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## Sea Change: The Seismic Shift in the Legal Profession and How Legal Writing Professors Will Keep Legal Education Afloat in its Wake

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### Cover Page Footnote

I would like to thank my family, my research assistants, the administration of the University of North Dakota School of Law, the Society of American Law Teachers, and the national legal writing community for being so supportive of this work.

## **Sea Change: The Seismic Shift in the Legal Profession and How Legal Writing Professors Will Keep Legal Education Afloat in its Wake**

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Kirsten A. Dauphinais<sup>1</sup>

*Never let a serious crisis go to waste. What I mean by that is it's an opportunity to do things you couldn't do before.*

Rahm Emanuel, Former White House Chief of Staff<sup>2</sup>

### I. THE GREAT RECESSION AND THE LEGAL PROFESSION

The year 2010 found us in the midst of what commentators have called “The Great Recession.”<sup>3</sup> The effects on the legal profession have been profound and, increasingly, it is thought by many, permanent. There is mounting evidence that law firms are no longer immune to economic downturns, if they ever were.<sup>4</sup> On June 30, 2009, industry leaders invited by the National Association for Law Placement (NALP) participated in a roundtable on the Future of Lawyer Hiring, Development, and

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<sup>2</sup> Editorial, *A 40-Year Wish List*, WALL ST. J. (Jan. 28, 2009), <http://online.wsj.com/article/SB123310466514522309.html>; Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2052 (2010) (“[P]oints of significant distress are at the same time moments of great opportunity.”).

<sup>3</sup> Molly McDonough, *Summer Associate Offers Plummet, Hitting 17-Year Low*, A.B.A. J. (Mar. 3, 2010), [http://www.abajournal.com/news/article/summer\\_associate\\_offers\\_plummet\\_hitting\\_17-year\\_low/](http://www.abajournal.com/news/article/summer_associate_offers_plummet_hitting_17-year_low/).

<sup>4</sup> Erin J. Cox, *An Economic Crisis is a Terrible Thing to Waste: Reforming the Business of Law for a Sustainable and Competitive Future*, 57 UCLA L. REV. 511, 512 (2009).

Advancement, which “[c]oncluded that the economic slowdown will have a lasting impact on lawyer hiring and development, including a move away from lockstep lawyer advancement models by many law firms.”<sup>5</sup> The roundtable noted that, at least in the short term, the effects of the recession included a staggering number of layoffs, salary cuts, and hiring freezes, which have resulted in historic unemployment (among both experienced lawyers and law school graduates) and even deaths.<sup>6</sup> The roundtable further found that large law firms were particularly impacted.<sup>7</sup>

In the summer of 2010, the legal-consulting firm Altman Weil released a state-of-the-business survey, which found:

- Nearly 40% of the firms surveyed made fewer partners in 2009 and 50% indicated they “will or might” do so again in 2010;
- About 50% of the firms reduced or discontinued hiring first-year associates and 38% said they will do the same again; and
- About 20% of the firms planned to fire non-equity partners this year, and 37% “will or might” de-equitize partners.<sup>8</sup>

Some law firms collapsed entirely.<sup>9</sup> Between April 2009 and May 2010, the legal sector experienced a loss of 28,000 jobs.<sup>10</sup> One ten-day stretch in

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<sup>5</sup> Press Release, Nat’l Ass’n for Law Placement, Industry Leaders Discuss the Future of Lawyer Hiring, Development, and Advancement (June 30, 2009), *available at* [http://www.nalp.org/future\\_pressrelease](http://www.nalp.org/future_pressrelease) [hereinafter Press Release, NALP]. The Roundtable also “explored the ways in which the economy and client needs may change traditional law firm leverage models.” *Id.*

<sup>6</sup> Wald, *supra* note 2, at 2052–53.

<sup>7</sup> See Larry E. Ribstein, *The Death of Big Law*, UNIV. OF ILL. COLL. OF LAW 1 (Feb. 2010), *available at* <http://works.bepress.com/ribstein/22/>.

<sup>8</sup> Nathan Koppel, *Future Remains Cloudy for Legal Biz*, WALL STREET J. L. BLOG (June 23, 2010, 10:40 AM ET), <http://blogs.wsj.com/law/2010/06/23/future-remains-cloudy-for-legal-biz>.

<sup>9</sup> Cox, *supra* note 4, at 512. These included Heller Ehrman, Thacher Proffitt & Wood, and Thelen. *Id.* at 516.

<sup>10</sup> Ross Todd, *Legal Sector Loses 1,100 Jobs in April*, AM LAW DAILY (May 7, 2010, 12:33 PM), <http://amlawdaily.typepad.com/amlawdaily/2010/05/april-jobs.html>.

February 2009 saw 2,500 jobs lost.<sup>11</sup> As of May 2010, the legal sector was still shedding jobs.<sup>12</sup> In many cases, attorneys who were fortunate to obtain or retain jobs at large law firms received pay cuts of 10 percent or greater.<sup>13</sup>

Recent law graduates saw an overall employment picture equally—if not more—bleak than that for experienced attorneys. In fact, 2010 was one of the roughest years for graduating law students ever.<sup>14</sup> NALP reports that for law schools accredited by the American Bar Association (ABA) the employment rate for 2009 graduates was at its lowest point since the mid-1990s.<sup>15</sup> A recent survey of managing partners at large law firms by Altman Weil reported that 42 percent of more than 200 respondents felt that reductions in first-year associate classes would be permanent.<sup>16</sup> Of those newly-minted attorneys who did report being employed at law firms, 3,200 to 3,700 graduates actually had the start dates of that employment deferred beyond December 1, thus causing these graduates to face several months of unemployment after taking the bar examination.<sup>17</sup> Some firms rescinded offers of employment to graduates entirely.<sup>18</sup> Almost 25 percent more of the

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<sup>11</sup> Cox, *supra* note 4, at 512–13.

<sup>12</sup> Todd, *supra* note 10.

<sup>13</sup> See Martha Neil, *BigLaw 'Has Changed Forever,' Says Womble Carlyle, Cutting Pay 10 Percent*, A.B.A. J. (Apr. 14, 2009), [http://www.abajournal.com/news/article/biglaw\\_has\\_changed\\_forever\\_says\\_womble\\_firm\\_cutting\\_pay\\_10\\_percent/](http://www.abajournal.com/news/article/biglaw_has_changed_forever_says_womble_firm_cutting_pay_10_percent/); see also Carlyn Kolker, *'Medieval' U.S. Law Firm Pay Structure Buckles (Update1)*, BLOOMBERG (Mar. 16, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aN3ilGkywFZg>. For many of the large East Coast law firms, this is a cut from \$160,000 to \$144,000 for starting associates. *Id.*

<sup>14</sup> Nicole Hong, *Summer Hiring Survey: 44% Down in 2010*, AM. LAW. (July 21, 2010), <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202463756317&slreturn=1&hbxlogin=1>.

<sup>15</sup> Stephanie Francis Ward, *The Job Seekers*, A.B.A. J. (Sept. 2010), [http://www.abajournal.com/magazine/article/the\\_job\\_seekers/](http://www.abajournal.com/magazine/article/the_job_seekers/).

<sup>16</sup> Karen Sloan, *Hope Drives Rise in Law School Applications*, NAT'L L. J. (July 12, 2010) [hereinafter Sloan, *Hope*], [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202463410108&Hope\\_drives\\_rise\\_in\\_law\\_school\\_applications&slreturn=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202463410108&Hope_drives_rise_in_law_school_applications&slreturn=1).

<sup>17</sup> Ward, *supra* note 15.

<sup>18</sup> Cox, *supra* note 4, at 513.

positions that were reported by NALP were temporary.<sup>19</sup> These employment figures also include those attorneys accepting stipends, which are significantly lower than a first-year associate's salary and are paid by a law firm or their alma mater, allowing the attorneys to pursue pro bono work for a year.<sup>20</sup> Some law school career service officers were advising their graduating students to take any job that they could get.<sup>21</sup>

Summer associates did not fare any better, with firms cutting their classes by an average of 44 percent<sup>22</sup> and job offers in 2010 hit a seventeen-year low.<sup>23</sup> When students did receive offers, they leapt at them with an astronomical 42.8 percent acceptance rate, the highest ever recorded.<sup>24</sup> And, of those, only 69 percent received offers for permanent employment from their firms upon graduation, down from 90 percent in the previous five years.<sup>25</sup>

This article arises during a moment in time where a crisis creates a situation in which sweeping, systemic change in the legal profession is not only necessary, but possible. A perfect storm of demands from legal employers and the clients who pay them, coupled with the rising cries of the academy's most learned critics, comes together to compel a fundamental reordering of law practice and of legal education's priorities. At the heart of the latter change could be a revaluing of the professors who deliver legal

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<sup>19</sup> Ward, *supra* note 15.

<sup>20</sup> Dana Mattioli, *New Task for Law-Firm Hires: Finding an Interim Job First*, WALL ST. J. (Oct. 6, 2009), <http://online.wsj.com/article/SB125478012114565787.html>; see also Letter from David M. Schizer, Dean of Columbia Law School, to Professor Kirsten Anne Dauphinais (May 3, 2010) (on file with author) (sharing that over thirty members of the 2010 graduating class of Columbia Law School do not have jobs and that the school is soliciting funds from Columbia Law alumni to create public interest fellowships).

<sup>21</sup> Mattioli, *supra* note 20.

<sup>22</sup> Adam Cohen, *With the Downturn, It's Time to Rethink the Legal Profession*, N.Y. TIMES (Apr. 1, 2009), <http://www.nytimes.com/2009/04/02/opinion/02thu4.html>.

<sup>23</sup> McDonough, *supra* note 3.

<sup>24</sup> *Id.*

<sup>25</sup> Nathan Koppel, *Bar Raised for Law-Grad Jobs*, WALL ST. J. (May 5, 2010), <http://online.wsj.com/article/SB10001424052748704866204575224350917718446.html>.

education, in particular recognizing the often overlooked worth of legal writing professors and forever jettisoning some of the basic shibboleths of the profession that have most obstructed meaningful progress.

Part II of this article will explore whether there is a paradigm shift in the structure of the legal profession itself—whether changes to hiring and business practices of American lawyers in the wake of the Great Recession, which began in December 2007,<sup>26</sup> are cyclical in nature or represent a lasting transformation in the legal profession. Part III of this article will discuss the calls for reform in legal education already being advocated for before the economic crisis began. Works such as *Educating Lawyers*<sup>27</sup> and *Best Practices for Legal Education*<sup>28</sup> call for reforms that are now vital to responding to the recession. This Part will also, in particular, advocate for a transformation in the academy's customs and practices regarding legal writing professors,<sup>29</sup> as these educators are key to a necessary component in the advancement of legal pedagogy; their lack of professional parity cannot be justified, especially now when the need for their expertise is nothing but amplified. Part IV will raise and defeat perhaps the principal counterargument to making needed changes in law teaching and concomitantly to improving the position of legal writing professors—that we cannot afford it. Finally, Part V concludes this article with an eye toward the developing trends that indicate a promising sea change in the profession and the academy that we cannot now turn back.

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<sup>26</sup> Press Release, Nat'l Bureau of Econ. Res., Determination of the December 2007 Peak in Economic Activity (Dec. 11, 2008), *available at* <http://www.nber.org/dec2008.pdf>.

<sup>27</sup> WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

<sup>28</sup> ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

<sup>29</sup> These professionals are cognomated in many different ways. For consistency's sake, I have elected to call them legal writing professors, which is probably the most common way in which they are referred. I do, however, have some reservations about this selection, as this title does not adequately capture the range of their subject matter expertise.

## II. UNCHARTED WATERS—IS THERE A SEA CHANGE UNDERWAY IN THE LEGAL PROFESSION?

*I think we're seeing a structural change in the industry. Even if things do come back, it won't be to the same degree we saw just a few years ago.*

Brian Tamanaha, Professor at Washington University in St. Louis School of Law<sup>30</sup>

The legal community has never faced an economic recession like the current one: although smaller economic downturns occurred in the early 1990s and again in 2000–2001, the Great Recession dwarfs them in scale and duration. “Thus, the legal profession is entering uncharted waters.”<sup>31</sup>

Some commentators have opined that underpinning the law firm disaster is the credit crisis, decimating traditional practice areas like structured finance and mergers and acquisitions, “the very things that have always kept a high gleam of polish on the city’s whitest shoes . . . [in short,] fewer Wall Street deals mean fewer Wall Street lawyers.”<sup>32</sup> With these corporate activities diminished, corporate law firms simply have less work to do.<sup>33</sup> For instance, in the early part of 2009, demand for legal services in New York was down by almost 10 percent compared with 2008.<sup>34</sup> There is even a blog dedicated to tracking the impact of the recession on the legal economy.<sup>35</sup>

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<sup>30</sup> Sloan Hope, *supra* note 16.

<sup>31</sup> Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 599 (2010).

<sup>32</sup> Alan Feuer, *A Study in Why Major Law Firms are Shrinking*, N.Y. TIMES (June 5, 2009), <http://www.nytimes.com/2009/06/07/nyregion/07law.html>.

<sup>33</sup> Rochelle Olson, *Job Market Leaves New Lawyers Far from Easy St.*, MINNEAPOLIS STAR TRIB., May 24, 2010, at A1.

<sup>34</sup> Feuer, *supra* note 32.

<sup>35</sup> LAW SHUCKS, [www.lawshucks.com](http://www.lawshucks.com) (last visited Oct. 21, 2011).

In general, “[w]hile the legal industry is hardly battling the existential threat that is facing, say, the newspaper trade, Big Law—especially in competitive New York—is facing a potential paradigm shift as fundamental as the one that has hit investment banks and the auto industry. Big, as a business model (let alone as an expression of the national mood), seems bound for obsolescence.”<sup>36</sup>

At least some commentators argue that the present predicament is only an acceleration of the decline of an already failing system.<sup>37</sup> There is even talk of so fundamentally restructuring the delivery of legal services that some advocate that law firms start accepting outside capital investment or even be publicly traded.<sup>38</sup>

Perhaps, not surprisingly then, one of the first targets for erosion is the traditional large firm model organization for law practice, often referred to as the “tournament” model:<sup>39</sup>

The large law firm that has predominated in recent decades emerged during the 1970s and 1980s. Under this model, law firms maintain a leveraged ratio of associates to partners, sometimes employing as many as five non-equity lawyers for every equity partner. With about one-third of the revenue from each non-equity lawyer’s billable hours translating into profit, this model

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<sup>36</sup> Feuer, *supra* note 32. Hugh Verrier, chairman of White & Case, queried: “Is there a paradigm shift? . . . I don’t think anyone has a monopoly on what the future’s going to bring.” *Id.*

<sup>37</sup> Ribstein, *supra* note 7, at 1 (“[T]his downsizing reflects a basically precarious business model rather than just a shrinking economy.”). Ribstein also notes that the erosion of the dominance of large law firms is due, in part, to the rise of in-house counsel. *Id.* at 11; Lynne Marek, *Layoff Pain Migrates In-House*, NAT’L L. J., Mar. 23, 2009, at 1. In the first three months of 2009, the Association of Corporate Counsel’s membership dropped by 6 percent. *Id.*

<sup>38</sup> Ribstein, *supra* note 7, at 35–36.

<sup>39</sup> MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 10 (1991); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeing, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1581 (1998) (“Tournament theory has become the dominant academic model for analyzing the institutional structure of large law firms.”).

maximizes a firm's profits per partner. For every new associate a law firm hires, profits increase, at least as long as there is enough work to keep everyone busy. This engine for prosperity comes with a large proviso, however. As younger lawyers move up the ranks, many of them must leave the firm to maintain the pyramid structure and the high profits. Firms using this model thus need to constantly hire a large number of new associates to replace the attorneys that leave the bottom of the pyramid.

At the same time, however, a firm cannot scare away young associates too early, or it will not earn back the investment it has made in hiring and training the young lawyer. To solve this problem, the pyramid model must hold out a credible promise of promotion to partner for a certain number of associates. Because the number of promotions required to make such a promise credible usually exceeds the number of partners who wish to retire or leave, law firms using this model tend to grow over time. Indeed, one study found that to keep a constant ratio of associates to partner while still promoting the requisite number of associates, law firms must engage in exponential growth. Consequently, the pyramid model causes law firms to engage in intense competitions for top graduates, including ever-expanding associate salaries and lavish summer programs.<sup>40</sup>

However, due to the decreased demand for legal services, these income-generating associates are increasingly being replaced by lower-paid staff or contract attorneys or, increasingly, not being hired at all.<sup>41</sup>

Alan Feuer of the *New York Times* concurs:

Peter Zeughauser, a legal strategist in California, said that “for a quarter of a century, there has been this enormous boom in business, mostly due to expanding capital markets, and the top-tier firms kept hiring as if the boom would never end. Most of the top

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<sup>40</sup> Thies, *supra* note 31, at 600–01.

<sup>41</sup> *Id.* at 603; see also Judith Welch Wegner, *Response: More Complicated Than We Think*, 59 J. LEGAL EDUC. 623, 625 (2010) [hereinafter Wegner, *Response*] (“Legal scholars who have theorized about the ‘tournaments’ that drive large law firm dynamics and decisions . . . posed questions about the viability of traditional large law-firm practices, even before the depths of the current recession.”).

firms are completely out of balance, with lots of young associates underfoot—and associate pay is the biggest component of law firm overhead. And on Sept. 15, when Lehman Brothers went under, everything hit a wall.”<sup>42</sup>

These changes have enormous implications for lawyers’ employment prospects.

As previously discussed, firms are closing down or shuttering offices entirely.<sup>43</sup> Legal services are being outsourced to India and other countries with cheaper labor.<sup>44</sup> Firms are laying attorneys off,<sup>45</sup> and will continue to hire fewer equity partnership-track associates.<sup>46</sup> On May 20, 2010, NALP released a survey listing overall lawyer employment of 2009 law school graduates at 88.3 percent, 3.6 percent below 2007’s historic high of 91.9 percent, and the lowest rate since the mid-1990s.<sup>47</sup> The survey also found increases in temporary and part-time employment.<sup>48</sup>

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<sup>42</sup> Feuer, *supra* note 32; Press Release, NALP, *supra* note 5 (criticizing the tournament model) (“[Clients] look at a model and they see . . . one that is not only highly leveraged but seems to encourage attrition.”).

<sup>43</sup> See Feuer, *supra* note 32 (detailing how White & Case closed offices in Bangkok, Dresden, and Milan and noting that Thacher, Proffitt & Wood, established prior to the Civil War, had closed entirely). Layoffs have affected other firms as well. *Id.* (specifically noting firms Proskauer Rose, Dewey & LeBoeuf, and Clifford Chance); Hindi Greenberg, “You’re History.” *Now What?*, A.B.A. J. (Jan. 2009), [http://www.abajournal.com/magazine/article/youre\\_history\\_now\\_what/](http://www.abajournal.com/magazine/article/youre_history_now_what/) (firm of Heller Ehrman); Lynne Marek, *Reports of Suicides Point to Job Stress*, NAT’L L.J., May 11, 2009, at 27 (firm of McDermott Will & Emery).

<sup>44</sup> Ribstein, *supra* note 7, at 16.

<sup>45</sup> See Feuer, *supra* note 32 (describing that White & Case laid off one in ten of its attorneys, including partners who had previously made salaries in excess of \$1 million per year).

<sup>46</sup> Thies, *supra* note 31, at 605. Even before the recession, there was a significant increase in firms retaining lawyers as permanent employees in an “elastic tournament,” granting them “senior associate” or “of counsel” positions, with no future opportunity for promotion to equity partner. Ribstein, *supra* note 7, at 13 (citing Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008)).

<sup>47</sup> Olson, *supra* note 33, at A8.

<sup>48</sup> *Id.*

Many unemployed attorneys have had to rely on positions as contract attorneys who cost less and could be hired on as-needed bases and then let go during slower periods.<sup>49</sup> For the thousands of attorneys who can only secure these kinds of positions, it is often a grim prospect.<sup>50</sup>

For those who are able to obtain and retain positions as associates in major law firms, future prospects can also be dim. In response to the loss of revenue from clients, many firms are abandoning lock-step compensation for classes of associates in favor of performance-based remuneration with increased expectations for billable hours and “rainmaking,” the art of driving large amounts of business to the firm.<sup>51</sup>

Interestingly, the big law firms’ loss could be a gain for smaller firms, nonprofit associations, government employers, and corporations, who will have a deeper pool of laid-off associates and recent graduates from which to select new employees.<sup>52</sup> It is likely that these employers too will be seeking practically skilled attorneys.<sup>53</sup> Some smaller and mid-size firms are discontinuing their summer programs and concentrating instead on recruiting more experienced attorneys.”<sup>54</sup>

Another target for erosion is fundamental law firm business practices. One corporate litigation department head reports:

Clients are different. They take weeks, sometimes months, to “flyspeck” every one of your bills. Not just to find something they don’t like, but also to justify delays in paying their bills as long as they can.

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<sup>49</sup> Thies, *supra* note 31, at 604.

<sup>50</sup> See Anonymous, *Down in the Data Mines*, A.B.A. J. (Dec. 2008), [http://www.abajournal.com/magazine/article/down\\_in\\_the\\_data\\_mines/](http://www.abajournal.com/magazine/article/down_in_the_data_mines/) (report by an anonymous attorney of the dead end and tedious work life of a contract attorney assigned to major discovery requests at a Midtown Manhattan law firm).

<sup>51</sup> Thies, *supra* note 31, at 604–05.

<sup>52</sup> *Id.* at 607.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

The gravy train is over. . . . Gone are the days when big clients understood and accepted that they were being billed for training associates and compensating partners, and for buying dark red carpets, mahogany furniture and fancy electronic equipment.

If you're charging thousands of dollars for eight or 10 hours of a partner's time, you've got a lot of justifying to do. Not just the details in your bills, but the thought and analysis that goes into all the letters you send, the memos you write, the questions you ask, the explanations you give for the actions you recommend. They all have to create the impression that you and your firm are worth it.<sup>55</sup>

Prior to the recession, there was already a trend toward alternate billing arrangements, such as imposing a fixed fee per transaction or project,<sup>56</sup> and now "[t]ight corporate budgets will give clients more leverage to push to pay by the project or for successful outcomes."<sup>57</sup> According to a recent survey by legal consulting firm Altman Weil, 94.5 percent of law firms responding were now offering some kind of nonhourly billing.<sup>58</sup> Moreover, client loyalty to firms is decreasing, as clients tend to shop around for the best deal.<sup>59</sup> "Clients will just flat-out spend less, drive harder bargains, and get more for their money."<sup>60</sup>

Another casualty of the recession might be previously well-nigh ubiquitous views about large firm cachet.

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<sup>55</sup> Jim McElhaney, *No More Gravy Train*, A.B.A. J. (Sept. 1, 2009), [http://www.abajournal.com/magazine/article/no\\_more\\_gravy\\_train/](http://www.abajournal.com/magazine/article/no_more_gravy_train/).

<sup>56</sup> Mark Chandler, Senior Vice President and Gen. Counsel of Cisco, State of Technology in the Law, Address at the Northwestern School of Law 34th Annual Securities Regulation Institute (Jan. 25, 2007), available at [http://blogs.cisco.com/news/cisco\\_general\\_counsel\\_on\\_state\\_of\\_technology\\_in\\_the\\_law/](http://blogs.cisco.com/news/cisco_general_counsel_on_state_of_technology_in_the_law/) (describing Cisco's fixed fee arrangements with the law firms of Fenwick & West and Morgan Lewis).

<sup>57</sup> *Id.*

<sup>58</sup> Victor Li, *Study: For Law Firms, Cost-Cutting and Alternative Fees Here to Stay*, AM LAW. DAILY (June 22, 2010, 06:43 PM), <http://amlawdaily.typepad.com/amlawdaily/2010/06/firmscuttingcosts.html>.

<sup>59</sup> See Ribstein, *supra* note 7, at 26.

<sup>60</sup> Paul Lippe, *Law Firms' 2011 Scenario and the End of Leverage*, AM. LAW. (Feb. 2, 2009), <http://www.law.com/jsp/article.jsp?id=1202428174244&slreturn=1>.

If this recession leaves a legacy among litigators and their clients, it might be the death of some long-held taboos. “I used to work at a big law firm, so I sort of have the big-firm snobbery,” says one Fortune 500 general counsel. “But there are good lawyers everywhere. And big law firms, expensive law firms, don’t necessarily have the corner on that market.”<sup>61</sup>

Perhaps not unsurprisingly, some small- and mid-sized firms have reaped benefits from the economic conditions, thriving in smaller markets less impacted by the recession and, in some cases, even opening new branch offices.<sup>62</sup> They are also sometimes able to land work that had previously gone to larger firms because they charge lower fees.<sup>63</sup>

Law graduates will need to be prepared for all of these changes. “For the first time in several decades, the legal employment market favors firms and not graduates. . . . [T]he firms will thus be able to dictate their terms”<sup>64</sup> and are likely to focus on hiring attorneys who are practice-ready, in whom the firms do not have to invest significant resources.<sup>65</sup> Lawyers competing for a reduced number of law firm positions will be evaluated on merit-based core competencies and their ability to hit the ground running.<sup>66</sup>

Some of those who would in earlier days have been hired as associates may need to make a living—at least for a period—as contract attorneys, who will also need to be practice-ready in order to be employable. These attorneys will assume many of the more ministerial tasks that once occupied young associates, and thus those associates who are hired will need to be able to immediately demonstrate the practical skills to handle sophisticated lawyering tasks.<sup>67</sup> Furthermore, with the Obama stimulus package and less

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<sup>61</sup> Nate Raymond & Ben Hallman, *Cost-Cutting Clients Put the Squeeze on Law Firms*, AM. LAW. (May 6, 2009), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202430470948>.

<sup>62</sup> Karen Sloan, *Midsized Firms Make Their Move*, NAT’L L. J., Feb. 23, 2009, at 1.

<sup>63</sup> *Id.*

<sup>64</sup> Thies, *supra* note 31, at 606–07.

<sup>65</sup> *Id.* at 599.

<sup>66</sup> Press Release, NALP, *supra* note 5.

<sup>67</sup> Thies, *supra* note 31, at 605.

likely attrition at law firms after the recession is over, the government will hopefully be increasing the number of recent graduates it seeks, and those lawyers too will need to be practice-ready.<sup>68</sup>

### III. EVOLUTION IN LAW PRACTICE AND THE NECESSITY OF A COMMENSURATE EVOLUTION IN LEGAL EDUCATION IN RESPONSE

The increased competition that will create new demands for lawyer training will likewise casuse a paradigm shift in legal education itself.

As NALP explains:

Legal education has always been shaped by the underlying economic realities of the educational system and the legal profession. The earliest formal legal education in America developed as practitioners sought to supplement their incomes by taking on apprentices. Langdell's case method, for all its other virtues, ultimately became a dominant paradigm largely because it allowed large class sizes, and thus cheap education. The rise of the clinical movement in legal education coincided with a period of unprecedented prosperity and growth in the legal market. While the economic forces at play in these examples were not the only factors influencing the shape of legal education, they set both its boundaries and the goalposts. In other words, they helped to define both the constraints within which legal education had to operate and the objectives it was trying to achieve.<sup>69</sup>

Perhaps until now, the tournament law firm model gave law schools low incentive to emphasize their students' skills training.<sup>70</sup> The model created an "apparently insatiable demand . . . for the annual crop of warm bodies."<sup>71</sup>

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<sup>68</sup> *Id.* at 607.

<sup>69</sup> Thies, *supra* note 31, at 598. Langdell's case method is otherwise known fondly by generations of law students as the Socratic Method. David A. Garvin, *Making the Case*, HARV. MAG., Sept.–Oct. 2003, <http://harvardmagazine.com/2003/09/making-the-case.html>.

<sup>70</sup> Thies, *supra* note 31, at 601.

<sup>71</sup> *Id.* (quoting R.B. McKay, *The Rise of the Justice Industry and the Decline of Legal Ethics*, 68 WASH. U. L. Q. 826, 846 (1990)).

It was a seller's market for law students, and employers had no ability to demand or expect lawyers better trained in skills.<sup>72</sup> Moreover, the highly-leveraged tournament model busied young associates with tasks like coping with large discovery requests, document review, and basic research and writing, which did not require refined preparation in practical skills and allowed breathing space for new associates to learn on the job and on the client's dime.<sup>73</sup>

Law schools shaped their program of legal education in response to the realities of large law firm practice.<sup>74</sup> These firms had little expectation that associates would arrive to them trained in practical skills; thus, law schools had no incentive to provide such training. Indeed, it was commonly understood in the profession that large law firms provided the best possible training for the young lawyer.<sup>75</sup> Big Law firms, notably Cravath, Swain, and Moore, thus developed sophisticated training programs geared towards transforming recent law graduates into capable professionals:

One of the fundamental misconceptions of the Cravath system is that the firm hired the best lawyers. In reality, the Cravath system created them. Junior lawyers spent years in apprenticeship rotations that immersed them in the details of every aspect of corporate law practice. According to Cravath, the purpose of this lengthy, expensive, labor-intensive process was to create "a better lawyer faster." Moreover, advancement to the highest level of the firm required not only superior legal work but also the ability to manage, supervise, and delegate legal work to junior lawyers,

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<sup>72</sup> *Id.* at 602.

<sup>73</sup> *Id.*

<sup>74</sup> *See generally* AM. BAR ASS'N SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, THE MACCRATE REPORT (Joan S. Howland & William H. Lindberg, eds., 1994) [hereinafter MACCRATE REPORT].

<sup>75</sup> Thies, *supra* note 31, at 605.

attributes “requiring the nicety of balance which many men with fine minds and excellent judgment are unable to attain.”<sup>76</sup>

All of this “allowed schools to put skills training on the backburner. As the job market has broken down, however, this reality is beginning to change.”<sup>77</sup>

#### A. Law Firm Evolution—How the Tides Have Changed

Even before the recession, as hiring lawyers became more and more expensive, clients became more and more unwilling to pay to train associates.<sup>78</sup> Simultaneously, the pressure on partners to increase billing made them unwilling to spend time on training new attorneys.<sup>79</sup> Billing model alternatives to the billable hour also encouraged the need for efficiency in the new attorney.<sup>80</sup>

Law schools will have to alter their pedagogical methods to produce graduates who can compete in this market.<sup>81</sup> This will need to happen at every law school, regardless of their *U.S. News and World Report* ranking. Traditionally, there had been a myth that students with the best grades from highly ranked law schools always made the best lawyers, with a sense that these graduates could take care of themselves in terms of acquiring necessary practice skills.<sup>82</sup> As one director of professional development at a major international law firm stated: “We have not evolved from the idea that law school is a rigorous test of an individual’s ‘intellectual

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<sup>76</sup> William D. Henderson, *The Bursting of the Pedigree Bubble*, NAT’L ASS’N LEGAL PLACEMENT BULL., July 2009, at 12, available at <http://www.law.indiana.edu/lawlibrary/services/bibliography/doc/NALPHenderson.pdf>.

<sup>77</sup> Thies, *supra* note 31, at 603.

<sup>78</sup> *Id.* at 605.

<sup>79</sup> *Id.* at 605–06.

<sup>80</sup> *Id.* at 606.

<sup>81</sup> *Id.* at 599.

<sup>82</sup> Scott Westfahl, *Response: Time to Collaborate on Lawyer Development*, 59 J. LEGAL EDUC. 645, 646 (2010).

horsepower,’ and that small differences in GPA represent enormous gaps in potential.’<sup>83</sup> However:

[L]aw school grades emanate from exams measuring legal reasoning and issue spotting under an artificial timetable, as an individual effort. They do not measure a candidate’s ability to draft a motion, review an agreement, come up with an innovative way to help paralegals track discovery on a big case, or a host of practical skills. Nor do they measure how well students work as part of a team, influence and lead others, think on their feet, present complex material orally, evaluate business terms or develop robust networks to help them to get their jobs done, and eventually to develop business.

Law firms try to find proxy measurements for some of these skills, such as law journal experience, student organization leadership, and pre-law work experience. But these fall far short of being effective bases for comparison, and are always secondary considerations. A candidate must first meet the tried but not true top grades/top schools test even to be considered for a position in this market.<sup>84</sup>

Now, “there are . . . signs that firms are willing to take [practically skilled] graduates wherever they find them, regardless of whether they hold the traditional credentials from an elite law school.”<sup>85</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 646–47.

<sup>85</sup> Thies, *supra* note 31, at 606. Indiana University law professor William D. Henderson writes:

Most large law firms are very sensitive to pedigree, though you would be hard pressed to find any hard empirical evidence why the kid who went to Harvard is a better bet than someone who went to, say, Boston College, Illinois, or even the University of Houston. . . . [A]s the economy has slipped into recession, the pedigree bubble has finally burst. It is now painfully obvious to everyone that it does not matter where you went to school, or who you clerked for—a lawyer in his or her first or second year of practice is not just worth \$275 per hour.

Shibboleths of the legal profession and legal education are fading away as we watch. Graduation from an Ivy League law school is no longer a guaranteed golden ticket. “[S]ome law firms have been pleasantly surprised by the performance of some experimental new hires from the top of their class at ‘lesser’ ranked law schools”<sup>86</sup> and are moving away from “ingrained intellectual snobbery.”<sup>87</sup> Studies are coming out that demonstrate that school rank and grade point average are not always the best indicators of large firm success.<sup>88</sup> Some commentators are noting that management,

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Henderson, *supra* note 76, at 1. However, Westfahl refutes Thies’s notion that the sea change of the recession will lead to pressure on students to be more skilled. He posits instead:

One of the first things that happened in law firm recruiting departments as the current recession hit was an almost gleeful re-calibration of how high in the class at the best schools each firm could now recruit, given that fewer recruits needed to be hired. Very little has been given to selecting more effectively for candidates with strong practical skills training. Thus, a huge barrier to reform that Thies misses is that the myth of the meritocracy runs just as deep in law firms as it does in legal academia.

Westfahl, *supra* note 82, at 646. However, other commentators disagree with this analysis, and Westfahl himself concedes “there is hope that the recession will eventually help market forces to align as Thies suggests.” *Id.*

<sup>86</sup> Ward Bower, *The War for Talent and Starting Salaries*, REPORT TO LEGAL MGMT., Apr. 2007, at 1, 10, available at [http://www.altmanweil.com/dir\\_docs/resource/aa26ed0a-08e1-422b-8605-6e42e944bb92\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/aa26ed0a-08e1-422b-8605-6e42e944bb92_document.pdf).

<sup>87</sup> William D. Henderson, *Are We Selling Results or Résumés? The Underexplored Linkage Between Human Resource Strategies and Firm-Specific Capital* 4 (Ind. Legal Studies Research Paper No. 105, 2008), available at <http://ssrn.com/abstract=1121238>.

<sup>88</sup> Thies, *supra* note 31, at 606; Henderson, *supra* note 87, at 3 (“[T]here is empirical evidence that within a certain range, differences in cognitive ability, such as I.Q., are uncorrelated with contributions to organizational productivity, which suggests the price premium for elite law school graduates is excessive.”). Recently, Professors Marjorie Schultz and Sheldon Zedeck at the University of California, Berkeley’s Boalt Hall law school conducted a study of lawyering effectiveness factors based on interviews with supervising lawyers, clients, and judges and reviewing the educational profiles of Boalt Hall and University of California, Hastings Law graduates. Marjorie Maguire Schultz & Sheldon Zedeck, *Final Report-Identifications, Development and Validation of Predictors for Successful Lawyering* (working paper series) (Jan. 30, 2009), available at <http://ssrn.com/abstract=1353554>. The study revealed that the most effective lawyers

client relations, and teamwork skills might be more important in the hiring process than top school credentials.<sup>89</sup> And with the increased pressure of the recession, many firms are starting to embrace the large pool of lawyers “with slightly less elite credentials who are willing to work very hard for substantially less than \$160,000 per year.”<sup>90</sup>

It should be noted that this change in the skills emphasis in legal education—like other progressions in skills education, such as the rise of legal writing and clinical programs—will probably begin and be most pronounced in the lower-ranked *U.S. News* schools, which were always under greater pressure to demonstrate value added to entice prestigious firms to hire their graduates.<sup>91</sup>

It could be argued that law schools should not be hasty in undertaking a fundamental revision in their curricula and pedagogical methods, as law firms and law practice could simply be at the nadir of an ever-changing economic cycle that will eventually return to the status quo:

All of these cost-saving trends are unremarkable for a market shaped by a deep recession. It is possible that, like all good businesses, law firms are simply adapting to a weak spot in the market and preparing to return to business as usual as soon as the economy improves. Many commentators, however, argue that the

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were not necessarily graduates of highly ranked law schools or members of law review. Wegner, *Response*, *supra* note 41, at 636.

<sup>89</sup> Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1927 (2008). In fact, there is currently a push for law schools to offer law practice management courses as part of their curriculum. G.M. Filisko, *Getting the Business: Recession Inspires Call for Classes in Running a Law Firm*, A.B.A. J. (Aug. 2010), [http://www.abajournal.com/magazine/article/getting\\_the\\_business/](http://www.abajournal.com/magazine/article/getting_the_business/). Additionally, the 2009 NALP Roundtable on the Future of Lawyer Hiring, Development, and Advancement agreed as to “the benefits of teaching law students about the economics of how law firms function.” Press Release, NALP, *supra* note 5. However, a 2008 study revealed that only sixty-four of the then 195 ABA-accredited law schools offered such courses. *Id.*

<sup>90</sup> Henderson, *supra* note 87, at 3–4.

<sup>91</sup> Westfahl, *supra* note 82, at 648–49.

downturn will lead to more than a routine disruption in the legal market, and may spell the end of the traditional law firm model.

The reason for this dire prediction is that the natural tensions of the model were becoming unsustainable even before the economic troubles hit. . . . [T]he model places intense pressure on law firms to continue hiring top graduates from the best law schools to replace associates on the bottom tier of the pyramid who have left or ascended to partner. Law firms' attempts to remain competitive in this hiring market caused associate starting salaries to remain nearly uniform while rising to \$160,000 just before the recession hit. Once the associates had been hired, however, law firms had to get their money's worth by requiring large numbers of billable hours. The greater demands on associates then increased attrition which, in turn, required law firms to hire even more new lawyers. The entire system was dependent on enough work coming in to fill everyone's time. Because this cycle had repeated for a number of years, law firms were highly vulnerable to a sudden decrease in demand for their services.<sup>92</sup>

But the pressure was already on firms even prior to the recession to create alternative models for staffing and billing clients.<sup>93</sup> For instance, there was already increased reliance on contract attorneys.<sup>94</sup>

Some firms have increased their profitability during the recession, but did so through cutbacks, particularly in their number of equity partners.<sup>95</sup> Of course, rates of promotion to equity partnership were already declining before the recession.<sup>96</sup> There was also an increase in creating alternate statuses other than equity partner for more senior attorneys, such as non-equity partnerships or of-counsel or staff positions.<sup>97</sup>

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<sup>92</sup> Thies, *supra* note 31, at 603–04.

<sup>93</sup> *Id.* at 604–605.

<sup>94</sup> *Id.* at 603–04.

<sup>95</sup> John Eligon, *Law Firms Weather the Economic Storm*, CITY ROOM (Apr. 30, 2010, 1:57 PM), <http://cityroom.blogs.nytimes.com/2010/04/30/law-firms-weather-the-economic-storm/>.

<sup>96</sup> *See* Thies, *supra* note 31, at 604.

<sup>97</sup> *See id.*

Moreover, associates were also already becoming savvy to the elusiveness of the payout of becoming partner, and this revelation had already begun to undermine the allure of the traditional law firm model for the newly minted attorney.<sup>98</sup> NALP reported in 2009 that firms parted ways with 80 percent of their law school hires within five years:<sup>99</sup> “[A]ssociates . . . tend not to be as focused on the brass ring of partnership.”<sup>100</sup>

In short, as Steven Davis, chair of Dewey & LeBoeuf, states: “I lean much more in the direction that this is not a blip. . . . In the medium term, we’re seeing, and will continue to see, a paradigm shift.”<sup>101</sup>

#### *B. Changes Already Being Implemented in the Legal Academy*

Just as the traditional law firm tournament model was becoming unsustainable even before the onset of the Great Recession, so too were many key facets of legal education. Several recent studies of legal education have called for the enhancement of skills instruction and practice-readiness in legal education.<sup>102</sup> These studies have included the ABA’s MacCrate Report,<sup>103</sup> and, more recently, *Best Practices in Legal Education*<sup>104</sup> and the Carnegie Report.<sup>105</sup>

As early as 1992, the MacCrate Report stated: “[C]omplaints heard by the Task Force concerning law graduates’ writing skills suggest that further concerted effort is required to teach legal writing at a better level than is

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<sup>98</sup> *Id.*

<sup>99</sup> Dan Dipietro, *Leaving Lockstep Behind: Abandoning Lockstep Pay Would Go a Long Way Toward Solving the Crisis in Associate Recruiting and Retention*, AM. LAW. (May 2009), <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202423359681>.

<sup>100</sup> *Id.*

<sup>101</sup> Julie Triedman, *Associate Pay Cuts Here to Stay, Say Firms, Analysts*, AM. LAW DAILY (Dec. 10, 2009, 12:48 PM), <http://amlawdaily.typepad.com/amlawdaily/2009/12/associate-compensation-cuts-not-temporary-say-firms-analysts.html>.

<sup>102</sup> See Wegner, *Response*, *supra* note 41, at 623, 634–35.

<sup>103</sup> MACCRATE REPORT, *supra* note 74.

<sup>104</sup> STUCKEY ET AL., *supra* note 28.

<sup>105</sup> CARNEGIE REPORT, *supra* note 27.

now generally done both in the law schools and in bridge-the-gap programs after law school.”<sup>106</sup> The Report further opined that these deficiencies “may be due at least in part to the schools [*sic*] failure to value the importance of these programs to the training of lawyers to become competent professionals.”<sup>107</sup>

When it was released in 2006, the Carnegie Report reintroduced into the working lexicon of legal education the centuries-old notion of “apprenticeship, with its intimate pedagogy of modeling and coaching.”<sup>108</sup> However, this latter-day apprenticeship was to be improved over the “arbitrary and often haphazard nature of old-time apprenticeships”—to be effectuated now by legal educators trained in effective teaching methods.<sup>109</sup> The Carnegie Report proposed three apprenticeships to be implemented in legal education: the *theoretical* apprenticeship of the “intellectual and cognitive, [which] focuses the student on the knowledge on way of thinking of the profession,”<sup>110</sup> the *practical* apprenticeship of “expert practice shared by competent practitioners,”<sup>111</sup> and the *ethical* “apprenticeship of identity and purpose, [which] introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible.”<sup>112</sup> As will be discussed *infra* Part III(C), legal writing professors are indispensable to the teaching of each.<sup>113</sup>

<sup>106</sup> MACCRATE REPORT, *supra* note 74, at 264.

<sup>107</sup> *Id.* at 266. The Report subsequently recommended, “Law schools should assign primary responsibility for instruction in professional skills to permanent full-time faculty who can devote the time and expertise to teaching and developing new methods of teaching skills to law students.” *Id.* at 333–34.

<sup>108</sup> CARNEGIE REPORT, *supra* note 27, at 25.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 28.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> John A. Lynch, Jr., *Teaching Legal Writing After a Thirty Year Respite: No Country for Old Men?*, 38 CAP. U. L. REV. 1, 8, 11 (2009) (“The Carnegie Report does not contemplate a hierarchy for the participants in these apprenticeships, but the ABA accreditation standards do because they provide incomplete employment protection for legal writing faculty.” “[I]t is . . . difficult to reconcile legal education’s lip service to

Professor William Stuckey's *Best Practices in Legal Education* began with the assumptions that "[m]ost new lawyers are not as prepared as they could be to discharge the responsibilities of law practice"<sup>114</sup> and that "[s]ignificant improvements to legal education are achievable if the issues are examined from fresh perspectives and with open minds."<sup>115</sup> Professor Stuckey further stated: "The primary goal of legal education should be to develop competence, that is, the ability to resolve legal problems effectively and responsibly."<sup>116</sup> Stuckey deemed compelling the necessity of improving legal education, as law schools had not committed to preparing practice-ready students.<sup>117</sup>

With the current recession:

[Law] schools may . . . become more serious about curricular reform. The Carnegie Foundation for the Advancement of Teaching released an influential report that, among other things, urged law schools to make better use of the sometimes-aimless second and third years. If law jobs are scarce, there will be more pressure on schools to make the changes Carnegie suggested, including more focus on practical skills.<sup>118</sup>

Thus, both the Carnegie Report and *Best Practices* set the stage for the rise of the legal writing professor.

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Carnegie with the reality that so many law schools have essentially subcontracted legal writing instruction to teachers it refuses to treat as full-fledged faculty.").

<sup>114</sup> STUCKEY ET AL., *supra* note 28, at 1.

<sup>115</sup> *Id.* at 1 n.1. ("[T]he process for becoming a lawyer in the United States will not change significantly," and "if there is any possibility that [this] assumption is invalid, we would encourage the legal profession to reconsider the entire continuum of educating and training lawyers in the United States.").

<sup>116</sup> *Id.* at 8.

<sup>117</sup> *Id.* at 11, 16.

<sup>118</sup> Cohen, *supra* note 22.

*C. Why Legal Writing Professionals: The Solution to the Problem*

A stable cadre of experts in the pedagogy of lawyering skills can implement the Carnegie apprenticeships. There are no others who can do the job as effectively.

Practice-centered teaching is not antithetical to intellectuality.<sup>119</sup> “The two kinds of legal knowledge—the theoretical and the practical—are complementary. Each must have a respected place in legal education.”<sup>120</sup> “Lawyering skills is the junction where legal thinking and legal practice connect.”<sup>121</sup>

In an integrated model, the practical apprenticeship stands not subordinate to but in a complementary relationship with legal analysis. At its best, the relationship between formal knowledge and practical knowing might be thought of as symbiotic. . . . However it is organized, [it is] the sustained dialogue among faculty with different strengths and interests united around common educational purposes that is likely to matter most.<sup>122</sup>

The Carnegie Report refers to connecting the three apprenticeships—the theoretical, the practical, and the ethical—through legal writing.<sup>123</sup> In fact, “until legal writing faculty have full tenure-track faculty status, legal education must be viewed as failing Carnegie’s second apprenticeship.”<sup>124</sup> The further integration of legal writing professors into the professional, permanent, and equal ranks of legal educators would only further aid the marriage of theory and practice, to the benefit of all. Such integration would also make law school much more akin to other professional schools, such as medical and business.<sup>125</sup>

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<sup>119</sup> CARNEGIE REPORT, *supra* note 27, at 10.

<sup>120</sup> *Id.* at 13.

<sup>121</sup> *Id.* at 108.

<sup>122</sup> *Id.* at 196.

<sup>123</sup> *Id.* at 104.

<sup>124</sup> Lynch, *supra* note 113, at 12.

<sup>125</sup> See CARNEGIE REPORT, *supra* note 27, at 88; Christine N. Coughlin et al., *See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in*

But there is a whole class of shibboleths that need to be overcome in order for legal writing professors to achieve this goal. The fact that such shibboleths exist and are so widely shared in the legal academy is not surprising: we are, in many ways, a surprisingly homogenous and orthodox bunch, “a self-perpetuating elite.”<sup>126</sup>

The faculty of American law schools remains dominated by graduates of a few law schools. Fifteen law schools during the 2007–2008 academic year provided 52.9% of the faculty listed by the AALS [(Association of American Law Schools)] member schools and fee-paying schools. In the same time frame, fifteen of the 200 law schools accredited by the ABA provided one out of every two law professors in the United States, while two law schools, Harvard and Yale, provided over 20% of the law professors in the United States during 2007–2008.<sup>127</sup>

Thus, “[a]pplicants for law school teaching positions who did not graduate from plutocratic, oligarchical law schools, that already control the faculty-recruitment process, face outsider status.”<sup>128</sup> Moreover:

[T]he culture of legal education . . . is shaped by the practices and attitudes of the elite schools; those practices and attitudes are reinforced through a self-replicating circle of faculty and graduates . . .

Students at the top schools who are identified after their first year as stars in analytical reasoning receive extensive apprentice-like training as law review editors during their second and third years; training comes from both faculty and more experienced peers. They then go on to yet more hands-on mentoring as law clerks for appellate judges before taking up such positions as

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*the Law School Curriculum*, 26 GA. S. U. L. REV. 361, 371 (2010) (“The *Best Practices* acknowledges that, just as it was difficult for medical schools to transform their curricula, so too will reformation present challenges for legal education.”).

<sup>126</sup> Robert P. Schuwerk, *The Law Professor as a Fiduciary: What Duties Do We Owe Our Students?*, 45 S. TEX. L. REV. 753, 762 (2004).

<sup>127</sup> Daniel Gordon, *Hiring Law Professors: Breaking the Back of an American Plutocratic Oligarchy*, 19 WIDENER L. J. 137, 149 (2009).

<sup>128</sup> *Id.* at 153.

appellate advocate, legal scholar and teacher, or judge. Drawing law school faculty from this pool has ensured great uniformity in career path and outlook, especially in matters of faculty promotion and curriculum, introducing little diversity of experience into faculty perspectives.<sup>129</sup>

Critics argue that this homogeneity leads to an ethos of intellectual superiority and classism.<sup>130</sup>

Because doctrinal faculties in all schools continue to replenish themselves with members who attended law schools that were more likely to consider their legal writing faculties as somewhat inferior (perhaps because of the emphasis of these schools on theory over practical skills and experience), it is only natural that these faculties would adopt a similar view of their present legal writing colleagues.<sup>131</sup>

Then-Dean of Vanderbilt University Law School and current Dean of the School of Law at Washington University in St. Louis, Kent Syverud, has gone so far as to analogize law faculties to traditional Indian society with “Brahmin” casebook<sup>132</sup> faculties desiring to employ lower castes to do the “dirty work.”<sup>133</sup> And more than anyone else in legal education, except

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<sup>129</sup> CARNEGIE REPORT, *supra* note 27, at 89–90.

<sup>130</sup> Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 131 (2010).

<sup>131</sup> Mitchell Nathanson, *Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor*, 11 J. LEGAL WRITING INST. 329, 352 (2005) [hereinafter Nathanson, *Practical Scholarship*].

<sup>132</sup> Again, on the subject of nomenclature, I opt to use the term “casebook professor” to refer to a tenured or tenure-track law professor who does not teach Legal Writing or a Clinic, recognizing, as a legal writing professor myself, that the subtext of word choice is often of primary importance to an effective argument. Alternate terms heard are “doctrinal” or “substantive” professor—leading, of course, to the implication that clinicians and legal writing professors are teaching neither doctrine nor anything of substance.

<sup>133</sup> Newton, *supra* note 130, at 140 (quoting Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS'N LEGAL WRITING DIR. 12, 13–17 (2002)).

maybe clinicians, legal writing professors are the ones who “are willing to roll up their sleeves and do transformative dirty work.”<sup>134</sup>

Legal Writing Faculty are lower caste. They teach courses that relatively few tenured faculty want to teach, although many tenured faculty once did so. Few are on a tenure track, and even tenure-track directors experience some caste discrimination at tenure-time, when “The Faculty” and “The Dean” focus, often for the first time, on the nature of scholarship about legal writing. The terms and conditions of employment reflect that status, with caps on terms of employment, low salaries, and other restrictions—including resistance at many schools even to the use of Professor or Faculty title. All of these conditions vary widely by school. At the same time, the legal writing, lawyering, advocacy and research courses have evolved dramatically almost everywhere, particularly in the last ten years.<sup>135</sup>

As Professor John Lynch notes: “If this were a perfect world, one would imagine that legal education, in appreciation of the legal writing professoriate’s dedication to undertake such arduous tasks, would accord legal writing professors great respect and provide rewards commensurate with their service. But this is not a perfect world,” and has not been since the early days of formal legal education in the United States.<sup>136</sup>

As early as fifty years ago, legal writing was referred to as “the step child [*sic*] of the curriculum, unwanted, starved and neglected.”<sup>137</sup> “Nearly everyone who writes about legal writing duly records faculty disdain for the

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<sup>134</sup> Lynch, *supra* note 113, at 4.

<sup>135</sup> Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, J. ASS’N LEGAL WRITING DIR. 12, 14 (2002).

<sup>136</sup> Lynch, *supra* note 113, at 4.

<sup>137</sup> Stewart Macauley & Henry G. Manne, *A Low-Cost Legal Writing Program—The Wisconsin Experience*, 11 J. LEGAL EDUC. 387, 389 (1959). Bryan Garner goes further: “Legal writing isn’t the stepchild of legal education, as it’s sometimes called. It isn’t even the foster child. It’s more like an abused child.” Bryan A. Garner, *Legal Writing: How Serious is Your School About Writing?*, STUDENT LAW., Oct. 2000, at 18.

subject matter and administrative dislike of the expense.”<sup>138</sup> Even today, there are some law faculty who believe legal writing should not be a law school discipline at all.<sup>139</sup> Professor Mary Beth Beazley, Director of Legal Writing at Ohio State Moritz College of Law, relates an anecdote:

This perception was vividly driven home to me during the job interview for my first full-time legal writing job, which was interrupted by a drunken law professor. He was disgusted to learn that I was interviewing for a Legal Writing job, saying accusingly, “You can’t teach people how to write. They either know it or they don’t.”

At the time, I didn’t realize that this drunken academic had articulated a sobering issue that many Legal Writing faculty face to this day: the attitude that the good writing fairy blesses you with the ability to write at birth, in the same way you might get good teeth. And if you are not blessed with the good writing gene, there is nothing a teacher can do, so law schools should not waste their money trying to teach Legal Writing.<sup>140</sup>

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<sup>138</sup> Mary Ellen Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 317–18 (1980).

<sup>139</sup> J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 46–47 (1994) (“Some go so far as to say that [legal writing] is anti-intellectual because it distracts students from the real business of learning substantive law by competing with the rest of the curriculum for their study time.”).

<sup>140</sup> Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the “Casebook” Classroom (Without Grading Papers)*, 10 J. LEGAL WRITING INST. 23, 28 (2004) [hereinafter *Beazley Better Writing*]; see also Rideout & Ramsfield, *supra* note 139, at 41–42 (identifying as “traditional views” that “[w]riting is writing,” “[l]egal writing is a talent; either you have it or you don’t,” and “[w]riting can’t be taught, so we shouldn’t try.”). This author has personally repeatedly heard, with regard to the students at my Ivy League alma mater and other schools of its tier, that for these “elite” students, all you need to do is provide desultory writing instruction, such as an instructional handout, wind them up, and point them in the right direction, and they can learn the forms and processes of legal writing by themselves. Professor Levine shares my assessment that teaching lawyering skills is not a significant priority at these schools: “The conventional wisdom among legal writing teachers has been that the ‘elite’ law schools devote few resources to legal writing and are particularly zealous about refusing to recognize professionalism in the field by allocating tenure-track positions to those teachers, even when nationally known legal writing teachers are on their faculties.” Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers*

Indeed, at most law schools, legal writing professors do not enjoy professional status equal to that of their casebook colleagues. Legal writing professors have been relegated, quite literally, to “other” status:<sup>141</sup>

For the 2009–2010 academic year, as in past years, most [legal writing] programs continued to use full-time nontenure-track teachers (79 programs, or 41.3%, of those responding . . . ) or a hybrid staffing model (71 respondents, or 37.2%). Twenty programs reported using solely adjuncts (10.9%), twelve programs used solely tenured or tenure-track teachers hired specifically to teach LRW (6.3%) . . . ; and another 17 programs used such teachers in hybrid programs. . . .<sup>142</sup>

Other indicia of the subordinate status of legal writing professors’ “separate and unequal treatment,” in the words of Professor Jo Anne Durako,<sup>143</sup> include physically segregated offices, inferior academic titles, denial of the franchise in faculty governance matters, limited academic freedom, lower pay, and less institutional support—such as funding for research assistants, attending and presenting at conferences, buying books, summer support for scholarship, and sabbaticals. This lack of support can have obvious implications for professional development and can widen the gap between legal writing professionals and their casebook colleagues.<sup>144</sup>

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*in Legal Research and Writing Programs*, 45 J. LEGAL EDUC. 530, 538 (1995). There tends to be a perpetuation of the mentality that, “I never took a legal writing course and I did just fine.” Rideout & Ramsfield, *supra* note 139, at 40.

<sup>141</sup> Beazley, *Better Writing*, *supra* note 140, at 29.

<sup>142</sup> ASS’N OF LEGAL WRITING DIR. LEGAL WRITING INST., ALWD/LWI 2010 SURVEY REPORT iii (2010), available at [http://www.alwd.org/surveys/survey\\_results/2010\\_Survey\\_Results.pdf](http://www.alwd.org/surveys/survey_results/2010_Survey_Results.pdf) [hereinafter 2010 ALWD/LWI Survey].

<sup>143</sup> Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 UMKC L. REV. 253, 255 (2004) [hereinafter Durako, *Dismantling Hierarchies*].

<sup>144</sup> *Id.* at 269. Professor Nathanson makes an interesting point regarding the denial of the franchise to legal writing professionals:

On a rational level, the status attached to voting is obvious. Voting, in an academic setting just as in the world at large, is power, and those who have it are perceived as superior in status to those who do not. Beyond these more

The consequences of this discrepant treatment may indeed take many different forms:

How can we expect law students to become competent and ethical practitioners when the faculty members best suited to teach them the necessary practical skills and ethical lessons from real-world cases . . . are marginalized and even openly held in disdain by some members of the “main” faculty? What message is being communicated to law students by their primary faculty role models?<sup>145</sup>

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objective observations, however, voting is much more significant on a subconscious level and it should be sought for these reasons rather than for power alone. For the determination of who votes is, at its core, a determination of who is considered competent to govern and those considered competent to govern will be those who are believed to be good, moral people. Conversely, those denied this opportunity are inherently considered something less. Thus, in those schools in which the members of the legal writing faculty are not permitted to vote, the “immorality of the other” is inherently demonstrated at each and every faculty meeting.

Mitchell Nathanson, *Dismantling the “Other”: Understanding the Nature and Malleability of Groups in the Legal Writing Professorate’s Quest for Equality*, 13 J. LEGAL WRITING INST. 79, 106 (2007). The lack of the franchise and academic freedom at one law school led to students voting to demand a switch in citation textbook and the faculty committee deciding to impose the choice on the legal writing program against the judgment of its experienced legal writing director. Durako, *Dismantling Hierarchies*, *supra* note 144, at 263. All of these hallmarks of repression are noted and can be acted upon by students. “The doctrinal faculty’s treatment of the legal writing faculty provides a bad example for law students to do likewise. All too often when law students are frustrated with law school, the legal writing teacher is the cat that gets kicked!” Lynch, *supra* note 113, at 16.

<sup>145</sup>Newton, *supra* note 130, at 148; *see also* Gordon, *supra* note 127, at 155 (“Law schools fail to value legal research and writing instructors as part of the mainstream tenure track faculty. Research and writing are not taken seriously as a legal-teaching status, and legal writing instructors are placed lower on the law school faculty hierarchy. . . . Law schools should treat legal research and writing professors like all other tenured and tenure track faculty, but the ABA has undercut such a system by allowing law schools to provide only short-term contracts for research and writing.”). The message of subordination is communicated at many schools very clearly to students. First, as Professor Durako points out, at many schools, legal writing faculty are often segregated together in other parts of the building from their casebook colleagues. Durako, *Dismantling Hierarchies*, *supra* note 143, at 255–56. Do torts faculty find themselves housed on the “Torts” floor? *Id.* Naturally, these separations impede the legal writing

### 1. A Closer Look at this Homogeneity in the Legal Academy: A Separation of the Sexes

On the subject of orthodoxy and marginalization, it should not be overlooked that there is a homogeneity of another kind at play in the legal academy. “Legal education has traditionally been a white male affair, to which women and people of color have only recently gained entry.”<sup>146</sup> Perhaps because they are fairly recent entrants in the history of the academy,<sup>147</sup> women dominate the discipline of legal writing:

Since 1999, the Association of Legal Writing Directors and the Legal Writing Institute have administered an annual survey with 100 questions on many aspects of legal writing programs, including staffing. In recent years, this survey has received responses from over 90% of all ABA-accredited law schools. And so we know with confidence that the typical legal writing professor is a white female, hired off the tenure-track with a multi-year

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faculty and the casebook faculty from getting to know each other and each other’s work, allowing stereotypes to continue unchallenged. *Id.* Inferior academic titles, like “Professor of Legal Writing,” or “Legal Writing Instructor,” rather than “Professor of Law,” are also patent to students; casebook professors are not designated “Professor of Contracts,” indicating to the world that their expertise is somehow circumscribed. *Id.* at 258.

<sup>146</sup>Nancy E. Dowd et al., *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J. L. & PUB. POL’Y 11, 12 (2003).

<sup>147</sup>In this regard, Professor Lynch notes:

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

Lynch, *supra* note 113, at 14–15.

contract, earning significantly less than the typical tenure-line law faculty hire.<sup>148</sup>

Large numbers of non-tenure-line legal writing positions were created in the 1980s and women entered these positions “at very high rates.” Law schools simply took advantage of the situation, ignoring the undercurrent of gender discrimination. Legal writing became entrenched as a non-tenure-line pink ghetto, and most law schools and their national accrediting agency still appear comfortable with this reality.<sup>149</sup>

“Legal writing may have been, perhaps unconsciously, an economical strategy to accomplish the positive goal of adding more women quickly to law school faculties.”<sup>150</sup> And it worked. In Professor Liemer and Temple’s 2008 study of legal writing professors, 74 percent of the 428 respondents were female.<sup>151</sup>

The gender discrepancy in a demonstrably lower-status cadre of the legal academy is troubling. “[T]he predominantly female legal writing cohort endures ‘a version of gender discrimination that no law firm or corporation

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<sup>148</sup> Susan P. Liemer & Hollee S. Temple, *Did Your Legal Writing Professor Go to Harvard?: The Credentials of Legal Writing Faculty at Hiring Time*, 46 U. LOUISVILLE L. REV. 383, 413–14 (2008).

<sup>149</sup> *Id.* at 415–16 (quoting Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 539 (1988)). This “pink ghetto” phraseology has been used in several articles to refer to women in legal writing. See Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562, 562 (2000) [hereinafter Durako, *Pink Ghetto*]. Noted legal writing expert Bryan Garner concurs: “The status of today’s [legal research and writing] programs also gives law schools an appearance of sex discrimination.” Bryan Garner, *Legal Writing: Writing Instructors Need Your Support Because Schools Give Them So Little*, 31 STUDENT LAW. 10, 10 (2003) [hereinafter Garner, *Legal Writing*].

<sup>150</sup> Durako, *Pink Ghetto*, *supra* note 149, at 580. For many legal writing professors, including this author, motherhood played a significant role in their transition to teaching. Lynch, *supra* note 113, at 12.

<sup>151</sup> Liemer & Temple, *supra* note 148, at 418.

would dare institutionalize or rationalize, let alone put into print.”<sup>152</sup> Moreover, a gender discrepancy even exists within legal writing departments:

In American law schools today, about three-quarters of the doctrinal faculty—these teaching such subjects as contracts and constitutional law—are men. Suppose it were discovered that those men had been systematically treated less well in terms of salary and status than one-quarter of doctrinal faculty who are women. Suppose further that these men had been paid, on average, 80 percent of what the women earn, and that the men were awarded tenure at lower rates than the women. Would this be a problem? Would law schools take notice? Take action? What would deans and faculties do about this? What would the academic community, the legal profession, and wider audiences say about it? . . .

The 1996 Report of the American Bar Association’s Commission on Women in the Profession urged law schools to ‘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.’” The recent surveys of legal writing programs found that the specialized teaching area of legal writing has become just such a pink ghetto and that, within the ghetto, women directors are treated like second-class citizens.<sup>153</sup>

Professor Ann McGinley illustrated these differences with qualitative data:

While I have not conducted a comprehensive empirical study, I created a questionnaire that I sent to two listservs that are directed at legal writing faculty. I received thirteen responses that provided anecdotal evidence. The anecdotal evidence suggests that, at least

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<sup>152</sup> Lynch, *supra* note 113, at 13 (quoting Kathryn Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools [sic] Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 1, 4 (2001)).

<sup>153</sup> Durako, *Pink Ghetto*, *supra* note 149, at 562–63 (quoting COMMISSION ON WOMEN IN THE PROFESSION, A.B.A., *ELUSIVE EQUALITY: THE EXPERIENCE OF WOMEN IN LEGAL EDUCATION* 4 (1996)).

in some schools, either unconsciously or consciously, other faculty, administrators, and students have different expectations regarding gendered work done by male and female legal writing instructors. The anecdotal evidence suggests that tenure track faculty more frequently consider male legal writing faculty members than females to be in the job temporarily as a means to an end. Moreover, it suggests that other faculty members accept the male legal writing professors as equals more than they accept their female counterparts as equals. It also appears that at least some deans are uncomfortable paying male legal writing professors the low salaries earned by women in the same jobs, that faculty and administrators offer to mentor male legal writing faculty members more often to do research, and that, on at least two occasions, the male legal writing professors were granted research stipends that had been previously unavailable to the women occupying the position.<sup>154</sup>

The sexism within legal writing itself has unfortunate consequences on the quality of student education:

Failure of women directors to have power and status results in their having less authority over and less impact on the very legal writing programs they must oversee. . . . Without job security or the protection of academic freedom, women writing directors are less likely to challenge such traditions as the male model of oral argument or the overemphasis on litigation rather than transactional documents in legal writing courses.<sup>155</sup>

One might argue that:

[s]ome of the discrepancies may be explained by the very real pressures, both external and internalized, that our society still places on women, more than men, to put family concerns before their own professional ambitions. These pressures limit the geographic mobility of some women faculty candidates, who may take a non-tenure-line teaching job over no teaching job. These

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<sup>154</sup> Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 132–134 (2009).

<sup>155</sup> Durako, *Pink Ghetto*, *supra* note 149, at 585.

same family pressures also may cause some women lawyers to seek the scheduling flexibility of teaching jobs, including legal writing positions. In fact, some highly-credentialed women may be consciously choosing to avoid the extra time constraints of traditional tenure-line positions.<sup>156</sup>

Indeed, often heard is:

when legal writing professors' requests for improved status have been denied, several themes have emerged. One frequent comment made by deans and faculties is that market forces are at work. Others say that the law school just does not have the resources now. And quite often, legal writing professors hear that upgrades cannot be made for them because, after all, they were not hired with the same credentials as the tenure-line faculty.<sup>157</sup>

However, Professor Lynch responds: "While apparently gender-neutral, this 'magic of the marketplace' standard has insidiously permitted law schools to exploit the disadvantages of women in the legal employment market to obtain first-rate teachers at bargain basement wages."<sup>158</sup>

#### *D. Legal Writing Professors as Second-Class Citizens*

Whatever the reason for the second-class citizenship of legal writing professionals, the relegation is marked and enduring. In the same vein as the marketplace argument is the idea that:

Yes, it would cost more not to discriminate against these women lawyers with tenure-line credentials. It seems hypocritical, however, for law schools to teach courses on employment discrimination while rationalizing their own employment discrimination as a great money saver. Law school development offices have long raised money for endowed chairs and other

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<sup>156</sup> Liemer & Temple, *supra* note 148, at 426–27.

<sup>157</sup> *Id.* at 387–88. Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: The First Images: A Survey of Legal Research and Writing Programs*, 1 LEGAL WRITING 123, 125 (1991) ("Historically, the driving force in creating [legal writing] programs has been to find the cheapest, not the best, structure and method.")

<sup>158</sup> Lynch, *supra* note 113, at 15.

salary supplements for professors. Those same offices could address this funding issue, too, particularly as the bar continues to call for greater skills training and a focus on developing legal research and writing skills.<sup>159</sup>

#### The marketplace argument

do[es] not withstand close scrutiny. Law schools may make marketplace arguments that they can attract highly qualified writing teachers for depressed salaries, but these same arguments have not decreased salaries for doctrinal teaching positions by comparable amounts despite the extremely high number of applicants for those jobs. While law schools may respond that they must pay to attract the best teacher-scholars and do not want to teach Contracts on the cheap, that concern for quality instruction apparently does not carry over to ensuring high quality in legal writing courses and scholarship. The related assumption that any lawyer can teach legal writing does not appear to carry over to the idea that any lawyer can teach Torts.<sup>160</sup>

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<sup>159</sup> Liemer & Temple, *supra* note 148, at 428.

<sup>160</sup> Durako, *Pink Ghetto*, *supra* note 149, at 584. Professor Beazley also refutes this market-based argument:

Tenure-track positions are inappropriate because you can't attract "tenure quality" people to them, OR they are unnecessary because we are already attracting high-quality people even without the lure of tenure. . . .

[N]o sane person with any options really *wants* to teach legal writing. Those who do must have some ulterior motive, or are too incompetent to get any other sort of job. When it's pointed out that many highly qualified people already teach legal writing—including people who have the good "paper credentials" of federal clerkships and high class rank—the [argument] shifts shape and declares that tenure-track positions are not needed because we're already attracting well-qualified people. . . .

We need tenure-track positions in legal writing not just to benefit highly qualified people who are already teaching in it, but also to attract even more of these qualified people to the field. With the current state of affairs, it's no wonder that few so-called "quality" candidates have sought out legal-writing jobs. The conventional wisdom is that teaching legal writing—or even expressing an interest in teaching it—sounds the death knell of any chance for a tenure-track position. Not surprisingly, people deny any interest in this undervalued discipline. If, however, legal writing becomes valued, if there is

“Although it may be implicitly sanctioned by ABA Standard 405(d), [which requires some measure of job security for legal writing professionals, but which implicitly does not promote their tenure-track appointment], ‘take it or leave it’ is not an appropriate condition of employment when it is applied only to one cohort of the law professoriate.”<sup>161</sup> The status of legal writing professionals appears to be an anti-competitive collusion on the part of law schools and their

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an opportunity to build a worthwhile career teaching legal writing, then valuable people will seek out those positions.

As for the reverse argument—that tenure is unnecessary because we are already attracting good people without it—law faculty would be wise not to discuss supply and demand too loudly. We create tenure-track positions for law professors not because it is the only way to attract good teachers, but because it is the best way to attract the best teachers. Certainly, in the current market, law schools could find good teachers of contracts, torts, constitutional law, and many other courses without offering tenure-track positions. But the academy’s cost-benefit analysis has always been that the benefit of committed, secure, full-time faculty with academic freedom is worth the cost of tenure-track positions.

A tenure-track professor is an incredible resource, and not just for the law school. The three elements of the tenure-track position—scholarship, teaching, and service—produce concrete, tangible benefits for law students, the legal community, and the public at large. . . .

The lack of tenure-track positions in legal writing denies the bench, the bar, and the public the opportunity to benefit from the work of experienced writing teachers. Like any other professor, legal-writing professors can conduct CLE seminars and sit on bar committees. They can analyze how writing is best accomplished in law firms and propose training programs for new attorneys. They can study how lay people read and use legal documents, and they can suggest improvement. The possibilities are endless.

Mary Beth Beazley, “*Riddikulus!*”: *Tenure-Track Legal-Writing Faculty and the Boggart in the Wardrobe*, 7 SCRIBES J. LEGAL WRITING 79, 84–86 (2000) [hereinafter Beazley, *Riddikulus!*]. Professor Lynch also points out the incongruity in corner-cutting when it comes to legal writing programs, as it is for legal writing, of all law school subjects, that the ABA has perhaps the most rigorous requirements for the nature and quality of instruction. Lynch, *supra* note 113, at 10–11 (“Although ABA standards pertaining to legal writing programs require law schools to provide students with an educational Mercedes, they require schools to pay only for a Hyundai.”).

<sup>161</sup> Lynch, *supra* note 113, at 15.

administrations, not unlike the 1985 Major League Baseball efforts to boycott free agents.<sup>162</sup> The entire market-based debate must also recognize that attrition of legal writing professors and the recruitment and training of replacements is also extremely expensive, so efforts to cut corners in lawyering skills salaries are not necessarily paying off in the final analysis, either as a money-saving device or as sound educational policy.<sup>163</sup>

Finally, arguments regarding the inferiority of legal writing professionals as compared to their casebook colleagues are so universally mentioned as to take on the aforementioned shibboleth-like status; it is shibboleths of this kind that continue to require demystification.<sup>164</sup> After all, “[d]evaluation of either the teacher or the subject hurts, not helps, legal education.”<sup>165</sup>

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<sup>162</sup> See Marc Edelman, *Has Collusion Returned To Baseball? Analyzing Whether a Concerted Increase in Free Agent Player Supply Would Violate Baseball's "Collusion Clause"*, 24 LOY. L.A. ENT. L. REV. 159, 162–64 (2004) (describing 1985's collusive conspiracy among baseball team owners to artificially depress the salaries of free agent players).

<sup>163</sup> See Rideout & Ramsfield, *supra* note 139, at 87–88:

Staffing models contribute to turnover. . . . In all models except the full-time tenure track model, the turnover is high. Establishing a sound pedagogy is next to impossible under these circumstances, which may explain why so many schools have attempted to restructure their programs each year. Instead, law schools should consider hiring and training professors who have the job security that allows them to develop programs and generate scholarship in legal writing.

<sup>164</sup> Professor Mary Beth Beazley, in homage to the Harry Potter series of books, refers to these shibboleths as “boggarts”:

In the third book of the popular Harry Potter series, Harry and his classmates at the Hogwarts School for Witchcraft and Wizardry encounter a scary creature called a boggart. A boggart isn't confined to one creepy form but “shape-shifts,” taking “the shape of whatever it thinks will frighten us the most.” Boggarts hide in enclosed spaces like wardrobes, grandfather clocks, and the shadowy spot underneath your bed.

Law-school faculties face boggarts too. These boggarts are the living myths that pop out and whisper in faculty ears whenever someone suggests that law schools should create tenure-track—or even permanent—faculty positions in legal writing. Although some faculties have defeated those boggarts, they are still out there, popping out not from under the bed or from behind the closet

### 1. Shibboleth #1: Legal Writing Professors Are Not Intellectual.

This is Professor Beazley's first "boggart." "The It's-Not-Intellectual Boggart."<sup>166</sup> "Legal writing lacks enough intellectual substance for a tenure-track position, *OR* it's so hard to teach that burnout is inevitable, making contract caps necessary."<sup>167</sup>

Legal writing is just a glorified gramm[a]r course. Because it's a simple course to teach, it can be taught well off the top of your head, with no preparation, training, or experience. Thus, there is no need for teachers who have developed any sort of expertise or for any scholarship in the field.<sup>168</sup>

The authors of the Carnegie Report corroborate that these sentiments run rampant in the legal academy: "In many of the schools we visited, students commented that faculty view courses directly oriented to practice as of secondary intellectual value and importance."<sup>169</sup>

However, there is great rigor in both the pedagogy and scholarship of legal writing. With regard to accusations of a feeble-minded pedagogy, Professor Beazley replies:

Riddikulus! Legal writing is not focused on grammar any more than tax law is focused on math. Legal-writing faculty teach communication skills, it's true, but they teach those skills in the context of substantive issues of legal doctrine, professional

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door, but at lunch in the faculty lounge, after the committee meeting, and during the conversation in the hallway. When challenged, these boggarts shift their shapes, twisting their logic until they are almost unrecognizable, exploiting the fears of those who debate the inclusion of legal-writing professionals in the academy.

Beazley, *Riddikulus!*, *supra* note 160, at 79 (quoting J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN 133 (1999)).

<sup>165</sup> Durako, *Pink Ghetto*, *supra* note 149, at 584.

<sup>166</sup> Beazley, *Riddikulus!*, *supra* note 160, at 80.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 80–81.

<sup>169</sup> CARNEGIE REPORT, *supra* note 27, at 88.

responsibility, and legal practice. Legal-writing courses aren't the dirty diapers of legal education. Instead, they embody the very essence of what lawyers do: identify relevant authorities, synthesize legal rules from those authorities, and apply those rules to the relevant facts, all in a particular jurisdictional and procedural context. This is what 'thinking like a lawyer' is all about, and it is what legal-writing professionals teach their students every semester.<sup>170</sup>

With regard to scholarship, legal writing professors are required to *do* scholarship. A 2005 bibliography published by Professors Terrill Pollman and Linda H. Edwards is revealing:

The list contains entries for nearly 300 authors. It includes more than 350 books, book chapters, supplements, and editorships, and over 650 law review articles. It includes at least that many articles in peer-reviewed academic journals, specialty journals designed primarily for practitioners, and other kinds of publications. By any criteria, the content of the list is impressive.

Law review placements span the spectrum of the academy and include journals at such schools as Harvard, Yale, Columbia, N.Y.U., Cornell, Georgetown, Minnesota, Virginia, California, Michigan, Duke, Wisconsin, Notre Dame, Stanford, and Chicago.<sup>171</sup>

Furthermore, while legal writing professors can and do engage in scholarship in a broad array of legal fields,<sup>172</sup> legal writing also has its own distinct and rigorous brand and body of scholarship. In fact, a 2004 article by Professor Michael R. Smith identified five subcategories of legal writing scholarship, distinguishable by substantive content and audience:<sup>173</sup> scholarship on program design and administration of legal writing

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<sup>170</sup> Beazley, *Riddikulus!*, *supra* note 160, at 81.

<sup>171</sup> Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 J. LEGAL WRITING INST. 3, 8 (2005).

<sup>172</sup> *Id.* at 8–9.

<sup>173</sup> Michael R. Smith, *Foreword: The Next Frontier: Exploring the Substance of Legal Writing*, 2 J. OF THE ASS'N OF LEGAL WRITING DIRECTORS 1, 5 (2004).

programs;<sup>174</sup> scholarship on legal writing pedagogy;<sup>175</sup> scholarship on legal writing as a profession;<sup>176</sup> scholarship on legal writing scholarship;<sup>177</sup> and scholarship on the substance of legal writing.<sup>178</sup>

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<sup>174</sup> *Id.* at 6.

<sup>175</sup> *Id.*

In some ways, the legal writing profession's focus on pedagogical scholarship is understandable. Because of the inherent nature and quality of teacher-student interaction in legal writing instruction, many people who are drawn to legal writing as a profession are dedicated "teachers" who put a high value on effective teaching. In fact, I would surmise that legal writing teachers are among the most conscientious teachers in the legal academy. It comes as no surprise then that many legal writing professionals write about teaching, for it is natural to write about what one cares about the most.

*Id.* at 23. Indeed, legal writing professors are leaders in the academy on writing about legal pedagogy: a leadership that becomes crucial at a time when, as this article has been discussing, economic conditions and intensive critique are compelling a fundamental change in how we prepare our students:

The value of scholarship about pedagogy is the subject of debate within the legal academy, but a compelling case can be made for including pedagogical analysis as part of legal scholarship. Judge Harry Edwards begins his well-known critique of modern legal scholarship with an epigram from Felix Frankfurter: "In the last analysis, the law is what the lawyers are. And the law and the lawyers are what law schools make them. He returns to Frankfurter again in the article's conclusion and argue for "practical scholarship and pedagogy." He writes, "I earnestly believe that much of the growing disarray that we now see in the profession is directly related to the growing incoherence in law teaching and scholarship.

Judge Edwards is writing primarily to criticize highly theoretical scholarship not readily usable by the profession, but his criticism also says something important about taking seriously our role in "making lawyers." Tellingly, in this same article, Judge Edwards decries inadequate law school attention to legal writing and asserts that "far too few law professors recognize the gravity of the problem." He notes problems with matters of style and presentation in the practitioner writing he sees, but observes that "[t]he more serious problem is . . . lack of depth and precision in legal analysis.

If Felix Frankfurter and Judge Edwards are right that the lawyers we "make" define the future of the law, then surely pedagogy should not be excluded from our close, critical scholarly examination. Careful analysis of legal pedagogy serves all the identified values of scholarship. It identifies and proposes solutions for a serious legal problem; the problem of bad legal

In many instances, much of the scholarship on the substance of legal writing is referential of composition theory,<sup>179</sup> and the heart of that is rhetoric: “in particular, the rhetorical concept that meaning is constructed out of the interaction of reader and writer, text and context.”<sup>180</sup>

When legal writing professors took a turn towards scholarship, the prevailing view in the legal academy was that scholarship examining theory and doctrine was to be preferred over pedagogical scholarship or scholarship examining skills and

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writing with its attendant effects on clients and on the legal system. It improves the performance of tomorrow’s legal decision-makers far more directly than can a doctrinal article about a particular, often esoteric legal issue or highly theoretical article addressed largely to other highly theoretical scholars writing in the same specialized field. It advances knowledge about one of our own professions, the profession of teaching. And given the marginalized status of legal writing programs and faculty members at many schools, scholarship about legal writing pedagogy often must speak truth to power. . . .

The claim that scholarship enhances teaching is one of the primary justifications for devoting so many institutional and personal resources to the scholarship project. It is difficult to square that claim with institutional policies declaring pedagogy categorically off limits as an area of scholarly inquiry. If serious scholarly treatment of law teaching is outside the boundary of acceptable scholarship, we cannot claim truthfully that we write to improve our teaching.

Pollman & Edwards, *supra* note 171, at 30–32 (quoting Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 64–65, 77 (1992) and Letter from Felix Frankfurter, Professor, Harvard Law School, to Mr. Rosenwald 3 (May 13, 1927) (Felix Frankfurter papers, Harvard Law School Library) (quoted in RAND JACK & DANA C. JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 156 (1989))).

<sup>176</sup> *Id.* at 7.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 8. This realm of scholarship can be further broken down into “best practices of legal writing,” *id.*, scholarship about audience, *id.* at 11, “rhetorical analysis scholarship,” *id.* at 12, “scholarship on ethics and professionalism in legal writing,” *id.* at 13, “[s]cholarship on legal method and the nature of legal authorities,” *id.* at 14, and “[s]cholarship on appellate practice and procedure,” *id.* at 16.

<sup>179</sup> CARNEGIE REPORT, *supra* note 27, at 108.

<sup>180</sup> Linda L. Berger et al., *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 J. LEGAL WRITING INST. 521, 521–522 (2010).

practice. At the same time, within academia more generally, the interpretation of “texts” was favored over the composition of texts. In both cases, the more respected professors were those whose scholarship focused not on how to write or how to teach, but instead on how to interpret, analyze, and critique the written artifacts of legal processes.<sup>181</sup>

The rejection of rhetoric by the legal academy as a subject worthy of intellectual exploration is ironic, given that “[l]awyers are rhetors. They make arguments to convince other people. They deal in persuasion.”<sup>182</sup> As with so many other intellectual pursuits connected with legal writing, the argument has been advanced that writing about legal writing is not a sufficiently rigorous scholarly topic:

One rationale sometimes offered to support a policy discounting legal writing topics is the sweeping generalization that writing on legal writing topics does not constitute scholarship. Even assuming the possibility of a static and universal definition of “legal scholarship,” this assertion cannot sustain reasoned analysis.

First and at the very least, the assertion is overbroad. [Legal writing scholarship includes such categories] as the roles and functioning of the judicial and legislative systems; the doctrine of stare decisis; precedential values and appropriate uses of legal authority; the forms of legal reasoning; the principles of statutory construction; relevant ethical duties of lawyers; the standards of appellate review; and other doctrines relating to appellate practice. One can hardly deny that these topics qualify as subjects of legal scholarship. Some of them have been well established as subjects of legal scholarship for many years. Consider, for example, such classics as Judge Benjamin Cardozo’s *The Nature of the Judicial Process*; Karl Llewellyn’s *Bramble Bush* or his famous “thrust and parry” article; Edward Levi’s classic book on legal reasoning; David Mellinkoff’s *The Language of the Law*; or Robert Cover’s

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<sup>181</sup> *Id.* at 523–24.

<sup>182</sup> Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 *YALE J.L. & HUMAN.* 155, 177 (2006).

famous Forward to the Supreme Court 1982 Term, *Nomos and Narrative*.<sup>183</sup>

Now, many commentators argue that legal writing scholarship should take up notions of how good legal writing is done by all legal writers, including practitioners and judges, to respond to criticisms of the legal academy that legal scholarship is esoteric and disconnected from the actual practice of law.<sup>184</sup> Indeed, Professor Beazley argues:

[T]his field cries out for scholarship. Academics are people who apply research to problems. They evaluate the problem, propose solutions, and test those solutions with further scholarship. The problems in professional legal writing are severe, and the calls for help have come from many sources, from the MacCrate Report to the recent AALS speech of Attorney General Janet Reno. If the law schools are honestly committed to solving these problems, then they should create the tenure-track positions that will spur needed scholarship.<sup>185</sup>

She further notes that legal writing scholars make enormous contributions to the profession of law: “Legal-writing scholars have already taken giant strides: they have analyzed myriad types of legal prose and created a legal-writing vocabulary that allows us to discuss what makes an analytical document complete or a drafted document comprehensible. But much remains to be done.”<sup>186</sup>

A step toward acceptance of the legal writing brand of scholarship came with:

[t]he twists and turns toward interdisciplinary legal scholarship [which] opened up a new direction for legal writing scholars. Since the late 1960s, articles featuring “interdisciplinary” applications to

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<sup>183</sup> Pollman & Edwards, *supra* note 171, at 35.

<sup>184</sup> Berger et al., *supra* note 180, at 530 (citing Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ASS’N LEGAL WRITING DIRECTORS 129 (2006)).

<sup>185</sup> Beazley, *Riddikulus!*, *supra* note 160, at 81–82.

<sup>186</sup> *Id.* at 85.

the law and cognitive science. Some of these disciplines lend themselves to arguments that come naturally to legal writing professors, arguments about what language means or what decision-makers intended or how a decision was . . . reached and how it should be interpreted.<sup>187</sup>

Legal writing scholarship now delves into such fields as linguistics<sup>188</sup> and feminist theory.<sup>189</sup> A mainstay of legal writing scholarship is interpretative works, akin to the traditional interpretative works of the legal academy, in which “linguistics, classical and contemporary rhetoric, social science, and cognitive science [are applied to explain] how and why particular texts [are] rhetorically effective.”<sup>190</sup>

Like the scholarship of casebook faculty, the work of legal writing professors is well-researched, original, current, and creates a learned dialogue within the discipline.<sup>191</sup>

One must proceed with caution when considering the merits of this relative newcomer to the canon of legal scholarship. Dean Geoffrey Stone, then Dean of the University of Chicago Law School, warned:<sup>192</sup>

First, we may undervalue “good” work because we do not understand it. Aficionados of law and literature may not appreciate the subtle elegance of a novel application of the Coase Theorem. They may not understand why the work is original or useful. Moreover, because they do not grasp the work’s substance, they may tend to dismiss its significance. Even law professors fall victim to human nature.

Second, we may undervalue “good” work because it suggests, implicitly or explicitly, that the work we do is not valuable.

<sup>187</sup> Berger et al., *supra* note 180, at 524–525.

<sup>188</sup> Elizabeth Fajans & Mary R. Falk, *Politics and Literature: Teaching Lawyers to Write: Linguistics and the Composition of Legal Documents: Border Crossings*, 22 LEG. STUD. F. 697 (1998).

<sup>189</sup> Kathryn M. Stanchi, *Feminist Legal Writing*, 39 SAN DIEGO L. REV. 387 (2002).

<sup>190</sup> Berger et al., *supra* note 180, at 530.

<sup>191</sup> *Id.* at 536–40.

<sup>192</sup> Pollman & Edwards, *supra* note 171, at 45.

Practitioners of law and economics may feel that feminist theory rejects the basic premise of their work. An all-too-human response is to dismiss those ideas that do not “appropriately” value our own.

Third, we may undervalue “good” work because it promotes a view of the legal system or society or human relations that is fundamentally inconsistent with our own world view. Such work may challenge not only the value of our work, but also our broader sense of the appropriate order of things socially, economically, politically, and personally. Work that casts doubt upon everything we cling to is not likely to be embraced enthusiastically.<sup>193</sup>

If an argument could be made that legal writing scholarship in any way lags behind that of its casebook cousins, a catch-22 must be recognized. “Until an academic subject is professionalized, that is, until an academic subject is undertaken by people with the experience, time, and resources to explore its intellectual boundaries, the growth of its doctrine will be slow.”<sup>194</sup>

As an academic discipline, legal writing is a relative newcomer to the legal academy. Over the last few decades, skilled attorneys have become dedicated teachers and scholars, creating both a core pedagogy and a body of scholarship that have given shape to the field of legal writing. At the same time, these pioneering professors have shaped their own futures. Legal Writing positions have evolved from short-term, stepping-stone jobs into professional career paths.<sup>195</sup>

In short: “[i]mproved conditions would . . . contribute to the intellectual development of the field by increased output and recognition of legal writing scholarship, a consequence that is already in evidence.”<sup>196</sup> Indeed, Professor Beazley has pointed out that the development of legal writing

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<sup>193</sup> Geoffrey R. Stone, *Controversial Scholarship and Faculty Appointments: A Dean’s View*, 77 IOWA L. REV. 73, 74 (1991).

<sup>194</sup> Smith, *supra* note 173, at 22.

<sup>195</sup> Liemer & Temple, *supra* note 148, at 383–84.

<sup>196</sup> Durako, *Pink Ghetto*, *supra* note 149, at 584.

scholarship as a discipline has been deterred at schools that do not credit this scholarship as part of a professor's qualifications for tenure.<sup>197</sup>

Moreover, it should further be recognized that the very nature of legal writing pedagogy creates the need for teaching to be at the center of the legal writing professor's daily time commitments.<sup>198</sup> "Most law faculty acknowledge that writing teachers may well have the heaviest workload at the law school."<sup>199</sup>

The heavy workload of writing teachers stems from several sources. Most required research and writing course curricula cover research, analysis, writing, citation, legal discourse, and legal skills. Students generally complete several assignments during the semester, typically getting individual written critique on the assignments, conferencing on some assignments, and perhaps rewriting assignments. This style of individualized, responsive, recursive teaching is burdensome and time-consuming. But responsive teaching is required to be effective in teaching a complex set of lawyering skills.<sup>200</sup>

Furthermore, "[t]he numbers of students [that lawyering skills professors] were assigned as well as the teaching and commenting practices they engaged in made it difficult to find the time to study and write."<sup>201</sup> The Association of Legal Writing Directors/Legal Writing Institute survey is revealing as far as time commitment: legal writing professors average reading 1,489 pages of student work and holding 49.13 hours of required or strongly recommended conferences every fall and 1,520 pages and 45.05

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<sup>197</sup> Beazley, *Riddikulus!*, *supra* note 160, at 84.

<sup>198</sup> Lynch, *supra* note 113, at 4.

<sup>199</sup> Durako, *Dismantling Hierarchies*, *supra* note 143, at 270.

<sup>200</sup> *Id.* n.111.

<sup>201</sup> Berger et al., *supra* note 180, at 540; Pollman & Edwards, *supra* note 171, at 9 n.15 ("[Because of] the greater-than-normal teaching loads of most legal writing professors . . . , meaningful comparisons to productivity levels for casebook faculty members are impossible."); *see also* Lynch, *supra* note 113, at 5 ("If there is a perception that legal writing teachers are scholarship-challenged, a number of explanations have been suggested. One explanation is . . . the time demands are imposed by interactions with students, which are demands not ordinarily shared by other faculty.").

conference hours every spring.<sup>202</sup> Finally, emotional labor can disrupt the scholarly work of the legal writing professor: “The legal writing professor, like the mother in the traditional family who disrupts her own sleep to respond to her children’s cries, is eternally interruptible. These interruptions come at the expense of other work such as class preparation or scholarly pursuits, and can also invade leisure time.”<sup>203</sup> Professor McGinley also argues that female faculty in general might experience a disproportionately heavy service load as well: “Law faculties tend to emulate the family’s gender divide. That is, women tend to do the housework—the committee work and the other internal work at the law school—men tend to do the outside work—more scholarship, more travel, more self-promotion, more blog entries and other “scholarly” career work.”<sup>204</sup>

Perversely, this heavy workload itself has been cited as a reason to deny legal writing professors tenure-track status:

When challenged, this boggart shifts shape and says that legal writing is so hard to teach that a permanent position is unwise. Legal-writing teachers face inevitable burnout from the mental strain of correcting papers—certainly no one could stand doing it for more than a year or two. We must protect legal-writing teachers by using capped contracts that force them out into better jobs.<sup>205</sup>

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<sup>202</sup> 2010 ALWD/LWI Survey, *supra* note 143, at ix.

<sup>203</sup> McGinley, *supra* note 154, at 131.

<sup>204</sup> *Id.* at 150–51.

<sup>205</sup> Beazley *Riddikulus!*, *supra* note 160, at 81. Of course:

[T]eaching legal writing is no more likely to lead to burnout than teaching any other subject matter. Just as certain people enjoy the intellectual challenge of tax law or property law, some enjoy the challenge of studying and teaching legal writing. The growing number of experienced legal-writing teachers who have taught for 5, 10, 15 years or more prove the point. If a legal-writing teacher is not overwhelmed by too many students and has opportunities for professional development, burnout need never be a problem.

*Id.* at 82.

There are a myriad of other hallmarks to the intellectual rigor of legal writing as a discipline: two dedicated, peer-reviewed journals (the *Journal of the Legal Writing Institute* and the *Journal of the Association of Legal Writing Directors*, as well as a number of newsletters and other publications),<sup>206</sup> two “flagship” organizations (the Legal Writing Institute (LWI) and the Association of Legal Writing Directors (ALWD) as well as other smaller organizations);<sup>207</sup> dedicated and regularly scheduled conferences (with either an LWI or ALWD meeting every year, and a multitude of smaller, regional conferences),<sup>208</sup> regularly convened writers’ conferences;<sup>209</sup> and two dedicated listservs and a blog.<sup>210</sup> Few, if any, legal disciplines can boast such a wealth of opportunities for intellectual exchange.

## **2. Shibboleth #2: Legal Writing Professors Are Less Qualified than Casebook Professors.**

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<sup>206</sup> Berger et al., *supra* note 180, at 532.

<sup>207</sup> *Id.* at 533. For instance, ALWD

has diligently sought to improve legal writing as a discipline and as a profession. Up to now, ALWD has waged this battle on four primary fronts. First, recognizing the power of shared information, ALWD has organized legal writing directors and has created mechanisms through which they can exchange data, ideas, experiences, and strategies. These efforts alone have had a dramatic impact on the growth of our discipline. . . . Third, ALWD has sought to improve the status and working conditions of legal writing professionals by actively participating in the American Bar Association’s hearings on law school accreditation standards. Fourth, ALWD, along with Darby Dickerson of Stetson Law School, has revolutionized legal citation with the publication of the ALWD Citation Manual. The success and impact of this project has been dramatic. By clarifying and simplifying the rules on legal citation, the ALWD Citation Manual “became the most popular new law school book in Aspen [Publishers] history.”

Smith, *supra* note 173, at 2–3 (quoting Aspen Publishers, *Aspen Publishers 2003 Law School Publications* 64 (2003)).

<sup>208</sup> Berger et al., *supra* note 180, at 531.

<sup>209</sup> *Id.* at 528.

<sup>210</sup> *Id.* at 533.

A number of recent studies have examined the veracity of this supposition. It is true that in Professor Nathanson's 2004 study of fifty casebook professors and fifty legal writing professors, more casebook professors than legal writing professors had earned their initial law degree from a top-twenty law school, although the discrepancy was not as great as some might suppose: twenty-nine to twenty-one.<sup>211</sup> Professor Liemer and Temple's larger 2008 study found, out of 428 surveyed, 121, or 28 percent, received their Juris Doctor (JD) from a top-twenty law school.<sup>212</sup> Eighteen (4 percent) and eight (2 percent) of the respondents received their JD degrees from Harvard and Yale, respectively.<sup>213</sup> Considering law degrees other than the JD, 155 of those surveyed, or 36 percent, had post-undergraduate degrees from a school ranked in the top twenty by *U.S. News and World Report*.<sup>214</sup> It is difficult to argue against the proposition that graduation from a top-twenty law school is an indispensable criterion for holding a tenure-track position, as 42 percent of casebook professors did not either.<sup>215</sup> However, even if it is, 36 percent of all those legal writing professors surveyed graduated from a top-twenty school, but only 17 percent were in a tenure-eligible position.<sup>216</sup>

Moreover, legal writing professors have other compensatory credentials. Legal writing professors spent more years in practice, and particularly in private practice (the setting in which most of our students will find themselves)<sup>217</sup> than their casebook counterparts.<sup>218</sup> Professors Liemer and

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<sup>211</sup> Nathanson, *Practical Scholarship*, *supra* note 131, at 337. If that law school credential is limited to graduating from Harvard Law School, the discrepancy between casebook professors and legal writing professors is quite large—fourteen to three. *Id.*

<sup>212</sup> Liemer & Temple, *supra* note 148, at 418.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 412.

<sup>216</sup> *Id.* at 420.

<sup>217</sup> BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2010–11 EDITION, available at <http://www.bls.gov/oco/ocos053.htm>. In further emphasis on the imperative need for practical skills for law graduates, half of all lawyers in private practice are, in fact, solo practitioners [hereinafter BUREAU OF LABOR STATISTICS

Temple also found that legal writing professors had experience in a greater variety of practice settings than casebook professors.<sup>219</sup> This additional experience is significant in an environment where 65 percent of law school students and 90 percent of lawyers report that law school does well at teaching legal theory, but less so at the practical business skills needed to practice law.<sup>220</sup>

Professor Nathanson also found legal writing professors to have a similar number of judicial clerkships to casebook professors,<sup>221</sup> although the clerkships for the casebook professors tended to be the more “prestigious”<sup>222</sup> federal clerkships, as opposed to the more frequent state clerkships held by legal writing professors.<sup>223</sup> Again, over one-third of legal writing professors clerked, but only 17 percent held tenure-line positions.<sup>224</sup> Professors Liemer and Temple found an even greater number of legal

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HANDBOOK 2010–11]. Terry Carter et al., *Legal Rebels Riding Solo*, A.B.A. J. (Sept. 1, 2010), [http://www.abajournal.com/magazine/article/legal\\_rebels\\_riding\\_solo](http://www.abajournal.com/magazine/article/legal_rebels_riding_solo).

<sup>218</sup> Liemer & Temple, *supra* note 148, at 411 (citing Mitchell Nathanson, *Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor*, 11 J. LEGAL WRITING INST. 329, 332 (2005)). In fact, Nathanson’s study found legal writing professors to have over double the practice experience as casebook professors, 4.5 years and 2.12 years respectively. *Id.* at 411 n.175.

<sup>219</sup> *Id.* at 424.

<sup>220</sup> LEXISNEXIS, STATE OF THE LEGAL INDUSTRY SURVEY: COMPLETE SURVEY FINDINGS 7 (2009), *available at* [http://www.lexisnexis.com/document/State\\_of\\_the\\_Legal\\_Industry\\_Survey\\_Findings.pdf](http://www.lexisnexis.com/document/State_of_the_Legal_Industry_Survey_Findings.pdf)

<sup>221</sup> Nathanson, *Practical Scholarship*, *supra* note 131, at 337 (reporting, in his admittedly somewhat limited sample, seventeen clerkships for casebook professors and nineteen for legal writing professors).

<sup>222</sup> Liemer & Temple, *supra* note 148, at 412.

<sup>223</sup> Nathanson *Practical Scholarship*, *supra* note 131, at 178. It should be noted, however, that this may in part be accounted for by the gender disparity in legal writing, as women also hold a disproportionate number of state clerkships as opposed to federal. Liemer & Temple, *supra* note 148, at 412 n.178 (citing NALP, *Courting Clerkships: The NALP Judicial Clerkship Study* (2000), *available at* <http://www.nalp.org/courtingclerkships?s=courting%20clerkships>).

<sup>224</sup> Liemer & Temple, *supra* note 148, at 422–23.

writing professors to have worked for courts, either as clerks or in other capacities, such as staff attorney.<sup>225</sup>

Professor Liemer and Temple's study revealed that legal writing professors exceed casebook professors in participation in law review while in law school—67 percent versus 40 percent, 48.2 percent, or 58 percent for casebook professors in previous studies.<sup>226</sup> Assuming selection for law review and law review participation to be a good proxy for high grades and strong writing skills in law school, this statistic again demonstrates a striking discrepancy between the 67 percent of legal writing professors who participated on law review and the 17 percent who hold tenure-line jobs.<sup>227</sup> The fact that 22 percent of the legal writing professors surveyed had served as teaching assistants in law school and 36 percent had been research assistants provides further indication that they were strong students in law school.<sup>228</sup> In fact, legal writing professors have such strong legal writing and research expertise that they are not only able to perform these functions themselves, but can teach them successfully to others.<sup>229</sup>

Finally, in this era of emphasis on humanizing legal education, which will be discussed at greater length later in this article:

[t]here is ample evidence that legal writing professors are expected to have credentials not required of other law professors. Specifically, hiring committees seek certain personality traits and characteristics when interviewing and hiring legal writing professors. They are expected to have strong interpersonal communication skills and to exhibit 'niceness, caring . . . [and] patience. . . .' They also are not likely to be hired if they exhibit 'arrogance or an inflated ego' or 'rigidity or inflexibility.' Would all traditional tenure-line law professors hold their current

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<sup>225</sup> *Id.* at 422.

<sup>226</sup> *Id.* at 421.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 423. Comparably, previous studies had revealed that 27.2 percent, 27.0 percent, or 37 percent of casebook professors had any kind of previous teaching experiences prior to assuming their tenure-line positions. *Id.*

<sup>229</sup> *Id.*

appointments if these requirements were a condition of their employment?<sup>230</sup>

Thus, the shibboleth that legal writing professors are less qualified than their casebook colleagues is very much called into question, unless the sole determinative criterion becomes the law school from which one graduated when he or she was twenty-five years old.

*E. The Need for Legal Writing Professors: The Indispensable Masters of Carnegie's Three Apprenticeships*

**1. The Intellectual or Cognitive Apprenticeship (Theoretical)**

While often not credited by the academy with this mastery, legal writing professors daily contribute much to this apprenticeship. They have evolved away from being “‘instrumentalists’—those who saw writing as merely a method for transcribing thought”<sup>231</sup> to “‘cognitivists’—those who [see] writing as a way of making meaning, as a method of thinking.”<sup>232</sup> “During the writing process, we learn more than we do by speaking, thinking, listening, or reading because we engage in all these activities and more

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<sup>230</sup> *Id.* at 425 (quoting Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 158–59 (1997)). Professor McGinley elaborates:

Jobs that are gendered female on law school faculties are more interruptible, require much more student contact, and perform a high degree of emotional labor. Emotional labor is not recognized as work because it appears to come from the inherent qualities of the person, rather than requiring an effort to present a patient and caring response. Because legal writing professors teach in small groups and have twice or three times the number of office hours with students as doctrinal faculty, the administration and other faculty members expect them to be more personally connected to their students, and they often take on a counseling role.

McGinley, *supra* note 154, at 128–29.

<sup>231</sup> Beazley, *Better Writing*, *supra* note 141, at 32.

<sup>232</sup> *Id.*

when we write.”<sup>233</sup> Each written and oral task required in a legal writing course demands that the student analyze a legal problem and formulate arguments.<sup>234</sup> Nowhere more than in legal writing class is the law student truly “thinking like a lawyer.”

What professors teaching legal writing know is that they must begin instruction by establishing a foundation of information and analytical skills for their students because adults learn by connecting information to what they already know. This requires assessing what foundational knowledge is needed and how to provide it so that the course goals and coverage are satisfied. The former is evaluated from the learner’s point of view; only the latter is from the teacher’s point of view.

What professors teaching legal writing also know is that they must layer material, from simple to complex, to maximize understanding and to provide a platform from which students can structure subsequent information. Learners can connect and structure new material only if it is appropriately layered. Material is appropriately layered when new material overlaps with old material enough for learners to connect new information to what they already know. However, material is not appropriately layered when new material is so unrelated to what learners already know that learners cannot determine with any certainty what the connection between the old and the new material might be. Whether material is appropriately layered must be evaluated from the learner’s point of view.<sup>235</sup>

This layered pedagogy is intimately familiar to the legal writing professor as a means of teaching analysis. For instance, one “learning layer” used to excellent effect by legal writing professors is the simulation, a key pedagogy in legal writing that teaches students to engage in critical thinking

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<sup>233</sup> Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 892 (2002).

<sup>234</sup> See CARNEGIE REPORT, *supra* note 27, at 39.

<sup>235</sup> M.H. Sam Jacobson, *The Curse of Tradition in the Law School Classroom: What Casebook Professors Can Learn from Those Professors Who Teach Legal Writing*, 61 MERCER L. REV. 899, 906–07 (2010).

about practice.<sup>236</sup> Moreover, the Carnegie Report notes that the import of legal writing's emphasis on critical thinking is felt beyond the legal writing classroom, reporting that many interviewed students found that their writing courses in turn fostered the development of their reasoning skills in their casebook courses.<sup>237</sup>

Professor Stuckey urges that law professors “[u]se context-based instruction to teach theory, doctrine, and analytical skills,”<sup>238</sup> and this is precisely what a legal writing professor does when working with students through the problems on which writing assignments are based.

## 2. The Expert Practice Skills Apprenticeship (Practical)

The necessity of the effective teaching of skills is enshrined in the ABA Standards that govern legal education. Law schools must ensure that each student has “substantial instruction in . . . professional skills generally regarded as necessary for effective and responsible participation in the legal profession,”<sup>239</sup> and the authors of the Carnegie Report stated that the best legal writing classes they studied focused on learning tasks and contexts that were reflective of and simulated actual legal work<sup>240</sup> because “the pedagogy [of lawyering skills] is . . . performative and learned in role.”<sup>241</sup> Professor Stuckey also cites among his best practices the use of “multi-modal”<sup>242</sup> pedagogy and reduction in classroom reliance on the case or Socratic method.<sup>243</sup>

<sup>236</sup> CARNEGIE REPORT, *supra* note 27, at 39.

<sup>237</sup> *Id.* at 108.

<sup>238</sup> STUCKEY ET AL., *supra* note 28, at 146.

<sup>239</sup> AM. BAR ASS'N, SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, 2011–2012 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2011) (Standard 302(a)(4)), *available* at [http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html) (follow “Chapter 3: Program of Legal Education” hyperlink).

<sup>240</sup> CARNEGIE REPORT, *supra* note 27, at 105.

<sup>241</sup> *Id.* at 108.

<sup>242</sup> STUCKEY ET AL., *supra* note 28, at 97; Judith Welch Wegner, *Reframing Legal Education's “Wicked Problems,”* 61 RUTGERS L. REV. 867, 888 (2009) (urging that

Legal writing pedagogy is multi-modal by its very nature.<sup>244</sup> “What the professor teaching legal writing knows is that information provided in only one way will benefit only one type of learner. Professors teaching legal writing have had to expand their teaching repertoire to benefit all types of learners because their students must master legal analysis and communication, not just complete the course, to succeed in law school.”<sup>245</sup>

An example of the multi-modal teaching employed by legal writing professors is, as previously discussed, the “[s]imulation of legal tasks in context . . . [which] is the core pedagogical practice in lawyering courses.”<sup>246</sup> Legal writing professors are leaders on law school faculties in this and other experiential and innovative forms of teaching:

[L]aw faculty have had to fight the powerful force of inertia: the property of an object at rest to remain at rest, or the tendency of a Property teacher who was taught by the case method/final exam system to begin teaching and continue teaching using the case method/final exam system. We tend to teach the way we were taught, and casebook faculty were taught by teachers who gave exams, while Legal Writing faculty were taught by students, or not

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reduced reliance upon the “signature pedagogy” of the “case-dialogue method,” in particular, as being unsuited to the teaching of skills, as well as to the environments of discussion settings, seminars, and clinics) [hereinafter Wegner, *Wicked*].

<sup>243</sup> STUCKEY ET AL., *supra* note 28, at 97.

<sup>244</sup> See 2010 ALWD/LWI Survey, *supra* note 142, at 14–15 (detailing various pedagogical methods employed in legal writing classrooms).

<sup>245</sup> Jacobson, *supra* note 235, at 910.

<sup>246</sup> CARNEGIE REPORT, *supra* note 27, at 39. And simulation may be the signature pedagogy of the future. For instance, Washington and Lee University School of Law has recently announced that it has discarded its old model of the third year of law school in favor of a series of legal simulations. Karen Sloan, *Reality’s Knocking: The Ivory Tower Gives Way to the Real World’s Demands*, NAT’L L. J. (Sept. 7, 2009), [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433612463&Realty\\_knocking&slreturn=1&hblogin=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433612463&Realty_knocking&slreturn=1&hblogin=1). University of Dayton School of Law implemented its “Lawyer as a Problem Solver” curriculum, which requires a course in alternative dispute resolution, an externship, and a clinic or capstone simulation course. It says that its graduate placement improved in 2008 at a time when placement at other schools was beginning to fall off. *Id.*

taught at all. Thus, we had no preconceived agenda to follow, and this lack of an agenda encouraged us to explore new horizons.<sup>247</sup>

Not only are legal writing professors leaders in pedagogical methodology, but they are also substantive experts in the teaching of skills indispensable to the practice of law:

[I]n 2005 Gerry Hess and Stephen Gerst conducted a survey of the Arizona Bar. They asked those lawyers and judges to assess the importance of various professional skills to the success of an associate at the end of the first year of practice in a small, general practice firm. Twelve skills were rated by more than 70% of the respondents as 'essential' or 'very important,' and three more were rated that highly by more than 50% of the respondents.

1. Legal analysis and reasoning (96%).
2. Written communication (96%).
3. [L]egal research (library and computers) (94%).
4. Drafting legal documents (92%).
5. Listening (92%).
6. Oral Communication (92%).
7. Working cooperatively with others as part of a team (90%).
8. Factual investigation (88%).
9. Organization and management of legal work (88%).
10. Interviewing and questioning (87%).
11. Problem solving (87%).
12. Recognizing and resolving ethical dilemmas (77%).
13. Pretrial discovery and advocacy (64%).
14. Counseling (58%).
15. Negotiation (57%).<sup>248</sup>

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<sup>247</sup> Beazley, *Better Writing*, *supra* note 140, at 32.

First-year legal writing programs teach most, or, in some cases, all of these skills.<sup>249</sup> Legal writing professors also figure prominently in teaching upper-level course offerings in these areas.<sup>250</sup>

Professor Judith Wegner, one of the authors of the Carnegie Report, decries the undervaluing of the essential contribution of legal writing professors to the teaching of the second apprenticeship:

Even first year legal writing programs (with legal research on the side or more central) have in many schools been relegated to the margin of the educational enterprise. Many law faculty members do not fully appreciate the importance of legal writing courses in bolstering students' analytical strengths, providing them with an important context in which to learn from experience, engaging them in solving poorly defined problems, exposing them to the art forms and acts required of lawyers in practice, and modeling fresh forms of lawyering (such as coaching and counseling). Similarly, courses that introduce legal research to first year students may be marginalized because they are seen as a venue for introducing very detailed information about sources (what sources exist, what is their value for diverse purposes, how should they be cited), rather than valued as emphasizing the exercise of professional judgment regarding what information is needed, how its quality is best assessed, and how diverse forms of knowledge should best be integrated and employed to accomplish important tasks. In short, legal education has not really embraced the need for students to learn to "do and act" or appreciated the ways in which "doing and acting" are powerful means to fuel learning of substance itself.<sup>251</sup>

Legal writing professors can also be of assistance to their casebook colleagues, as they are experts at the pedagogy of teaching lawyering skills

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<sup>248</sup> STUCKEY ET AL., *supra* note 27, at 78 (citing Gerry Hess & Stephen Gerst, Phoenix Int'l School of Law, Arizona Bench and Bar Survey and Focus Group Results (2005) (on file with Roy Stuckey)).

<sup>249</sup> See generally 2010 ALWD/LWI Survey, *supra* note 142, at 13 (surveying key data on legal writing programs, classes, and professors).

<sup>250</sup> *Id.* at 24–30, 56.

<sup>251</sup> Wegner, *Wicked*, *supra* note 242, at 888.

across the curriculum.<sup>252</sup> There is nothing but benefit to the entire faculty and legal education if course teaching cross-pollinates:

[I]t would help student learning if caste lines were blurred. Perhaps everybody could be a Brahmin, as some schools seem to be trying, and maybe, as at some new proprietary schools, the roles of each faculty member can be entirely scrambled. But it would be a more incremental step if we could just get the best faculty in each caste to teach periodically the classes traditionally assigned to the other castes. It should be encouraged and rewarded when a good tenure-track faculty member teaches a lawyering section or a legal writing faculty member teaches international law. . . . That not only would help disseminate best practices, but would affect how students view the castes and the respect different types of faculty have for the challenges of others. Team-teaching across castes ought to be encouraged for the same reasons—what I call educational miscegenation. It should be encouraged by giving full teaching credit to both teachers.<sup>253</sup>

To some casebook faculty, the prospect of this cross-pollination is a fearsome thing:

Writing faculty may be restricted in their profession—restricted to teaching only one subject (legal research and writing) and to only one level of student (first-year students). Even those who had extensive practice experience in a substantive area of law before becoming writing teachers may not be able to break the bonds of the limits imposed by their law schools. Some schools would prefer to hire an adjunct professor or a new tenure-track professor with less experience in the area of the law to teach a subject rather than to allow a writing teacher to reach beyond the limits of writing courses.<sup>254</sup>

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<sup>252</sup> See CARNEGIE REPORT, *supra* note 27, at 104.

<sup>253</sup> Syverud, *supra* note 135, at 19.

<sup>254</sup> Durako, *Dismantling Hierarchies*, *supra* note 143, at 269. As for casebook faculty teaching legal writing courses, Professor Lynch reports:

There are other doctrinal faculty teaching legal writing, but not too many. Most doctrinal faculty are not eager to teach legal writing, which is a shame. It

Professor Beazley further explored this boggart:

Law schools shouldn't create tenure-track positions in legal writing because this will result in a "specialist" position, and law-faculty members are supposed to be able to teach everything. . . .

This boggart shifts its shape based on two mutually exclusive myths about law faculty. The first is that faculty members routinely switch from teaching one subject to another at a moment's notice, moving effortlessly from criminal procedure to cyberlaw to environmental torts. The second is that, each year, tenured faculty present a list of their preferred courses to the associate dean, and the associate dean bows deeply and grants each request. No matter which myth prevails, tenured legal-writing professors would create a threat. They might be perceived as being unable to step into the breach and teach an unfamiliar subject. . . .

Riddikulus! The reality is that most law professors are mostly specialists, with one or two areas of particular competence in which they prefer to teach. But they are also realists, and they know that the law schools needs to have teachers for all its required and elective courses. So they are willing to teach a first-year required course—even though it's not their favorite, or a new upper-level course when curricular needs require it, this step is not taken lightly or routinely. Further, many legal-writing faculty are already teaching other courses, either because their law schools need them to do so or because of their experience or interests—in other words, for the same reasons that all faculty teach different courses.

The other reality of that even tenured faculty have only limited power to choose the courses they teach. Academic freedom does not usually mean that you can teach whatever courses you want, whenever you want. At most law schools, the administration develops the course schedule by balancing faculty requests and

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is actually great fun, especially when one teaches it in tandem with a substantive course. It is humbling, even for one who has done it before. There is substantial new pedagogy that I still must master.

Lynch, *supra* note 113, at 17.

curricular needs. If all the requests and needs can be met, fine. But if not, curricular needs will usually trump.<sup>255</sup>

In short, “[t]he artificial lines drawn between doctrinal, clinical, and writing faculty do not help the goals of legal education.”<sup>256</sup> Legal writing professors could be at the head of a collaborative law school team dedicated to ramping up skills education, as demanded by both learned critique of our field and economic imperatives.

### 3. The Apprenticeship of Identity and Purpose (Ethical)

The 2006 Law School Survey of Student Engagement reported a dismaying statistic: over 33 percent of all law students found that their law school placed low emphasis on integrity.<sup>257</sup> Professor Wegner concurs with

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<sup>255</sup> Beazley, *Riddikulus!*, *supra* note 160, at 82–83. The corollary to this boggart is the notion that even a bid on the part of a legal writing professor to get on the tenure-track is part of nefarious plot where “after deceiving the faculty by feigning an interest in this distasteful field, they would wield the enormous power of tenure and refuse ever to teach legal writing again.” *Id.* at 83. Professor Beazley responds:

[W]hile it’s possible that a small percentage of legal-writing faculty who get tenure will *ask* not to teach legal writing anymore, whether these requests are granted depends on the administration.

That said, the fear of a request to stop teaching legal writing is probably overblown. When choosing, for example, a tax professor, law schools look for someone with a demonstrated interest in the field, as evidenced by teaching history, practice experience, scholarship, or all three. Schools should do the same when searching for legal-writing faculty. Of course, some legal-writing faculty will have multiple interests, just as some tax-law or civil-procedure faculty have multiple interests. Interestingly, some schools have even *forced* tenure-track legal-writing professionals to develop another area of specialization by refusing to accept legal-writing scholarship as part of the tenure-review process. While there’s nothing wrong with a legal-writing professor’s having multiple interests, law schools could promote a commitment to legal writing by rewarding scholarship in the field.

*Id.* at 83–84.

<sup>256</sup> Durako, *Pink Ghetto*, *supra* note 149, at 586.

<sup>257</sup> LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, 2009 ANNUAL SURVEY RESULTS 8 (2009), available at [http://amlawdaily.typepad.com/LSSSE\\_Annual\\_Report\\_2009.pdf](http://amlawdaily.typepad.com/LSSSE_Annual_Report_2009.pdf) [hereinafter LSSSE].

this general impression: “This apprenticeship is the one that seems most absent and least well understood within the legal education universe of today.”<sup>258</sup> She goes on to critique the “signature pedagogy” of the Socratic method as being particularly unsuited to “opening up issues of professional identity and values, or fostering a critique based on social justice.”<sup>259</sup> Professor Barbara Glesner-Fines argues that this neglect cannot continue:

Students will drift to a worthy end, but they do not drift without guidance or influence. Students do not just “pick up” their development as professionals along the way. To the contrary, students will be formed by our teaching regardless of our intention. Professional development, like morals teaching, is more often “caught than taught.”<sup>260</sup>

And legal writing class is a key locale for “catching” professionalism. Legal writing courses present the opportunity for students to go beyond the casebook and explore the practicalities of professional development: problem solving within the complex realities of the “personal, practical, professional, and institutional.”<sup>261</sup> Moreover, legal writing class provides students their first and an indispensable opportunity for practicing their emerging ethics and professionalism skills in context: teaching the balance between zealous and civil advocacy, urging the crafting of creative yet non-frivolous arguments, requiring group cooperation and collaboration, and even requiring that assignments be submitted in a neat and timely manner in conformance with pre-established rules.<sup>262</sup>

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<sup>258</sup> Wegner, *Wicked*, *supra* note 242, at 888.

<sup>259</sup> *Id.* at 890.

<sup>260</sup> Barbara Glesner Fines, *Fundamental Principles and Challenges of Humanizing Legal Education*, 47 WASHBURN L.J. 313, 320 (2008).

<sup>261</sup> *See id.*

<sup>262</sup> Melissa H. Weresh, *Fostering a Respect for our Students, Our Specialty, and the Legal Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 21 TOURO L. REV. 427, 460 (2005).

Finally, Professor Lynch argues that the modeling of equal treatment of legal writing professionals itself is essential to inculcating the values of this third apprenticeship in our students:

[T]he unequal treatment of legal writing faculty within the legal field represents a departure from an important mandate imposed upon law schools in the Carnegie Report. The third “apprenticeship” embraced by Carnegie is an ethical apprenticeship. As the report states: “Professional education is inherently ethical education in a deep and broad sense.” Employing flimsy rationalizations, or no rationale at all, to treat one faculty cohort in an inferior manner patently does not fulfill legal education’s mission to nurture professional ethics among lawyers-in-training. On the contrary, it showcases resorting to sharp practice with a disadvantaged group.<sup>263</sup>

Legal writing professors are both an authority and an object lesson on the importance of professionalism and ethical conduct.

#### *F. Humanizing Legal Education and Educating Human Lawyers*

Legal writing professors are also invaluable to the fundamental well-being of our students and to that of their future clients. We legal educators widely agree that we have a responsibility to the welfare of our students.<sup>264</sup> However, despite this conviction, it is becoming increasingly evident that their well-being is not being tended to.<sup>265</sup> This support role could be filled by legal writing professors.

The problems with legal education extend far beyond educational shortcomings. There are clear and growing data that legal education is harmful to the emotional and psychological well-being of many law students.

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<sup>263</sup> Lynch, *supra* note 113, at 16.

<sup>264</sup> See CARNEGIE REPORT, *supra* note 27, at 21.

<sup>265</sup> Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 115 (2002).

It is well-known that lawyers suffer higher rates of depression, anxiety and other mental illness, suicide, divorce, alcoholism and drug abuse, and poor physical health than the general population or other occupations. These problems are attributed to the stress of law practice, working long hours, and seeking extrinsic rather than intrinsic rewards in legal practice.

It is less well-known that these problems begin in law school. Although law students enter law school healthier and happier than other students, they leave law school in much worse shape. “It is clear that law students become candidates for emotional dysfunction immediately upon entry into law school and face continued risks throughout law school and subsequent practice.”

The harm to students is caused by the educational philosophies and practices of many law school teachers. Educational theorists tell us that we should strive to create classroom experiences where “[t]he classroom is and must be a protected place, where students discover themselves and gain knowledge of the world, where they are free of all threats to their well-being, where all received opinion is open to evaluation, where all questions are legitimate, where the explicit goal is to see the world more openly, fully, and deeply.” Instead, too many law school classrooms, especially during the first year, are places where students fel[t] isolated, embarrassed, and humiliated, and their values, opinions, and questions are not valued and may even be ridiculed.<sup>266</sup>

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<sup>266</sup> STUCKEY ET AL., *supra* note 28, at 29–30 (quoting Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 526 (1998); also quoting JAMES M. BANNER, JR. & HAROLD C. CANNON, *THE ELEMENTS OF TEACHING* 37 (1997)); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 879–80 (1999) (“A review of the death certificates of over 26,000 white male suicide victims by the National Institute for Occupational Safety and Health suggested that the suicide rate for white male lawyers may be over twice that of other white males, although problems with the data made a firm conclusion impossible.”). Certainly, the mental health situation of practicing lawyers has not been helped by the recession. Several suicides of lawyers have been attributed to job loss and financial reversals in the wake of the economic crisis. See Richard B. Schmitt, *A Death in the Office*, A.B.A. J. (Nov. 1, 2009), [http://www.abajournal.com/magazine/article/a\\_death\\_in\\_the\\_office/](http://www.abajournal.com/magazine/article/a_death_in_the_office/) (detailing the circumstances surrounding the suicide of Mark Levy, a partner at Kilpatrick Stockton

Psychologist G. Andrew Benjamin and colleagues conducted a study in 1986, which found that the instances of psychiatric problems spiked significantly for first-year law students and then through law school and for two years after graduation.<sup>267</sup> Many students in law school report loss of

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who had been laid off); *see also* Marek, *supra* note 43, at 27 (reporting additional suicides of attorneys from Simpson Thacher & Bartlett and King & Spalding). The website, Lawyers with Depression, reported a 50 percent jump in hits in the months between November 2008 and May 2009. *Id.* (“Lawyers . . . may be primed for depression because of their heavy workload and legal training that accentuates the negative. . . . [T]he added stress of the economic downturn could be exacerbating that predisposition and pushing some people too far.”).

[S]aid a longtime partner at a big New York litigation firm . . . “For the first time in their lives, people feel sort of useless. All of a sudden, you can go to lunch for two and a half hours and not really be missed. It’s a blow to the ego. You’re talking about people who have never really failed.”

Feuer, *supra* note 32. This situation is only exacerbated when firms are less than honest about the reason for layoffs.

Law firms’ and corporations’ supposed rationale for terminating their lawyers will differ greatly, depending upon whether you speak to management or read the law blogs. Although some firms are candid and say that staffing cuts have been caused by lack of business or internal issues caused by volatile financial markets, others insist the dismissals are performance-based and not motivated by budgetary issues.

Greenberg, *supra* note 43, at 56.

<sup>267</sup> STUCKEY ET AL., *supra* note 28, at 31 (quoting Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 77 (2002)). A study of law students and practicing lawyers in Arizona discovered that when students enter law school, they suffer from depression at approximately the same rate as the general population. However, by the spring of the first year, 32 percent of law students suffer from depression, and by the spring of the third year of law school, the figure escalates to an astonishing 40 percent. Two years after graduation, the rate of depression falls, but only to 17 percent, or roughly double the level of the general population. Schiltz, *supra* note 267, at 875 (citing G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT’L J.L. & PSYCHIATRY 233, 234, 240 (1990)). Schiltz also cites elevated anxiety in law students and lawyers, with 5 percent of North Carolina lawyers in one study reporting physical symptoms of extreme anxiety, such as trembling and clammy hands, rapid heartbeat, and faintness, at least three times a month. *Id.* at 876 (citing N.C. BAR ASS’N, REPORT OF THE QUALITY OF LIFE TASK FORCE AND RECOMMENDATIONS 4 (1991)). He also cites to studies finding rates of 15 percent to 20 percent of lawyers with obsessive-compulsive disorder and 15 percent to 18 percent alcoholism. *Id.* Studies have

self-esteem and alienation as a result of the law school setting.<sup>268</sup> They also report feeling pressure to lay aside their values in law school.<sup>269</sup> Professor Hess reports that these feelings are even more prevalent in female and minority students.<sup>270</sup>

One cannot help but speculate as to whether these rates of mental illness and feelings of alienation contributed to law firm associate turnover, which was staggeringly high, at 19 percent annually from 2001 through 2004, even before the recession.<sup>271</sup>

Among Professor Stuckey's suggested best practices for legal education are: that law teachers be aware of the damage they can do to students and that they affirmatively endeavor not to harm students;<sup>272</sup> that there be a mutual respect between students and teachers;<sup>273</sup> that law teachers conscientiously endeavor to offer a supportive educational environment;<sup>274</sup> and that students be made to feel integrated and welcomed into law school,<sup>275</sup> which includes teaching to a wide variety of learning styles.<sup>276</sup>

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also revealed increased instances of physical health problems, including, ulcers, coronary artery disease, hypertension, and miscarriage. *Id.* at 880.

<sup>268</sup> Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 77 (2002). It should be noted, however, that other commentators dispute the charge that lawyers and law students are disproportionately unhappy, mentally unhealthy, or dissatisfied with their choice to become lawyers. See Marc S. Galanter & Thomas M. Palay, *Large Law Firm Misery: It's the Tournament, Not the Money*, 52 VAND. L. REV. 953, 954–55 (1999) [hereinafter Galanter & Palay, *Large Law Firm Misery*].

<sup>269</sup> Hess, *supra* note 268, at 77.

<sup>270</sup> *Id.*

<sup>271</sup> Chandler, *supra* note 56.

<sup>272</sup> STUCKEY ET AL., *supra* note 28, at 111.

<sup>273</sup> *Id.* at 114.

<sup>274</sup> *Id.* at 118.

<sup>275</sup> *Id.* at 121–22. The Foreword to the 2009 Law School Survey of Student Engagement also noted: “A sense that professors were more available was linked to more positive views about the overall law school experience.” LSSSE, *supra* note 257, at 2. However, unfortunately, “[n]early one-third of all students report that they never discuss ideas from their readings or classes with faculty members outside of class.” *Id.* at 8.

<sup>276</sup> STUCKEY ET AL., *supra* note 28, at 121–22; see also Kirsten A. Dauphinais, *Valuing and Nurturing Multiple Intelligences in Legal Education: A Paradigm Shift*, 11 WASH. &

Legal writing professors are experts at these core tenets of teaching. They are also at the beating heart of humane law school treatment:

Legal writing faculty are expected to act as mini-psychologists and emotional soothers for their troubled students. Their role, which resembles the behavior of a mother in a traditional family, is not only to teach, but also to guide with a gentle hand, to listen to complaints, to solve problems and to be available to respond to the students' emotional concerns about legal writing, law school, and, at times, life in general. . . . [L]egal writing professors note that students come to their offices to discuss their legal writing papers, but often conclude by discussing other problems. One legal writing director concludes that patience and enthusiasm are important qualifications for legal writing teachers. She advises that her legal writing faculty members keep tissues in their offices because it is likely that they will have students crying at least a few times a semester in their offices. Imagine the reaction that tenured faculty teaching substantive courses would have if they were told to keep tissues in their office for crying students! . . . The administration benefits from having legal writing faculty provide counseling services that would ordinarily be the job of the Dean of Students.<sup>277</sup>

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LEE RACE & ETHNIC ANC. L.J. 1 (2005) (describing Howard Gardner's theory of multiple intelligences, arguing for the importance of recognizing multiple intelligences in law school admissions, pedagogy, evaluation, and career counseling, and suggesting means by which to do so).

<sup>277</sup> McGinley, *supra* note 154, at 129–30. Professor McGinley continued anecdotally in a footnote:

During the six years I taught legal writing, students spoke to me about their fears that they would not be able to graduate from law school, their relationships with their spouses, children, and parents, their illnesses, and a host of other concerns. While the legal writing faculty member should not step beyond her expertise into therapy, she can help students get beyond those rough first year self-doubts and experiences and/or direct the student to a professional. From my discussions with colleagues during those years, I know that my experiences were not the exception. It was common knowledge that students often discussed professional and personal concerns with their legal writing teachers. This is a valuable role that legal writing faculty play at a time when their students are very vulnerable, but this work is time consuming and

Beyond this kind of counseling, legal writing professors also seem to engage in more career-mentoring than their casebook colleagues often do.<sup>278</sup>

Finally, there is an argument to be made that this modeling of humane treatment of law students has important effects beyond simply trying to keep our students healthy. Seeing compassion exhibited by their role models might tend to make students more likely in the future to be kind and sympathetic lawyers, a trait which is especially valuable in the wake of the recession. “[There is] the need for training in such ‘softer’ skills as listening to clients and emotional intelligences.”<sup>279</sup> An author of a recent study on success at large law firms stated that “attributes such as ability to adapt and get along with people contribute to success more than technical expertise.”<sup>280</sup>

Finally, legal writing professors can assist their students to develop into lawyers with a humane lawyering philosophy: “Assignments can be developed that incorporate considerations of the law as a healing profession where lawyers are viewed as humanistic and compassionate problem-solvers instead of solely as advocates wielding the sword for a client. . . . Indeed, many legal research and writing programs incorporate negotiation,

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invisible. To a lesser extent, I still play this role for some of my first year Torts students, but they visit my office much less frequently, seem to view our relationship much more formally, and consume much less of my time than my legal writing students did. Even so, tenured women and untenured women on the tenure track appear to bear an inordinate amount of student counseling in law schools.

*Id.* at 131 n.163.

<sup>278</sup> *Id.* at 130.

<sup>279</sup> Press Release, NALP, *supra* note 5.

<sup>280</sup> Deborah Cassens Weiss, *School Rank and GPA Aren't the Best Predictors of BigLaw Success*, A.B.A. J. (Oct. 16, 2008), [http://www.abajournal.com/news/article/school\\_rank\\_and\\_gpa\\_arent\\_the\\_best\\_predictors\\_of\\_biglaw\\_success](http://www.abajournal.com/news/article/school_rank_and_gpa_arent_the_best_predictors_of_biglaw_success).

letter writing, and interviewing and counseling exercises into the first-year curriculum.”<sup>281</sup>

#### IV. COUNTERARGUMENT: IS “GOOD” REALLY COST-PROHIBITIVE IN LIGHT OF AFFORDABLE “BAD?”

It might be argued that, especially in the wake of a recession, we cannot afford to foster a better-paid class of legal writing professionals. It is true that a United States Government Accountability Office (GAO) study attributed law school tuition increases, in part, to an increase in resource-intensive skills education in law school.<sup>282</sup>

The cost of legal education has been rising steadily throughout the extended expansion of the legal market during the last thirty years. Beginning in the 1980s, law school tuition has consistently risen at a rate more than two times the rate of inflation. Between 1992 and 2002, inflation was 28 percent, while the cost of legal education rose 134 percent at public schools and 76 percent at private schools. Since 2002, tuition has continued to rise anywhere from 5 to 15 percent a year. In 2007, the average tuition at private law schools was \$32,367—and at public law schools it was \$15,455. When one includes books and living expenses, the overall annual cost of attendance is \$50,000 or more. As a result, many law students graduate today with more than \$100,000 in debt, regardless of the rank of the school they attend.<sup>283</sup>

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<sup>281</sup> Cohen, *supra* note 22. This list would include the University of North Dakota School of Law’s Lawyering Skills program. Syllabus, University of North Dakota School of Law, Lawyering Skills II Spring Semester 2010 (on file with author).

<sup>282</sup> Wegner, *Response*, *supra* note 41, at 629.

<sup>283</sup> Thies, *supra* note 31, at 608. The 2010 tuition at Yale Law School, the top-ranked *U.S. News and World Report* law school, was a staggering \$48,340 a year. Debra Cassens Weiss, *US News Warns of Tough Times for Law Grads; Expert Says ‘It’s Just Like the Lottery,’* A.B.A. J. (Apr. 15, 2010), [http://www.abajournal.com/news/article/us\\_news\\_warns\\_of\\_tough\\_times\\_for\\_law\\_grads\\_expert\\_says\\_its\\_just\\_like\\_the\\_lo/](http://www.abajournal.com/news/article/us_news_warns_of_tough_times_for_law_grads_expert_says_its_just_like_the_lo/) [hereinafter Weiss, *Lottery*].

When the legal hiring boom was on, law schools could raise their tuition to support the rising cost of legal education and their graduates could still be assured of remunerative jobs that would support their debt loads.<sup>284</sup> The recession now makes this untrue in many cases.<sup>285</sup>

Moreover, tuition will likely continue to rise as the effects of the financial crisis become fully apparent. The recession is driving a reduction in private donations to law schools,<sup>286</sup> and both public and private law schools have thus been forced to cut their budgets.<sup>287</sup> Many schools have no choice but to raise tuition by double-digit amounts.<sup>288</sup>

There is also a serious question as to whether many law graduates will be able to pay back their educational debt:

There can be little doubt that students are, with reason, worried about the mismatch between income (job opportunities and pay levels) and future expenses (anticipated living costs and debt repayment obligations). The ABA reports that for students who graduated in 2008, the average debt load of those who attended private schools was \$91,506, while those who attended public law schools on average accumulated \$59,324 in debt. . . . Current monthly repayment levels thus approach the amount required to carry a house mortgage for those who graduated a few years before.<sup>289</sup>

“In 2007, the median salary of new graduates was \$62,000, a level at which servicing debt loads in excess of \$100,000 is, at best, difficult.”<sup>290</sup>

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<sup>284</sup> Thies, *supra* note 31, at 602.

<sup>285</sup> *Id.* at 599.

<sup>286</sup> Amanda Bronstad, *Law School Fundraising Tightens*, NAT'L L.J. (Oct. 27, 2008), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202425539593>.

<sup>287</sup> Karen Sloan, *Law Schools Dealing with Budget Cuts*, NAT'L L.J. (Jan. 19, 2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202427496279>.

<sup>288</sup> Thies, *supra* note 31, at 608.

<sup>289</sup> Wegner, *Response*, *supra* note 41, at 627.

<sup>290</sup> Thies, *supra* note 31, at 609. And most lawyers do not even make \$100,000. The 2010–11 Edition of the Bureau of Labor Statistics Occupational Outlook Handbook's section on Lawyers lists the median salary for all law graduates at \$68,500, practice practitioners at \$108,500, those practicing in business at \$69,100, government attorneys

Since the advent of the recession, salaries are only going to decline from that point until the economy improves. In particular, this level of debt is burdensome to attorneys hoping to enter public interest law and can serve as a barrier to entering such practices.<sup>291</sup>

Law school has recently been described as “an unfolding education hoax on the middle class that’s just as insidious and nearly as sweeping as the housing debacle.”<sup>292</sup> These conditions threaten to strip away the progress of the profession and legal education to return to a time where access to the practice of law was restricted to the economic elite of this country. This has deeply troubling social justice implications.

Yet as the job market declines, law school enrollment increases.<sup>293</sup> Despite the disheartening employment numbers, it appears that a growing number of people think they have what it takes. According to the Law School Admissions Council, applications for ABA-accredited law schools rose 3.9 percent in 2009. A *New York Times* article in January of 2010 said that applications to Cornell Law School were up 44 percent, and the number of people taking the Law School Admissions Test (LSAT) rose 20 percent in October 2009.<sup>294</sup>

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at \$50,000, and those in the academy or judicial clerkships at \$48,000. BUREAU OF LABOR STATISTICS HANDBOOK 2010–11, *supra* note 218.

<sup>291</sup> AM. BAR ASS’N COMM’N ON LOAN REPAYMENT AND FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 8 (2003), *available at* [http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/lrap/lrap\\_finalreport.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/lrap/lrap_finalreport.authcheckdam.pdf).

<sup>292</sup> Kathy Kristof, *The Great College Hoax*, FORBES, Feb. 2, 2009, at 60–61.

<sup>293</sup> Dan Slater, *Another View: Lock the Law School Doors*, DEALBOOK (Sept. 2, 2009, 10:00 AM), <http://dealbook.nytimes.com/2009/09/02/another-view-lock-the-law-school-doors/>.

<sup>294</sup> Ward, *supra* note 15.

Some of the biggest increases were at public law schools, which tend to cost less than their private counterparts. Applications were up by 70% at the University of Alabama School of Law, 65% at the University of Maine School of Law and 37% at the University of Illinois College of Law.

Sloan, *Hope*, *supra* note 16.

Student decisions to apply to law school are driven by many other considerations. Though the jobs are not out there, law school remains a key way to access the types of careers that many students want. But as we have seen, law school is not a safe “port in the economic storm.”<sup>295</sup> Jim Leipold, the executive director of the National Association for Law Placement, states that this behavior is consistent with that of previous recessions, but that the measure may not work as well this time because of the predictions that the number of lawyer jobs available have permanently contracted.<sup>296</sup>

David Stern, CEO of Equal Justice Works, told the magazine that students hear of law graduates making \$160,000—the going salary for associates at big law firms before the recession hit—and wrongly assume they will be making that kind of money.

“In their mind’s eye, [law students are] thinking of hitting the lottery and getting one of these \$160,000-a-year jobs, and it is a fiction,” Stern said. “By and large, it’s just like the lottery. You’re spending a huge amount of money in the hopes of hitting the jackpot, and there’s relatively small chances, and the chances have gotten a lot smaller.”<sup>297</sup>

“[S]tudents graduating from college . . . are more likely applying a consumer mentality than an investor mentality in selecting a law school.”<sup>298</sup> “I don’t know if we can take it for granted that a 22-year-old knows what it means to borrow \$100,000,” said Nora V. Demleiter, the Dean of Hofstra Law School, where enrollment is up a relatively modest 5 percent. “They look at the \$100,000 in loans, and then they look at the \$160,000 salary. And they think, ‘Well, that’s not so bad.’”<sup>299</sup> One commentator suggested

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<sup>295</sup> Wegner, *Response*, *supra* note 41, at 628–29. Also, Jim Leipold, executive director of NALP, says that law, more than medical or business school, tends to attract college graduates with “vague career ambitions,” due to the versatility of the degree, which allows the graduate to work in a wide variety of fields. Sloan, *Hope*, *supra* note 16.

<sup>296</sup> Sloan, *Hope*, *supra* note 16.

<sup>297</sup> Weiss, *Lottery*, *supra* note 283.

<sup>298</sup> Westfahl, *supra* note 82, at 647.

<sup>299</sup> Slater, *supra* note 293. Of course, it cannot be ignored that, even before the recession, many law graduates were making nowhere near \$160,000. At fifty-eight schools, the

the ameliorative measure of following the business school model by more heavily accentuating work experience and maturity in the law school admissions process to yield students who are exercising better and more informed judgment.<sup>300</sup>

So, while law students still flock to us in droves, while facing diminished prospects for economic prosperity upon graduation, how can we make law school a valuable experience? First and foremost, the greatest value for their dollar is the ability to pay off their debts upon graduation by ensuring that law students excel in each of the Carnegie Report's three apprenticeships, perhaps most significantly, practical skills. Legal writing programs are not the place to cut corners:

A law school undoubtedly saves money by stinting on LRW [Legal Writing and Research] programs. But you, the student, lose. No matter what other courses are offered, no matter what courses you take, if you can't reason out a problem, research it, and effectively explain the problem and its solution in writing, you haven't been adequately prepared for your career in law.<sup>301</sup>

Moreover, Garner points out, "[I]nvestments in LRW would give the school a huge advantage in the marketplace over competing schools."<sup>302</sup>

Nonetheless, it could be argued that rather than investing in legal writing, law schools properly spend their money on those indicia that influence the school's *U.S. News & World Report* ranking, such as faculty scholarship and facilities. However, many commentators, both within law schools and without, are now arguing that the stranglehold of the rankings as a lodestar for law school decision-making should be reduced. Indeed, one GAO study

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average starting salary was \$60,000. Debra Cassens Weiss, *Big Salaries Linked to Big-Name Law Schools; Small Pay is Larger Reality*, A.B.A. J., Jan. 8, 2008, [http://www.abajournal.com/news/article/big\\_salaries\\_linked\\_to\\_big\\_name\\_law\\_schools\\_small\\_pay\\_is\\_larger\\_reality/](http://www.abajournal.com/news/article/big_salaries_linked_to_big_name_law_schools_small_pay_is_larger_reality/). In 2008, the graduates of the University of South Dakota School of Law earned an average salary of \$38,251. *Id.*

<sup>300</sup> Westfahl, *supra* note 82, at 649.

<sup>301</sup> Garner, *Legal Writing*, *supra* note 149, at 10.

<sup>302</sup> *Id.* at 11.

cited both an increase in skills education in law schools as well as the effort “to compete in national rankings” as principal forces behind tuition increases.<sup>303</sup> “Forty percent of the ranking score now comes from prestige, a factor often based on the amount and quality of scholarship a school produces.”<sup>304</sup>

However, “[r]esearchers have concluded that the rankings misrepresent the quality of law schools by creating ‘rigid and fine-grained distinctions’ between schools that are not grounded in reality.”<sup>305</sup> Thus, law schools are motivated to spend their limited dollars on those indicia of prestige rather than on teaching, particularly of skills.<sup>306</sup>

It is true that scholarship on the part of law academicians is indeed necessary to legal education and the profession:

Faculty scholarship is also important, in ways that may not always be apparent to those outside the academy. Scholarly work by faculty is generally subject to peer review (pre-tenure and to some extent post-tenure) to assure knowledge and competence within the field. Most universities expect faculty members to engage in meaningful efforts to probe the current limits of their fields and to push the process of inquiry forward so that faculty members are well-positioned to prepare their students for future challenges. Because the ethic of inquiry and discovery is so deeply rooted in the academy, strong law schools cannot expect to be taken seriously within their universities, and are unlikely to be able to attract top-flight faculty members without hewing to these significant norms.<sup>307</sup>

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<sup>303</sup> Wegner, *Response*, *supra* note 41, at 629. The study also discussed the impact of “small advanced electives in such fields as international and environmental law, and enhanced academic support, career services, and similar activities.” *Id.*

<sup>304</sup> Thies, *supra* note 31, at 617.

<sup>305</sup> Wegner, *Response*, *supra* note 41, at 631 (citing MICHAEL SAUDER & WENDY ESPELAND, FEAR OF FALLING: THE EFFECTS OF U.S. NEWS & WORLD REPORT RANKINGS ON U.S. LAW SCHOOLS, Law School Admissions Council Grants Report 07–02 (2007)).

<sup>306</sup> Thies, *supra* note 31, at 612.

<sup>307</sup> Wegner, *Response*, *supra* note 41, at 638.

However, it should be balanced with an emphasis on the primary mission of law schools: to educate law students and ready them for practice.

There are additional negative ramifications of the *U.S. News* regime:

[T]he *U.S. News* system gives positive weight to schools with larger budgets and greater costs, positioning private schools ahead of most public schools that offer an excellent education often at lower cost because of state-subsidized tuition. The rankings also rely on “coaches’ polls,” whose respondents typically lack meaningful in-depth information about the schools they purport to judge, making such rankings ripe for ‘gaming.’ The rankings are also statistically suspect since they purport to treat minimal differences between schools as enough to justify substantial differences in the ‘rank ordering’ process, even though many American law schools tend to cluster much more closely on such variables as student-faculty ratios, student body characteristics, facilities and course offerings than the ranking would suggest.<sup>308</sup>

The rankings tend to focus on input measures like LSAT score and undergraduate grade point average, rather than the output measures captured by educational assessment. This is one reason why the ABA is now demanding law school assessment. And most of the legal academy is lacking in expertise and experience in this emerging best practice:

Feedback is provided primarily to support students’ learning and self-understanding rather than to rank or sort. Contemporary learning theory suggests that efficient application of educational effort is significantly enhanced by the use of formative assessment. For educational purposes summative devices have their place primarily as devices to protect the public by ensuring basic levels of competence. Formative practices directed toward improved learning ought to be primary forms of assessment.<sup>309</sup>

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<sup>308</sup> *Id.* at 634.

<sup>309</sup> CARNEGIE REPORT, *supra* note 27, at 189.

Stuckey emphasizes that giving timely and consistent feedback is crucial,<sup>310</sup> as well as employing frequent formative assessment.<sup>311</sup> “Students who got prompt feedback spent more time preparing for class and worked harder to meet faculty expectations. . . . This year’s report once again finds that feedback is critical to effective learning”<sup>312</sup>

When the assessment culture takes hold, legal writing professors are going to be essential to insuring that legal education measures up. Legal writing professors are experts within the legal academy on assessment because we have been doing, particularly, formative assessment from the beginning:

[B]ecause many Legal Writing courses were created with the more measurable goal of ‘teaching students how to write,’ Legal Writing faculty had an outcome-based goal of making good writers of *all* of their students, and they often looked for new teaching methods when this goal was not being met. . . . Legal writing courses [display] the evident connections between teaching methods and student performance in the course, which contrasts strongly to the indirect connections between class discussion of cases and the written final examination. Legal Writing teachers could readily see what worked and what did not work in their teaching, and this transparency spurred further innovation.<sup>313</sup>

The generation of assessment data by all law professors and law schools will not only be demanded by our accrediting body, but will also be helpful in facilitating law firms hiring on the bases of practice-readiness and merit in a brave new world where law firms hire associates based on their demonstration of core competencies.<sup>314</sup> “How can firms hire on the basis of

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<sup>310</sup> STUCKEY ET AL., *supra* note 28, at 125.

<sup>311</sup> *Id.* at 253–55.

<sup>312</sup> LSSSE, *supra* note 257, at 2.

<sup>313</sup> Beazley, *Better Writing*, *supra* note 140, at 30–31.

<sup>314</sup> Press Release, NALP, *supra* note 5.

practical skills and readiness to practice law when, other than summer associate work evaluations, they have no data to use to do so?”<sup>315</sup>

In reality, changes in law firm hiring pattern are an enormous opportunity for law schools to shake up the traditional hierarchy. Law schools that can demonstrate that their “outputs”—smart, motivated, well-trained, and versatile graduates—match up well with the needs of legal employers will inevitably create more job options for their students.<sup>316</sup>

Law schools need to invest in the educators who actually teach young lawyers how to fish.

Finally, even if equalizing legal writing professionals does prove costly, albeit necessary, treating well-qualified, mostly female, law professors on par with their colleagues is also—from a social justice perspective—just the right thing to do, and may well be the only legal thing to do:

Prospective law students learn both the explicit and the implicit lessons about women’s value and roles by observing how law schools treat their women faculty. If women are viewed as a less important part of the legal academy, students may infer that women are a less important part of the legal process. This fallacious reasoning appears to contribute to the pervasive patterns of gender bias found in all spheres of the law. Studies have indicated that discriminatory treatment of women in the courts may stem from law school experience. When law schools brand legal writing with the indicia of second- or perhaps third-class citizenship, students make value judgments about the importance of the people who teach them writing and about the skills they learn in writing classes.<sup>317</sup>

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<sup>315</sup> Westfahl, *supra* note 83, at 646.

<sup>316</sup> William D. Henderson, *The Class of 2009: Recession or Restructuring?*, NALP BULL., July 2010, at 18, 22.

<sup>317</sup> Durako, *Pink Ghetto*, *supra* note 149, at 585. Bryan Garner calls the treatment of legal writing professors “a grave injustice [against the] professors who work hardest with their students, week by week” Garner, *Legal Writing*, *supra* note 149, at 10.

As Professor Beazley states, “Unfortunately, the boggarts do more than just hurt the careers of legal writing faculty: they stunt the progress of the very profession that legal education is meant to improve.”<sup>318</sup>

Throughout history, other forms of discrimination have been justified by expense, expediency, and custom:

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

Unhappily, legal education has a back of the bus, and it is legal writing. But today, those who keep the mostly female legal writing faculty in the back of the bus do not wear pointy white hoods. Mostly, they wear business attire, and mostly they have degrees from good law schools. In a sense, although my law school has placed its legal writing teachers on a tenure track, maybe I have enabled this discrimination by a lack of curiosity about it and by passive acceptance. . . .

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

[However,] [w]hen I teach a legal writing course rather than federal income tax, I am teaching a different subject matter, but I am not doing a different job. It would be absurd to treat me differently for purposes of status and compensation because my teaching load includes legal writing than I am treated when I teach only doctrinal courses.

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<sup>318</sup> Beazley, *Riddikulus!*, *supra* note 160, at 80. And the discrimination, of course, does harm the individual legal writing professor: “[T]he denigration entailed in being treated as doing a job that is less worthy than that done by their doctrinal colleagues is harmful to legal writing teachers’ sense of self-worth. As Professor Arrigo stated, ‘[A] LRW (Legal Writing) instructor viewed and treated as a technician, may begin to view herself as little more.’” Lynch, *supra* note 113, at 16 (quoting Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 167 (1997)).

Notwithstanding its patent absurdity, much of legal education has entertained the notion that the work legal writing teachers perform is different from, and less valuable than, work done by doctrinal professors. The teaching of legal writing has been viewed as support for the real work done by doctrinal faculty, much like the work done by flight attendants to placate passengers so that pilots can fly the plane in peace.<sup>319</sup>

Professor Lynch continues:

[L]aw schools have a responsibility to encourage their students to respect the law and to behave in a manner that encourages others to do so. The ABA Commission on Women in the Profession has noted the inappropriateness of tolerating unequal treatment of women in the law school community: “Gender bias that affects women students or faculty, at best, starts young male and female lawyers off on the wrong foot and at worst, fails to provide them with the tools they will need to overcome the barriers they will likely encounter during their careers.” Although it is difficult to reconcile with Standard 405(d), which essentially enables law schools to treat legal writing teachers unequally, ABA Standard 211 requires law schools to embrace equal opportunity, including nondiscrimination based on sex.<sup>320</sup>

Professor Peter Brandon Bayer writes: “Having discarded the purported rational justifications [for disparate treatment of legal writing faculty], . . . the disparate treatment of writing professors is unfairly discriminatory under minimal equal protection standards, and thus should be considered

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<sup>319</sup> Lynch, *supra* note 113, at 13–14.

<sup>320</sup> *Id.* at 16 (quoting CORY M. AMRON ET AL., *ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION*, A.B.A. COMM’N ON WOMEN IN THE PROFESSION 3, 3–4 (1996)). Ultimately, Professor Lynch argues that ABA Standard 405(d) should be “scrapped” and all legal writing professionals should be hired on the tenure-track. *Id.*

not simply an unwise policy, but a patently unethical practice that contravenes the standards set by the AALS, the ABA and the AAUP.”<sup>321</sup>

Happily, many past discriminatory practices have ultimately been thrown on the ash heap of history. This one must be tossed out as well.

#### V. CONCLUSION: HOPE FOR THE FUTURE

*“I think what needs to be done is . . . a holistic rethinking of how we get people in the door, what the law schools do with them and say to them, how we meet them, how we get them to their firms, how we train them, how we develop them.”*

Howard Ellin, Global Chair of the Hiring Committee, Skadden, Arps, Slate, Meagher & Flom LLP<sup>322</sup>

*“The silver lining, if there is one, is that the legal world may be inspired to draw blueprints for the 21st century.”*<sup>323</sup>

We should not lose the opportunity to see potential upsides to the sea change in the legal profession. Perhaps there is wiggle room in the profit margin to pursue other imperatives. After all, before the recession, American law firms were among the most profitable businesses in the world.<sup>324</sup>

In 1994, a study of California lawyers revealed that over half surveyed would not become lawyers if they had it do over again.<sup>325</sup> Many studies over the years have revealed similar results, even for graduates of elite law

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<sup>321</sup> Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics*, 39 DUQ. L. REV. 329, 334 (2001).

<sup>322</sup> *Id.*

<sup>323</sup> Cohen, *supra* note 22.

<sup>324</sup> Chandler, *supra* note 56.

<sup>325</sup> Schiltz, *supra* note 266, at 882.

schools.<sup>326</sup> Professor Schiltz argues that lawyers' focus on money is at the root of their unhappiness and life imbalance.<sup>327</sup>

Big firm lawyers are, on the whole, a remarkably insecure and competitive group of people. Many of them have spent almost their entire lives competing to win games that other people have set up for them. First they competed to get into a prestigious college. Then they competed for college grades. Then they competed for LSAT scores. Then they competed to get into a prestigious law school. Then they competed for law school grades. Then they competed to make the law review. Then they competed for clerkships. Then they competed to get hired by a big law firm.

Now that they're in a big law firm, what's going to happen? Are they going to stop competing? Are they going to stop comparing themselves to others? Of course not. They're going to keep competing—competing to bill more hours, to attract more clients, to win more cases, to do more deals. They're playing a game. And money is how the score is kept in that game.<sup>328</sup>

Schiltz continues:

It is very difficult for a young lawyer immersed in this culture day after day to maintain the values she had as a law student. Slowly, almost imperceptibly, young lawyers change. They begin to admire things they did not admire before, be ashamed of things they were not ashamed of before, find it impossible to live without things they lived without before. Somewhere, somehow, a lawyer changes from a person who gets intense pleasure from being able to buy her first car stereo to a person enraged over a \$400,000 bonus.<sup>329</sup>

The recession provides us an opportunity to reexamine the governing values of our profession:

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<sup>326</sup> *Id.* at 883.

<sup>327</sup> Galanter & Palay, *Large Law Firm Misery*, *supra* note 268, at 953.

<sup>328</sup> Schiltz, *supra* note 266, at 905.

<sup>329</sup> *Id.* at 915.

When you are at that barbeque at the senior partner's house, instead of wistfully telling yourself, "This is the life," ask the senior partner some questions. (I'm speaking figuratively here; you probably don't want to actually ask these questions aloud). Ask him how often he sees the gigantic house in which he lives. If he's honest, you will find out that he hasn't seen his house during daylight in almost four weeks, and that the only reason he came home at a decent hour tonight is to host the barbeque. Or ask him how often he's actually sat on that antique settee in that expensively decorated living room. You will find out that the room is only used for entertaining guests. Or ask him about his beautiful wife. You will find out that she is the third Mrs. Partner and that the lawyers for the first two Mrs. Partners are driving him crazy. Or ask him about those beautiful children whose photographs are everywhere. You will find out that they live with their mothers, not with him; that he never sees one of them because she hates his guts; and that he sees the other two only on holidays—that is, when he is not working on the holidays, which isn't often. And then ask him when is the last time he read a good book. Or watched television. Or took a walk. Or sat on his porch. Or cooked a meal. Or went fishing. Or did volunteer work. Or went to church. Or did anything that was not in some way related to work.<sup>330</sup>

"If a sufficient number of law school graduates were to insist on maintaining balance in their lives, 'big firms would be very different places today.'"<sup>331</sup> Perhaps that day has now come, and this generation of young attorneys has different expectations from the cadre that came before it,<sup>332</sup> not holding partnership as the sole goal and valuing work/life balance so deeply that they are willing to leave jobs in order to achieve it.<sup>333</sup> A potential upside to lower salaries is that they should entail a commensurate cutting in grueling attorney hours, as well as enabling young lawyers to see

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<sup>330</sup> *Id.* at 923.

<sup>331</sup> Galanter & Palay, *Large Law Firm Misery*, *supra* note 269, at 954 (quoting Schiltz, *supra* note 266, at 942).

<sup>332</sup> Wegner, *Response*, *supra* note 41, at 626–27.

<sup>333</sup> Dipietro, *supra* note 99, at 107.

more options for their practice-life as the pay differential between private practice and public interest will not be as stark.<sup>334</sup> More contented associates should help large law firms as well. After all, as of 2008, firms lost 80 percent of their hires within five years.<sup>335</sup> Such a recalibration should help law firms weather the current crisis:

It may seem counterintuitive, but flexibility and balance-oriented policies **are** tools that can help firms survive the conflagration. “Eat what you kill” is traditionally associated with the most cutthroat, internally competitive firms. A compensation system where one’s career survival depends directly and constantly on the dollars one brings in the door has been seen—historically, anyway—as inflexible. But “eat what you kill” and “work/life balance” (with its “work less, make less” compensation system) share one goal: to pay lawyers only for work that enhances the bottom line. As a result, the two systems can live together very well. Layoffs cost firms, both financially (the lost investment in laid-off lawyers, and the premium often paid in ramping back up) and in terms of reputation (from “They’re going under” to “Remember what they did to associates back in ‘09?”). When those costs are taken into account, scaling back lawyer hours starts to look better and better.

Deborah Epstein Henry, founder and president of consulting firm Flex-Time Lawyers, urges firms to open their eyes to the reality that, unlike layoffs, promoting reduced hours cuts costs now, prevents future recruiting and training expenses, engenders loyalty, improves morale, and quells the burnout and lack of

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<sup>334</sup> The recent phenomenon of law firms offering up to \$80,000 to associates may have unintended consequences. Georgetown University law graduate Russ Ferguson writes: “These new lawyers have found that their new jobs are more fulfilling and more interesting, and—more importantly—they’ve seen that they can live on a smaller salary. As one of my classmates put it, ‘Add up the hours I worked this week and add up the hours that my friends at law firms worked. Divide our salaries by the amount of hours and you’ll see—I’m rich.’” Debra Cassens Weiss, *Will Deferred Associates Idea Backfire for Law Firms?*, A.B.A. J. (Feb. 16, 2010), [http://www.abajournal.com/news/article/will\\_deferred\\_associates\\_idea\\_backfire\\_for\\_law\\_firms/](http://www.abajournal.com/news/article/will_deferred_associates_idea_backfire_for_law_firms/).

<sup>335</sup> Dipietro, *supra* note 99, at 107.

productivity that may otherwise plague those left in a fragmented workplace. . . .

Replacing layoffs with voluntary or mandatory hours reductions would start to generalize, institutionalize, and destigmatize work/life balance through the back door of economic exigency.<sup>336</sup>

Perhaps the recession will spark a shift in the current paradigm in which “[l]aw students in elite settings are socialized to believe that the appropriate way to begin their careers as lawyers is to work very hard for a decent period of time at a large law firm,”<sup>337</sup> an expectation perennially at best uncomfortable and at worst tragic for law students who do not wish to work in that setting, or for whom it is not a healthy match—but who, nonetheless, feel pressured to seek those jobs.

For those who do remain at large firms, there should be other positive cultural changes. Hand in hand with progress in the skills portion of formal education, we should also embrace the growing trend of large law firms establishing their own “apprenticeship”<sup>338</sup> programs through which new attorneys are trained in tailored practical skills, law firm culture, and meeting client needs.<sup>339</sup> Such programs have already been implemented at firms such as Howrey, Drinker Biddle, Frost Brown Todd, Ford & Harrison, and Strasburger & Price, and “so far, firm leaders are giving them cautious thumbs-up.”<sup>340</sup> In Howrey’s apprenticeship program, which managing

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<sup>336</sup> Denise Howell, *Goodbye Economy, Hello Balance*, AM. LAW., June 2009, at 32 (emphasis in original).

<sup>337</sup> Bryant G. Garth, *Exploring Inequality in the Corporate Law Firm Apprenticeship: Doing the Time, Finding the Love*, 22 GEO. J. LEGAL ETHICS 1361, 1369 (2009).

<sup>338</sup> CARNEGIE REPORT, *supra* note 27, at 25.

<sup>339</sup> Wegner, *Response*, *supra* note 41, at 635. The 2009 NALP Roundtable on the Future of Lawyer Hiring, Development, and Advancement “[e]xpressed great interest in development” of law firm apprenticeship models. Press Release, NALP, *supra* note 5.

<sup>340</sup> Ashby Jones, *The Early Reviews on Law-Firm Apprenticeships: So Far, So Good*, WALL ST. J. L. BLOG (June 16, 2010, 11:04 AM), <http://blogs.wsj.com/law/2010/06/15/the-early-reviews-on-law-firm-apprenticeships-so-far-so-good/>. However, many other firms have been reluctant to follow. “Part of it has to do with the salaries. . . . [S]ome critics fear that the lower salaries commanded by apprentices will hurt an ability to recruit top prospects. Others wonder if the programs are

partner Robert Ruyak compares to a medical residency or accounting secondment:<sup>341</sup>

During their first year at the firm, associates will take classes on legal writing and research and will work on pro bono projects to give them hands-on experience without charging clients. In the second year of the program, associates will be embedded at client sites for several months at a reduced billing rate of between \$150 and \$200 an hour. They will also continue to take classes on litigation skills such as trial tactics, cross examination, and mediation and arbitration.<sup>342</sup>

Ruyak states:

The old model is broken. . . . You're bringing on these extremely bright individuals and letting them waste their careers buried in documents where they aren't really learning the practical skills it takes to be a lawyer. . . . The way we see it through is that it's going to cost more in the beginning because we're creating something from scratch, but once we get going and we start having a group of young, experienced lawyers coming out ready to handle client matters, we're going to turn a profit much more quickly than we would under the old model. . . . This way, we just get it out of the way in the beginning.<sup>343</sup>

These are all promising developments, and there is light at the end of the tunnel. NALP Executive Director James Leipold expects recruiting will still be sluggish through the Class of 2012, but states that "the worst does now seem . . . to be behind us."<sup>344</sup> The 2010 Altman Weil survey revealed:

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worth the time devoted by partners and other higher-billers." *Id.* Some consultants argue that if other big-name firms "make the leap," droves of other firms will follow. *Id.* At least some clients are pleased with the programs, with the lead attorney at Hewlett-Packard calling them "a great thing." *Id.*

<sup>341</sup> Jeff Jeffrey, *Howrey Introduces Apprenticeship Program for Associates*, NAT'L L. J., (June 22, 2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431654426&slreturn=1>.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> McDonough, *supra* note 3.

- About 50 percent of the firms indicated they will be more aggressive than last year in increasing headcount; and
- Billing rates went up this year by a median amount of 3 percent.<sup>345</sup>

Altman Weil concluded: “The legal profession is—and remains even after the Great Recession—tremendously stable.”<sup>346</sup>

In a final, hopeful analysis, we will move forward both in prosperity and toward a paradigm of well-balanced legal education and practice, purged of unjustified and destructive stereotypes. In the end, we will find that recent demands, both economic and critical, prompted a difficult but necessary reexamination of our profession, which inures to the good of us all: a “sea-change into something rich and strange.”<sup>347</sup>

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<sup>345</sup> Koppel, *supra* note 8.

<sup>346</sup> *Id.*

<sup>347</sup> WILLIAM SHAKESPEARE, *THE TEMPEST* act 1, sc. 2.