty gather in committees open only to them (typically for faculty retention and tenure decisions). With the exception of association with other LRW professionals, she may also be completely isolated outside of the institution. She may not even have any type of academic title that is recognizable by non-LRW faculty in other schools or within her own university.[277]

Besides being isolated, she can be rendered less effective by her lack of institutional status. First, she may need to be overly cautious, able to take few risks because the administration at many schools, as noted earlier, virtually command the legal writing program to run invisibly and silently.[278] Risk-taking means making the occasional mistake. Mistakes are likely to cause visible and audible student unrest. Being powerless (or at least power deficient) also renders the director vulnerable to potentially painful political maneuverings. Her authority may be undercut by her department members bypassing her and going directly to the tenured faculty or the administration to get rulings on decisions that the director is powerless to make. This is, of course, no problem if the director approves of the ruling. It is a problem when the director, had she had the power, would have ruled differently.

Finally, if the director should develop scholarly interests and find the time and energy to pursue them, she may be unable to engage faculty mentors, since there is nothing to "mentor" the director into—she is going nowhere in the institution. A potential faculty mentor may resist expending valuable time and energy on someone who will never become a full professional colleague. Thus, one may want to be wary of accepting a directorship without tenure potential.[279]

The director's job is stressful enough. She can be subject to a variety of strong competing demands[280] from at least the following quarters:

- her own students to whom she must give the same amount of professional and emotional attention as do the other LRW teachers;
- her LRW staff, to whom she owes time and support;

277. I am not alone in having killed a potential conversation with another academic by replying "LRW" when asked, "What is your field?" Several LRW colleagues have mentioned what a show stopper this answer is.

278. Jan Levine quotes one director as saying "[i]f there are *no problems*, the school is happy and *not interested* in administration. My autonomy is total, *as long as there are no complaints*." Levine, *Voices*, *supra* note 123, at 547 (emphasis added).

279. For a discussion of why LRW positions are worthy of being considered tenurable, see *supra* notes 89-114 and accompanying text.

280. For a general discussion of the stress accompanying multiple competing job demands, see Robert L. Kahn & Robert P. Quinn, *Role Stress: A Framework for Analysis*, *in* MENTAL HEALTH AND WORK ORGANIZATIONS 50, 50-115 (1970).

- the administration that wants her to keep the program "under control."[281]

Keeping the program under control can mean dealing with other LRW teachers' disgruntled students as well as her own. Trying to accomplish all these jobs is taxing even if one has real power. Doing them while realizing one is professionally sidelined can, over time, result in depression, disengagement, a feeling of lowered commitment to the job, "depressed aspirations," and diminished self-esteem.[282]

If the director position is tenure-track, an additional stress is the demand for scholarship, which complicates an already complex job. Furthermore, many schools view the administrative part of the directorship as de minimis, giving too little reduction in teaching load to permit the same type of scholarship demanded of non-LRW teachers and non-administrators or affording little to no credit toward tenure for administrative work.[283]

Of course, if schools obtained corrective lenses for their current academic myopia regarding the definition of scholarship, the work of directing a program would be seen as scholarly, intellectual work. In *Recognizing Faculty Work*, Robert M. Diamond and Bronwyn E. Adams,[284] relying on earlier work by Robert Boyer, discuss a wide range of what they term "significant intellectual work" that could (and, they would argue, should) count toward tenure. This work includes, inter alia,

> creating new knowledge or understanding; clarifying, critically examining, weighing, and revising the knowledge, claims, beliefs or understanding of others and oneself; connecting past knowledge to other knowledge; preserving, restoring, and reinterpreting past

---

281. For a specific study illustrating the stresses inherent in a job with too many competing demands, see Harold L. Nix & Frederick L. Bates, *Occupational Role Stresses: A Structural Approach*, *in* THE SOCIAL DIMENSIONS OF WORK 559 (Clifton D. Bryant ed., 1972) (describing situational factors causing stress among vocational agricultural teachers in rural community's pilot educational program).

282. KANTER, *supra* note 178, at 140. Amazingly, there are tenured faculty who remain oblivious to the very real difference between being a contract employee with potentially endlessly renewable contracts and being tenured. I am not the only LRW professional who has been faced with a tenured colleague saying something like "well, you know, what you have is 'just like tenure.' Having tenure would make no difference except you'd have to serve on more committees. Big deal." One LRW colleague (now a tenure-track director but previously a director with a non-tenure-track contract) squelched such observations with the retort: "You're probably right, so let's swap: I'll be tenured and you can be a contract employee."

283. *See* Levine, *Voices*, *supra* note 123, at 544-50 (discussing need for revised tenure criteria for tenure-track directors). Recently, some educational theorists have suggested that the notion of "scholarship" needs to be broadened to encompass a wider range of activities and contributions to the institution. *See generally* Robert Schwegler et al., WPA Executive Comm'n, *Evaluating the Intellectual Work of Writing Program Administrators: A Draft*, *in* 20 WRITING PROGRAM ADMIN. 92 (1996) (offering detailed description of writing administration and explaining ways in which it is intellectual work). *See also* ERNEST L. BOYER, SCHOLARSHIP RECONSIDERED: PRIORITIES FOR THE PROFESSORIATE 15-16 (1990) (discussing what he terms "scholarship of administration").

284. RECOGNIZING FACULTY WORK: REWARD SYSTEM FOR THE YEAR 2000, 115-18 (Robert M. Diamond & Bronwyn E. Adams eds., 1993).

> knowledge; arguing knowledge claims in order to invite criticism and revision; making specialized knowledge publicly accessible and usable, especially to young learners; helping new generations to become active knowers themselves, preparing them for lifelong learning and discovery; applying aesthetic, ethical, political or spiritual values to make judgments about knowledge and its uses.[285]

The work of a LRW program director (and indeed the work of many LRW teachers) would fit snugly within this expanded view of "scholarship" as significant intellectual work.[286]

So, a director's job is not necessarily an impossible one. It is, however, a job requiring even more stamina and skill than the job of teaching LRW itself and must be approached with full appreciation of its multiple, sometimes conflicting, demands.

VI. CONCLUSION

In an article entitled *Law Faculty in the 21st Century*, the president of the Association of American Law Schools acknowledges that law schools are not enjoying the best of times.[287] Nor are conditions likely to improve soon. Schools have fewer applicants overall, thus competition for the "best" applicants is fierce. Some law schools are reducing the number of students they accept.[288] Thus, tuition revenue is down. Other schools, unable to withstand such a revenue drain, may be forced to "dip lower into the applicant pool" to fill their classes with lower-credentialed applicants. Schools accepting applicants who have less enriched pre-law training, arguably have an ethical obligation to assist these students to succeed in their legal education. Students, the consumers of legal education, are more demanding than ever—particularly in light of the lackluster job market for attorneys that has existed since the early 1990s. Furthermore, legislatures may be cutting back funding for all higher education, including law.[289]

Employers of recent graduates—with the probable exception of large firms hiring from the elite law schools—want students to have some practical training before starting work.[290] Thus, law schools have little choice but to provide it.

---

285. *Id.*

286. *Id. Accord* ENOS, *supra* note 22, at 47.

287. Wallace D. Loh, *Law Faculty in the 21st Century: Responding to Megatrends and New Realities*, AALS: THE NEWSLETTER, Nov. 1996, at 1, 2-7.

288. Segal, *supra* note 110, at A1.

289. Perhaps even especially law. For example, the Regents of the University of California voted two years ago to stop subsidizing professional education. Whereas until 1993 California residents paid no more for a year at a University of California law school or medical school than for a year of undergraduate education, that subsidy has ended. Fees are on the rise and will ultimately reach parity with private law schools in the state. *See* Ben Wildovsky, *UC Regents Raise Some Fees Sharply*, SAN FRANCISCO CHRON., Mar. 18, 1995, at A19.

290. Segal, *supra* note 110, at A2 (noting pressures for greater competence of new graduates in practice skills, professional values, and ethical responsibilities).

A few law schools still adhere to a minimalist approach, maintaining programs in which there are no LRW professionals, or at most one, in which all the LRW instruction is delivered by upper class students or adjuncts. Perhaps at elite law schools the student-taught program works well enough, although even many elite schools have abandoned this approach in favor of the fellowship model.[291] The problems with student-taught programs for anything but the most elite schools, however, abound.

The strongest commitment a law school can make to its writing program is to hire tenure-track faculty eager to make LRW at least one of their primary areas of specialization. As shown above, law schools do not lack the ability to do this; the question is whether they have the will to make new choices concerning the distribution of resources.[292] This Article has argued that the provision of high quality, dedicated LRW teaching must no longer occur on the backs of a predominantly female army of instructors relegated to the lowest caste in the law school academic hierarchy.

In his treatise on distributive justice,[293] Princeton Social Science Professor Michael Walzer analyzes distribution of "hard work," which he defines as "jobs that are like prison sentences, work that people don't look for and wouldn't choose if they had even minimally attractive alternatives;" in other words, work that is dangerous, or dishonorable and degrading.[294] "Degrading," notes Professor Walzer, is a relative concept. Thus, one culture may designate as "degrading" work that elsewhere would garner no particular disdain.[295] As discussed throughout this Article, in the culture of the law school, many doctrinal faculty view teaching legal writing as beneath their dignity—in a sense, degrading.[296] The main point about this type of work is that society's dominants, wishing to avoid this work rather than to share it, must find a way to justify having others do it. This is accomplished by assigning it to "degraded people"—either imported slaves, "guest workers" (illegal immigrants for instance), or "inside aliens."[297] Inside aliens are members of the society identified as less worthy of respect and therefore deserving of the unpleasant jobs: for instance, Indian Untouchables or Ameri-

---

291. The University of Michigan, however, which is always listed as a top 10 law school, two years ago adopted a full-time LRW instructor model.

292. AALS president Loh seems to have accepted that the will is *not* there, as he asks, "What is the effect of an academic underclass—*permanently untenured* and growing, [in] a dual labor market—on the future of tenure and on an institutions's sense of community?" Loh, *supra* note 287, at 6 (emphasis added).

293. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

294. *Id.* at 165. While work like collecting garbage springs immediately to mind, Professor Walzer points out that traditional women's work—such as, cleaning, cooking, caring for the young, old, and ill—has also been disdained by men as unrewarding. *Id.*

295. *Id.* at 174. In India, for example, tanning cowhide is degrading and fit only for untouchables, while in other cultures it would be viewed as simply another job. *Id.*

296. *See* Pedrick, *supra* note 90, at 413.

297. WALZER, *supra* note 293, at 165.

can Blacks after emancipation.[298] In many societies, says Walzer, women have been tapped as the "inside aliens."[299] One who is consigned this "degrading work" is also viewed as a "degraded" person.[300] Thus, law schools forbidding LRW professionals from competing for tenure are signaling that those workers are professionally degraded.

It is worth considering the message that law schools' maintenance of an academic caste system is sending to the future lawyers of America. Recently, three important books have decried the state of the legal profession, and in particular the disengagement of attorneys from the critical mission of counseling clients to be ethical members of society.[301] In *The Soul of the Law*, Benjamin Sells, who is a psychotherapist as well as a lawyer, mentions the stress engendered in lawyers who have become "objects"—mere litigation machines unconnected to real people needing legal aid.[302] He argues that lawyers would feel more professionally fulfilled if they were more connected to the people they presumably serve. Yet, paradoxically, law students are being taught by example, starting in their first year of law school, that people who work most intensively with others—who take time to listen and respond individually to others' concerns—are the people without influence and without peer respect.[303] Thus, by its example the academy may be giving students a far more pernicious message than simply that they should elevate abstract legal theory over practical lawyering skills; it may also be telling them to elevate abstract legal theory over dynamic and committed human relations.

It is time for law schools to respond to the challenge of the ABA Commission on Women in the Profession that calls for the academy to eliminate overt and covert discrimination. It is time to end dualistic domination/subordination structures on law school faculties.[304] If any employers have an ethical obligation to rise above mere capitalistic "maximization of utility" by getting the most work for the least pay and, instead, base employment deci-

---

298. *Id.*

299. *Id.* at 166.

300. *Id.*

301. *See* ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); SOL M. LINOWITZ, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994); BENJAMIN SELLS, THE SOUL OF THE LAWYER: UNDERSTANDING LAWYERS AND THE LAW (1994).

302. SELLS, *supra* note 301, at 42.

303. The dual-status structure mystifies many students. Among the most peculiar discussions a LRW teacher can have is the one with a student who asks, "Why aren't the LRW professors on tenure track with everyone else?" None of the justifications outlined above, see *supra* Part IV, when offered as explanation of this dualism, seem convincing to a second or third year student who, during a clerkship, has personally experienced the importance of what he learned in his legal research and writing course—the precise skills that enable him or her to do the job.

304. Some relationships between LRW instructors and tenure-track instructors are vaguely reminiscent of the classic domination/subordination structure historically found in struggles between people of color and whites, or between men and women. For a discussion of hierarchical dualism in academia, see Deborah W. Post, *Critical Thoughts About Race, Exclusion, Oppression, and Tenure*, 15 PACE L. REV. 69, 81 (1994).

sions on a sense of distributive gender justice, it ought to be the very institutions in which men and women are being trained to identify and combat injustice. It is time for equality to be more than a topic of discussion for classes in feminist legal theory, critical race theory, or civil rights theory. It is time for equality to become the legal academy's foundational normative principle.