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SHOUTING INTO THE WIND: HOW THE ABA STANDARDS
PROMOTE INEQUALITY IN LEGAL EDUCATION, AND WHAT
LAW STUDENTS AND FACULTY SHOULD DO ABOUT IT¹

MARY BETH BEAZLEY*

INTRODUCTION

AT this wonderful Symposium, I participated in a panel entitled “Institutional Barriers to Gender Equity.” That title does not quite capture the problem; the problem is not just that we have institutional barriers to gender equity; the problem is that the current American Bar Association (ABA) standards actively *promote* inequality, and that neither law faculty nor the Association of American Law Schools (AALS) seem to care very much about making things better. The inequality on law faculties divides faculty members, particularly dividing women faculty from other women faculty. Further, it delegitimizes certain subject areas and teaching methods, hurting both our students and the legal profession.

I am currently employed at a law school—UNLV’s Boyd School of Law—that has one of the most equal faculties in the nation. Its legal writing faculty, clinical faculty, and casebook faculty² are all tenured or on the same tenure track. Its library faculty are hired on a university-level tenure track. But my current school’s situation is all too rare,³ and I have not always been so lucky.

1. This Article is derived from a presentation at the *Villanova Law Review’s* Norman J. Shachoy Symposium, sponsored by the Villanova University Charles Widger School of Law. The views expressed in this Article are my own. The “shouting into the wind” part of the title refers to the fact that I and many others have been fighting this fight for decades, with little success at changing the systems that promote inequity in legal education. I wrote my first piece on this topic at the turn of the century. See Mary Beth Beazley, “Riddikulus!”: *Tenure-Track Legal Writing Faculty and the Boggart in the Wardrobe*, 7 SCRIBES J. LEGAL WRITING 21 (2000).

* I wish to thank the sponsors of the Symposium, as well as the students who worked on producing the resulting issue of the Journal, especially Brett Broczkowski. I thank Professor James Rich, of the Law Library at the Boyd School of Law, for his excellent research. For their comments, I thank Professors Monte Smith, Joan Howarth, and Kathryn M. Stanchi. I also thank Dean Dan Hamilton and the Boyd School of Law at UNLV for generous research support.

2. I use the term “casebook faculty” to refer to faculty whose courses typically use casebooks. Legal writing faculty, in contrast, typically use textbooks in their courses, although students research and read cases as part of their coursework.

3. See, e.g., J. Lyn Entrikin et al., *Treating Professionals Professionally: Requiring Security of Position for All Skills-Focused Faculty Under ABA Accreditation Standard 405(c) and Eliminating 405(d)*, 98 OR. L. REV. 1, 24 (2020) (“No directly comparable data is available on the percentage of individual legal writing faculty by status, but roughly 28% of law schools make some or all of their legal writing faculty (other than directors) eligible for some form of tenure, whether traditional or programmatic.”).

(1037)

At my prior school, I spent many years as the only full-time legal writing faculty member. For twelve of those years, I was a staff member rather than a faculty member, but I was eventually able to move to the tenure track and receive tenure. When that school decided to hire more full-time legal writing faculty, I argued without success that those positions should also be tenure-track. At one of the interview dinners I attended, a candidate innocently asked, “Why aren’t these positions tenure-track?” My colleagues shifted in their seats uncomfortably and looked at their plates. I announced simply, “because I lost.” But that wasn’t the right answer; the answer was “because the ABA allows it, and because good people like you will take non-tenured jobs.”

The ABA allows this inequity through the actions of the ABA Council on Legal Education and Admission to the Bar (“the Council”), which is the major player in legal education.⁴ The Council promulgates and enforces, to varying degrees,⁵ the Standards for Legal Education that are the bible for every law school administration.

For decades, that bible has contained a standard that was meant to—and usually did—act as a barrier to unequal treatment; Standard 405(b) currently provides as follows: “A law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix 1 herein is an example but is not obligatory.”⁶ The appendix referred to follows the language of the *1940 Statement of Principles on Academic Freedom and Tenure* of the American Association of University Professors, and it describes the job security of tenure in part as follows: “After the expiration of a probationary period, teachers or investigators should have *permanent or continuous tenure*, and their service should be terminated only

4. The ABA is a separate entity from the ABA Section and Council. See AM. BAR ASS’N SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, THE LAW SCHOOL ACCREDITATION PROCESS 3 (2016), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2016_accreditation_brochure_final.auth_checkdam.pdf [<https://perma.cc/U963-54NT>] (“Under Title 34, Chapter VI, §602 of the Code of Federal Regulations, the Council and the Accreditation Committee of the ABA Section of Legal Education and Admissions to the Bar are recognized by the United States Department of Education (DOE) as the accrediting agency for programs that lead to the J.D. degree. In this function, the Council and the Section are separate and independent from the ABA, as required by DOE regulations.”).

5. See, e.g., Entrikin et al., *supra* note 3, at 35–36 (quoting now-Dean Anthony Niedwiecki’s comment at a hearing that “Standard 405 has built in a caste system [that] has a negative impact on women and runs counter to the ultimate goals of equality and diversity as articulated in Standards 211 and 212” (alteration in original) (quoting SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS’N, TRANSCRIPT OF PUBLIC HEARING—AMENDMENTS TO STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 62 (Feb. 5, 2014) (on file with authors))).

6. *ABA Standards and Rules of Procedure for Approval of Law Schools 2019–2020*, 2019 AM. B. ASS’N 1, 27, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf [<https://perma.cc/QD4S-N4QG>] [hereinafter *2019 ABA Standards*].

for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.”⁷ In practice, that standard led to the almost uniform tenure of full-time law faculty until the 1980s. While other provisions in Standard 405 have changed in various ways over the years, the language about academic freedom and tenure has remained sacred.

Sacred for some, that is. In 1984, in reaction to the clinical programs that had been springing up around the country, the ABA created the first of two carveouts, or exceptions, to the tenure standard. A new subpart, then labeled as Standard 405(e) and now as Standard 405(c), declared that a system of tenure was *not* necessary for those full-time faculty who taught what the rule called “professional skills,” stating that a law school need afford them only a “form of security of position *reasonably similar to tenure*, and perquisites *reasonably similar to those* provided other full-time faculty members” by the other standards in Chapter 4.⁸ A dozen years later, in 1996, the ABA created the second carveout, Standard 405(d), which specifically addresses how little job security law schools need to provide to full-time legal writing faculty.⁹

The current version of Standard 405 creates three distinct classes of faculty. Through various permutations of Standard 405, Standard 405(b) now contains the language guaranteeing academic freedom and a system of tenure to “The Faculty,”¹⁰ while 405(c) now labels faculty teaching in clinics more directly as “full-time clinical faculty members,” and notes that

7. *Id.* at 44 (emphasis added).

8. *American Bar Association Standards for Approval of Law Schools and Interpretations*, 1984 AM. B. ASS’N 1, 123, https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1984_standards.pdf [<https://perma.cc/8RK9-XZVK>] (emphasis added). For a history of clinical status issues under the ABA standards, see generally Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008).

9. See e.g., Entrikin et al., *supra* note 3, at 7–8 (The standard specified only that law schools should “provide conditions sufficient to attract well-qualified legal writing instructors or directors” (quoting AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, THE ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS STANDARD 43 (1996), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1996_standards.pdf [permalink unavailable])).

10. In a 2002 article describing legal education’s “caste system,” then-Dean Kent Syverud refers to the tenured and tenure-track family as the “Brahmins” of the law school and describes them as the main constituency of deans, noting their limited views on teaching:

[T]hey like teaching really good students (like the ones on the law review) but they abhor grading and, except in seminars, rarely evaluate and correct written work. Many of them are nice as individuals, but as a group it is a different matter; they become “The Faculty” (capital T capital F), as in the sentence “The Faculty will never agree to requiring THAT new course in the curriculum.”

Kent D. Syverud, *The Caste System and Best Practices in Legal Education Friday*, 1 J. ASS’N LEGAL WRITING DIRECTORS 12, 14 (2002).

the perquisites that have to be reasonably similar to those of “The Faculty” are limited to “non-compensatory perquisites.”¹¹ In other words, this Standard explicitly allows law schools to pay clinical faculty less than it pays The Faculty. The current version of Standard 405(d) provides only nominal protection to legal writing faculty; it provides as follows:

A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 302(a)(3), and (2) safeguard academic freedom.¹²

Neither 405(c) nor 405(d) mandate security of position for legal writing and clinical faculty. Interpretation 405-6, referring to Standard 405(c), provides that a separate tenure track is one way to provide something “reasonably similar to tenure,” but it also permits a “long-term contract,” which it defines as “at least a five-year contract that is presumptively renewable or *other arrangement sufficient to ensure academic freedom*.”¹³ In other words, the standard requires neither tenure nor presumptive renewability of a contract. Interpretation 405-9 refers to Standard 405(d), and it explicitly states that 405(d) “does not preclude the use of short-term contracts for legal writing teachers.”¹⁴

These carveouts are not just a barrier to equality; they have proven to be a highway to *inequality*.¹⁵ Further, they harm both the future of legal education and the future of tenure.

Let me state at the outset that any woman or man who teaches legal writing¹⁶ full-time at a law school probably has a better job than many, if not most, people, even when they have lower status, salary, and job security

11. *2019 ABA Standards*, *supra* note 6, at 27.

12. *Id.* As I have commented elsewhere, part (1) of this provision creates a conundrum for legal writing faculty. To prove that this standard has been violated, they must quit their jobs, or argue that they are not well-qualified for those jobs. Mary Beth Beazley, *Finishing the Job of Legal Education Reform*, 51 WAKE FOREST L. REV. 275, 287 (2016). As for part (2), see, for example, Richard K. Neumann Jr., *Academic Freedom, Job Security, and Costs*, 66 J. LEGAL EDUC. 595, 604–05 (2017) (noting instances of “compromised” academic freedom faced by legal writing faculty, including “requiring all the school’s legal writing teachers to use identical syllabi, to grade each assignment in specified ways, to give certain types of writing assignments, and to assign certain textbooks, prohibiting other types of writing assignments and other textbooks”).

13. *2019 ABA Standards*, *supra* note 6, at 28 (emphasis added).

14. *Id.*

15. See, e.g., Melissa H. Weresh, *Stars Upon Thars: Evaluating the Discriminatory Impact of ABA Standard 405(c) “Tenure-Like” Security of Position*, 34 L. & INEQ. 137, 137 (2016) (addressing “the potential for exploitation of law faculty members who hold . . . 405(c) status and the likelihood that such exploitation will have a disparate, discriminatory impact on a predominantly female cohort of law faculty”).

16. Although the carveouts of Standard 405 affect those who teach clinical courses and those who teach legal writing, this Article will focus more attention on their impact on legal writing faculty.

than those who teach with them. I am not seeking pity for these faculty: I am seeking fairness. If Jennifer Lawrence or Amy Adams earn a million dollars for work that earns Bradley Cooper or Christian Bale two million dollars,¹⁷ Jennifer Lawrence and Amy Adams won't starve, but we should still find out why it's happening. And we shouldn't accept fuzzy answers. As Amanda Seyfried noted in 2015, "It's not about how much you get; it's about how fair it is."¹⁸

This Article will analyze how we might return 405(b) to its appropriate role as a protector of equitable treatment of full-time law faculty. First, it will analyze some of the reasons that full-time legal writing and clinical faculty are treated differently; second, it will explain how the current system hurts equality, particularly gender equality; third, it will examine how these inequalities hurt the next generation of lawyers; fourth, it will describe how the inequalities hurt the supposed goals of legal education; and finally, it will suggest what law faculty, the ABA and AALS, and law students can do to improve all kinds of equality in legal education.

I. WHY DO LAW SCHOOLS TREAT CLINICAL AND LEGAL WRITING FACULTY DIFFERENTLY?

Typically, full-time faculty teach all or almost all of the first-year curriculum.¹⁹ The upper level curriculum is taught by a mix of full-time faculty and adjuncts. Among the full-time faculty, those who teach legal

17. See Mike Fleming Jr., *Bart & Fleming: Why Jennifer Lawrence's Bally 'American Hustle' Payday Rant Isn't Anatomically Correct*, DEADLINE (Oct. 18, 2015, 10:09 AM), <https://deadline.com/2015/10/jennifer-lawrences-equal-pay-american-hustle-star-salaries-political-films-1201586975/> [https://perma.cc/68S2-DVJ8] ("I'm told that Lawrence worked 19 days and was paid \$1.25 million and got \$250,000 in deferred compensation. She also got seven points Christian Bale worked 45 days for \$2.5 million upfront and nine points; Bradley Cooper worked 46 days for \$2.5 million and nine points. Amy Adams got \$1.25 million and seven points for working 45 days . . ."). The article criticizes Lawrence for complaining, noting that all the stars had worked for lower salaries to get the movie made, and that Lawrence had worked fewer days. It does admit that "if anyone has a beef," it would be Amy Adams, but that since most stars are "absurdly overpaid," "Jennifer should be grateful for her fabulous paydays—and change the subject." *Id.*

18. Melania Hidalgo, *All the Celebrities Who Have Spoken Out About Equal Pay in Hollywood*, CUT (Apr. 10, 2018), <https://www.thecut.com/2018/04/equal-pay-day-celebrities-hollywood.html> [https://perma.cc/6DC9-9TRJ]. Seyfried noted that on one of her recent films, a male star of relatively equal status was making ten times her salary. Richard Benson, *Hollywood Usually Likes to Tell You What You Are and I Don't Want That*, TIMES (July 12, 2015, 1:01 AM), <https://www.thetimes.co.uk/article/hollywood-usually-likes-to-tell-you-what-you-are-and-i-dont-want-that-t0nnwlrj000> [https://perma.cc/9QBM-JM5D].

19. Standard 403(a) provides as follows:

The full-time faculty shall teach substantially all of the first one-third of each student's coursework. The full-time faculty shall also teach during the academic year either (1) more than half of all of the credit hours actually offered by the law school, or (2) two-thirds of the student contact hours generated by student enrollment at the law school.

2019 ABA Standards, *supra* note 6, at 26.

writing and clinical courses are most likely to be ineligible for tenure. Note that I am being imprecise when I refer to these faculty as “legal writing and clinical faculty,” for at many schools, they also teach casebook courses. However, their low status is often tied to the fact that their careers began in legal writing or the clinic, or that legal writing or clinic courses are part of their teaching portfolio.

Perhaps unsurprisingly, this explosion of low-status positions—and the ABA rule changes that followed—began at about the same time that women began to graduate from law schools in significant numbers. 1972 was a watershed year, with many previously all-male elite schools opening their doors to women. At about that same time, women began entering law schools in measurable numbers.²⁰ As noted above, in 1984, the ABA enacted its first carveout rule, specifying that full-time “skills” faculty could be treated differently than those who were unwilling or unable to teach professional skills. Although these positions were mostly clinical positions, deans soon began assigning these new, low-status “skills” faculty to legal writing courses as well. Some deans were remarkably candid about their happiness at hiring “Mommy-track” faculty at low wages; one dean was quoted explaining that he asked law firms about women who had quit their jobs to raise families, bragging that he would have to pay them only “a few thousand dollars per school year.”²¹

In the past, legal writing courses had frequently been assigned to new faculty, perhaps as a sort of hazing that they had to endure before they could move to the “regular” curriculum. Other schools used students to teach or assist in the courses; I held such a position during my third year of law school. At others, schools hired aspiring faculty to teach these courses, limiting them to a two-year capped appointment that these aspirants endured while they searched for “real” jobs at other schools. As the market tightened, some if not most of these jobs became simply temporary jobs that people held before they went on to something else. Be-

20. See Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 3, 8 (2001) (noting that women who graduated in “ever-increasing numbers” in the 1970s “provided law schools with an excellent labor pool from which to hire skills teachers”).

21. Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 490 (2004) (internal quotation marks omitted) (quoting LARRY SMITH, TULANE TAPS ‘MOMMY-TRACK’ FOR LEGAL WRITING AND RESEARCH INSTRUCTORS 13 (1991)) (“In a [1991] article titled, *Tulane Taps ‘Mommy-Track’ for Legal Writing and Research Instructors*, a Dean is quoted as saying that the lawyers sought for the legal writing jobs would ‘typically be women who have taken leave of their employers in order to raise families.’ The Dean explained that he had actively sought women for the positions, by contacting ‘the major [city] firms, apprising them of the [new legal writing] program and requesting the names of any lawyers who have recently taken leaves of absence.’ Because Tulane did not want to pay for professional legal writing training, women on the ‘mommy-track’ offered ‘a viable alternative’ because the law school would only have to pay them ‘a few thousand dollars per school year.’” (footnotes omitted)).

ginning in the late 1980s and early 1990s, after the founding of the Legal Writing Institute, legal writing faculty had the opportunity to develop expertise in the theory and practice of legal writing. As law schools recognized the value of expertise in the teaching of legal writing—and because the ABA rules allowed them to do so—law schools removed the caps, and legal writing faculty could keep their jobs, albeit without job security, equal pay, or other equitable treatment.²²

The uncapped positions often started as ad hoc faculty slots. Someone had an idea that students needed more work on writing and that the short-term faculty weren't hitting the mark, and they asked someone they knew to step in. That is what happened for Teresa Godwin Phelps, who taught me legal writing at Notre Dame. After one year, however, the dean moved her to a tenure line position. That same transition happened at a few other schools, but most deans were happy to keep the ad hoc positions as non-tenure line slots, and the Council on Legal Education endorsed this behavior.

Pinning down the reasons for the continued low status of legal writing faculty is perhaps a “chicken and egg” question. Did deans value these positions less because women went into them, did most men refuse to apply for or accept these positions, or did deans seek out women for these positions because they wanted to pay people less? Some might say that the fact that women dominate in these jobs is not a bug; it's a feature.²³ Women were available for these lower paid, low-status positions precisely because as their education-based opportunities broadened, their sex-based limitations remained the same.

As Ann McGinley and others have noted, law schools were no different than other organizations that took advantage of societal expectations and structural barriers to create a “lower-paid, hard-working group at the bottom” of the law school hierarchy.²⁴ What happened in law schools was just a reflection of what has happened in a variety of the workplaces that “allowed” women to enter them. Thanks to our long history of structural inequality, too many women learned that they should work for less money and make fewer demands in the workplace.²⁵ By staffing these positions

22. See, e.g., J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 38 n.8 (1994) (noting typical caps of three years).

23. Stanchi, *supra* note 20, at 8 (noting that women left practice and moved to legal education due to “discrimination in law firm hiring, along with entrenched social norms regarding gender roles” because it offered flexibility to women who “overwhelmingly bore (and still bear) the burden of childcare and other family related duties”). I agree that teaching legal writing has flexibility. When my children were in school, I had the flexibility to leave work at 3 P.M. to take them to a doctor's appointment. I also had the flexibility to awaken at 3 A.M. to grade papers.

24. Ann C. McGinley, *Discrimination in Our Midst: Law Schools' Potential Liability for Employment Practices*, 14 UCLA WOMEN'S L.J. 1, 3 (2005) (“[A] large part of women's inequality exists because of invisible structural barriers . . .”).

25. See, e.g., *id.* at 5 (“But the limited choices, some self-imposed, some law school-imposed, some society-imposed, come into stark relief when we analyze the

with women, law schools increased their gender diversity profile, improved their students' academic experience, and saved money, all at the same time.²⁶

By design, these positions were—and are—significantly more time-intensive during the semester than casebook courses. This design recognizes the difficulty of teaching writing; indeed, the current ABA standards specify that the entire law school curriculum must be “rigorous,” but only for legal writing courses does the standard quantify what counts as rigor. Interpretation 303-2 provides that “[f]actors to be considered in evaluating the rigor of a writing experience include the number and nature of writing projects assigned to students, the form and extent of individualized assessment of a student’s written products, and the number of drafts that a student must produce for any writing experience.”²⁷ With these criteria, it is no wonder that legal writing faculty report spending five to ten hours of individual formative assessment per student, per semester.²⁸

But these overly time-intensive positions created the perfect Catch-22 situation: Deans told legal writing faculty that they need not or should not produce scholarship. At most schools, the guideline of “you need not produce scholarship,” evolved from “we don’t want you to produce scholarship,” to “you are unable to produce scholarship,” to “scholarship that you produce is unworthy,” to “even if you do produce scholarship that receives outside validation, it will not change your status, our opinion of your course, or our opinion of you.” One of my colleagues, while holding a capped, non-tenure-line, legal writing position, placed her first article in a higher ranked journal than articles produced by either of the faculty members who were up for tenure that year at her school. When the dean asked to see her in his office, she was expecting a bit of praise for her good placement. Instead, the dean told her that she should keep in mind that law journals are edited by law students, who are not good judges of quality.

situation of women lawyers who teach in law schools, primarily in positions of low status, low pay and little esteem.”).

26. See Renee Nicole Allen et al., *The “Pink Ghetto” Pipeline: Challenges and Opportunities for Women In Legal Education*, 96 U. DET. MERCY L. REV. 525, 527 (2019) (“Law schools have bolstered their overall faculty diversity by hiring women for non-tenure track clinical and legal writing faculty positions. Yet, these women suffer “occupational segregation” characterized by lower pay, lack of job security, and limits on the subject areas that they are permitted to teach. . . . These women are second-class citizens who are often excluded from faculty governance or the full protection of academic freedom.” (footnotes omitted)).

27. 2019 ABA Standards, *supra* note 6, at 16.

28. Admittedly, this number is anecdotal, collected by the author over several years of asking her colleagues from various law schools to calculate the formative footprint of their courses. It includes time spent providing the opportunities for “individualized formative assessment” that Standard 303-2 requires law schools to provide for their students. It typically includes time spent reviewing student work and providing written comments, holding individual conferences, and observing and assessing student performance in oral argument and other experiential simulations.

I doubt that he had reacted in the same way when a tenure-line faculty member achieved a similarly high placement.

Law schools can and do waive or reduce scholarship requirements for others on the faculty. Most deans and associate deans, though they are tenured, are allowed or encouraged to reduce their scholarly output significantly, due to the heavy time demands that administration requires. But for legal writing and clinical faculty, the time demands of teaching—time demands that the ABA specifically imposes, for a course that it specifically requires²⁹—are considered a fatal flaw that makes their jobs somehow less intellectual, and therefore inconsistent with the status, pay, and security of the tenure track.

At the same time, the ABA's decision to facilitate this discriminatory treatment—to ignore its antidiscrimination standards³⁰ and promulgate a rule that promotes discrimination against a class of faculty now largely made up of women—puts these faculty members into a caste from which it is difficult to escape. Those with power decide what kind of teaching and scholarship are valuable. Many lawyers gasp when they learn that legal writing and clinical faculty are valued less than those who teach casebook courses. “But that’s what lawyers do!” they cry. And they are correct. It makes little sense for the Council to mandate practice-ready teaching in Chapter 3 of the ABA standards and then to use Chapter 4 to provide a “how-to” guide for discrimination against the faculty who teach those practice skills.

Law schools offer many reasons for the poor treatment of legal writing and clinical faculty. A common excuse is the “market” excuse: they pay no more than what the market requires.³¹ Law schools seem not to notice that they don’t advertise current tenure-line positions on the open market. The conceit is that without the high salaries and union-like protections of the tenure system, only trolls and troglodytes would take those

29. See *2019 ABA Standards*, *supra* note 6, at 16. Standard 303 provides that law schools “shall” offer a curriculum that “requires each student to satisfactorily complete” one professional responsibility course, one faculty-supervised “writing experience” in the first year, and at least one faculty-supervised “writing experience” after the first year. *Id.* As noted earlier, the interpretations indicate that these writing “experiences” are courses, for the rigor of that experience is determined in part based on “the number and nature of writing projects” the students are assigned, as well as the number of drafts for those projects. *Id.* The only other requirement is for “one or more experiential course(s) totaling at least six credit hours.” *Id.* Both legal writing and clinical courses could fulfill that requirement. *Id.* Further, Standard 303(b) provides that law schools “shall provide” students with “substantial opportunities” for law clinics or field placements. *Id.*

30. See *id.* at 11 (“A law school shall *foster and maintain* equality of opportunity for students, faculty, and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability.” (emphasis added)).

31. See McGinley, *supra* note 24, at 5 (noting that “[p]roponents of a market approach would argue that legal writing faculty have the option of securing other positions if they so choose,” but arguing that choices for legal writing faculty are in fact limited by a variety of societal, personal, and law-school-related factors).

positions. But the many effective and highly qualified legal writing and clinical faculty show that the reality is far different. If every full-time law professor job were advertised at legal writing salaries and with legal writing job security, law schools could hire well-qualified people in most, and probably all, of those positions. They would no longer be great jobs, of course. But since I am constantly told by casebook faculty that the legal writing jobs are “good jobs,” I presume they would say the same about other jobs with similar salaries.

The second excuse is the “credentials” excuse: that the people who seek (and take) these jobs don’t have the T14, law clerk pedigrees of the casebook faculty. First, not all casebook faculty have these credentials, and some legal writing faculty do. This supposed requirement is mere credentialism, that is, “the inflated use of certain credentials for the purpose of restricting entry into a position to enhance its market value and monopolize social rewards.”³² More to the point, if credentials are really needed to teach and conduct scholarship, then those without those credentials would never be hired for tenure-level positions (or would never achieve tenure), and that proposition is certainly untrue. To the extent credentials have any validity as a “requirement,” they are a shortcut, just as a top 10% GPA is often a shortcut for other legal employers. As a former dean noted, if people can prove their qualifications in other ways—e.g., teaching and scholarship—the pedigree is irrelevant.³³ Second, if those without these credentials are really so bad, why do law schools allow them to teach ABA-required courses to literally every student in the building? Either the faculty are being cheated by being treated unfairly or the students are being cheated by being subjected to sub-standard faculty.

The final excuse is the “scholarship” excuse, which is typically divided into “scholarship quantity” and “scholarship quality” categories.

The quantity argument is tied directly to the Catch-22 noted above: these jobs are incredibly time-intensive, and law schools use this time requirement to claim that legal writing faculty are incapable of completing scholarship. It is certainly true that meeting ABA requirements for formative assessment can impose a cost on the quantity of scholarship that legal writing and clinical faculty can produce. First, I would argue that the current situation is unbalanced; scholarship is valued too highly, and teaching is valued too little.³⁴ Second, if legal writing jobs are designed appropri-

32. Stanchi, *supra* note 21, at 472–73.

33. Nancy B. Rapoport, *Is “Thinking Like A Lawyer” Really What We Want to Teach?*, 1 J. ASS’N LEGAL WRITING DIRECTORS 91, 97 n.22 (2002) (expressing frustration that “law schools focus so much attention on the grades of a lateral hire, rather than on her demonstrated ability to teach (evaluations) and research (publication record)”).

34. In the 1990s, “[t]he MacCrate Report blame[d] an overemphasis on scholarship for the unpreparedness of law graduates.” Reginald Mombrun, *The Relevance of Federal Income Tax Courses in the Law School Curriculum and in Law Practice: Now More Than Ever*, 59 TAX LAW. 1079, 1087 (2006) (citing AM. BAR ASS’N SEC. OF LEGAL EDUC. & ADMISSIONS BAR, *Legal Education and Professional Development—An*

ately, these faculty can still produce valid scholarship in a quantity that is appropriate when balanced with their vital teaching role.

Attacks on the quality and intellectual value of scholarship are made most often against new scholarship when the people doing that scholarship are women or members of minority groups.³⁵ My emerita colleagues at UNLV—Terry Pollman, Linda Edwards, and Linda Berger—have analyzed the quality of legal writing scholarship and debunked some of the biases against it.³⁶ I freely admit that some legal writing scholarship is not good, just as some scholarship in every field is not good.³⁷ But as Professor Edwards noted, the tendency is too often to judge the scholarship by one’s biases about the author.³⁸

The quality decision is too often made through the lens of power.³⁹ Those in power decide that articles about how to teach case analysis are less valuable than articles that do the case analysis, and that articles about the psychology of judges are more valuable than articles about the psychology of the reading and writing activities that those judges engage in. If legal writing faculty had equal power, their writing would have equal prestige.

So why do these low-status positions continue to exist? The short answer is that deans and the ABA (an overlapping construct) want them to,

Educational Continuum, Report of the Taskforce on Law Schools and the Profession: Narrowing the Gap 5 (July 1992)). Few would argue that scholarship has since become less prevalent. See e.g., Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1182 (2008) (“The U.S. News and World Report rankings reward schools that develop a reputation for research and scholarship and devalue schools that emphasize teaching and practice skills.”); Olufunmilayo B. Arewa et al., *Enduring Hierarchies in American Legal Education*, 89 IND. L.J. 941, 960 (2014) (describing the amount of faculty scholarship as “voluminous,” but noting that “[t]he usefulness of this expansion in quantity of legal scholarship to the profession and the courts has, however, regularly been the subject of heated debates”).

35. See, e.g., Harvey Gee, *Beyond Black and White: Selected Writings by Asian Americans Within the Critical Race Theory Movement*, 30 ST. MARY’S L.J. 759, 769 (1999) (discussing the controversy about “the validity of Critical Race Theory”); Bell Hooks, *Theory as Liberatory Practice*, 4 YALE J.L. & FEMINISM 1, 5 (1991) (talking about ways to “legitimize” feminist scholarship).

36. See generally Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 LEGAL WRITING: J. LEGAL WRITING INST. 3 (2005); Linda L. Berger et al., *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 521 (2010).

37. See, e.g., Beazley, *supra* note 12, at 297–98 (noting that legal writing faculty wrote informal pieces in the 1980s and 1990s to quickly educate themselves and their colleagues about how to use new teaching methods to teach legal writing).

38. Pollman & Edwards, *supra* note 36, at 36 (indicating that certain topics “count” as scholarship when renowned scholars write about them, but “not when legal writing professors write about them”).

39. E.g., Kathryn M. Stanchi, *The Problem with ABA Standard 405(c)*, 66 J. LEGAL EDUC. 558, 562 (2017) (“The performance of those in the lower ranks will be viewed through the lens of their inferior status. What scholarship is produced will likely be viewed skeptically and critically—confirmation bias is at work here . . .”).

and that people—mostly female people—agree to take them. But perhaps that’s okay. If it’s only hurting those who are so foolish as to accept these lower status, lower paying jobs, is that really a problem? The answer, of course, is *yes*.

II. HOW THE LAW SCHOOL FACULTY CASTE SYSTEM HURTS EQUALITY IN LEGAL EDUCATION AND BEYOND

The current system hurts diversity, particularly gender equality, in myriad ways, both directly and indirectly. The first and obvious impact is its direct impact on the lives of the women and men who teach legal writing. But the system also has indirect impacts, impacts that affect racial diversity and the power of all women on law faculties.

A. *The Direct Impact of Inequality on Those Who Teach Legal Writing*

The demographic differences between The Faculty and legal writing faculty are particularly telling. Although the data available is sometimes difficult to ferret out, the general consensus is that men make up 60–70% of tenure-track faculty, and women make up 72% of legal writing faculty.⁴⁰ Further, the racial makeup of legal writing faculty is unbalanced: as the most recent survey shows, only about 12% of legal writing faculty are people of color.⁴¹

The most measurable way that this system hurts legal writing faculty is financially. As I am far from the first person to notice, when women dominate in a field, the people who work in that field receive less pay.⁴² The reasons for this difference are beyond the scope of this Article, but certainly one cause is the presumption that women are secondary breadwin-

40. Entrikin et al., *supra* note 3, at 4–5 (noting “[w]hile 36% of tenured or tenure-track faculty in 2013-14 were women (a troubling statistic in its own right), women represented 63% of clinical faculty and 72% of legal writing faculty,” a percentage that has held for more than twenty years).

41. ASS’N LEGAL WRITING DIRS. & LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY 69 (2015), [https://www.alwd.org/images/resources/2015%20Survey%20Report%20\(AY%202014-2015\).pdf](https://www.alwd.org/images/resources/2015%20Survey%20Report%20(AY%202014-2015).pdf) [https://perma.cc/7H94-Y4QX] [hereinafter ALWD/LWI SURVEY].

42. See, e.g., Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 589 (2018) (“As more women enter a profession, the average pay for that position decreases.”). Men and women who work in feminine occupations get paid less. See *id.* at 596 (“After conducting a long-term analysis of median hourly wages for full-time workers by occupation—in which they controlled for education, experience, race, and geographic region, and changes in skills demanded by jobs—the researchers ‘found substantial support’ of a consistent trend over time ‘that increased feminization of occupations diminishes their relative pay.’” (quoting Asaf Levanon et al., *Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950–2000 U.S. Census Data*, 88 SOC. FORCES 865, 886 (2009))); see also Claire Cain Miller, *As Women Take Over a Male-Dominated Field, the Pay Drops*, N.Y. TIMES (Mar. 18, 2016), <https://www.nytimes.com/2016/03/20/upshot/as-women-take-over-a-male-dominated-field-the-pay-drops.html> [https://perma.cc/G8KE-KWHC].

ners, seeking only “pin money” and not in need of a real salary.⁴³ When I was still a staff member (despite the fact that I taught a mandatory course to the entire second-year class), I sought a salary increase from my dean. Lest he think me greedy, I took care to explicitly inform him that I was the primary breadwinner for my family of four.

While tenure-level salaries and security are often predictable at a given school, the salaries and job security of legal writing faculty are contingent on a variety of things, including the stinginess or generosity of their deans and their own ability to negotiate. Of course, as social science tells us, women are typically at a disadvantage when they seek higher salaries: blamed for their own low pay when they don’t try to negotiate, and worried about being accused of arrogance and “harpism” when they do.⁴⁴

The salary differential can make a huge difference over the course of a career.⁴⁵ A recent article reports that legal writing faculty start out \$30,000 per year behind their casebook colleagues.⁴⁶ Even if this differ-

43. E.g., Stephanie Bornstein, *The Statutory Public Interest in Closing the Pay Gap*, 10 ALA. C.R. & C.L.L. REV. 1, 2 (2019) (citing JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 24 (2000)) (“This gendered division of labor [into the domestic sphere v. the market sphere] reinforced the idea that women were less ‘suited’ for the workplace and that their work was for extra ‘pin money’ rather than a serious contribution to family income.”).

44. E.g., Arianne Renan Barzilay, *Discrimination Without Discriminating? Learned Gender Inequality in the Labor Market and Gig Economy*, 28 CORNELL J.L. & PUB. POL’Y 545, 551 (2019) (“[N]ew research suggests that . . . when . . . expectations are murky, asking for more money does not always work as well for women as it does for men, and it may actually hurt women both financially and socially.” (citing Julia B. Bear & Linda Babcock, *Gender Differences in Negotiations*, in THE NEGOTIATOR’S DESK REFERENCE 596, 600, 603 (Christopher Honeyman & Andrea Kupfer Schneider eds., (2017))); Christine Exley, Muriel Niederle, & Lise Vesterlund, *New Research: Women Who Don’t Negotiate Might Have Good Reason*, HARV. BUS. REV. (Apr. 12, 2016), <https://hbr.org/2016/04/women-who-dont-negotiate-their-salaries-might-have-a-good-reason> [<https://perma.cc/9N7Y-JCCB>]; Christine L. Exley, Muriel Niederle, & Lise Vesterlund, *Knowing When to Ask: The Cost of Leaning-In*, 128 J. POL. ECON. 8 (2020); Emily T. Amanatulla & Catherine H. Tinsley, *Punishing Female Negotiators for Asserting Too Much . . . or not Enough: Exploring Why Advocacy Moderates Backlash Against Assertive Female Negotiators*, 120 ORG. BEHAV. & HUM. DECISION PROCESSES 110, 110 (2013).

45. E.g., Benjamin P. Edwards & Ann C. McGinley, *Venture Bearding*, 52 U.C. DAVIS L. REV. 1873, 1886 (2019); Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 611 n.32 (2020) (noting that “the gender wage gap widens over time as women advance in their careers” and citing source that shows that women face an income gap of 44 percent in retirement, a difference that is more than twice the overall gender pay gap). The pay gap is also wider for women of color. Edwards and McGinley note that in business jobs, a recent study found an overall gender pay gap of 20%, while Hispanic and Latina women face a pay gap of 46%, and African-American women, a 37% gap. Edwards & McGinley, *supra*, at 1886. Edwards and McGinley note that the pay gap reflects “not only differential pay for women who have family responsibilities, but also a differential that cannot be explained by pregnancy, childcare, or other factors.” *Id.*

46. Entrikin et al., *supra* note 3, at 26–27 (citing survey results indicating that average starting salaries for entry-level, contract legal writing faculty are about \$70,000, compared to \$106,151 for doctrinal-law, tenure-track faculty).

ence does not widen (unlikely, given that raises are typically made on a percentage-of-salary basis), a hypothetical legal writing faculty member would earn almost a million dollars less over a thirty-year teaching career. To take myself as an example, I taught full time (as a staff member) for about a dozen years at another law school before I transitioned to the tenure track and earned tenure. I left the school seventeen years after that transition. One of my casebook faculty friends there started on the tenure track when I started as a staff member. And even though I had moved to the tenure track years ago, my late start made a huge difference to my income: when I left, her base salary was about \$60,000 per year higher than mine.⁴⁷

These financial realities hurt the short- and long-term financial security of the women and men⁴⁸ who hold these low-paid positions, even though they paid the same costs in time, tuition, and interest on student loans to graduate from law school. Further, the costs are more than financial. Many legal writing faculty spend their careers being subjected to microaggressions, treatment that ensures that they never forget that they occupy a lower rung on the faculty ladder.⁴⁹ The disparate treatment often includes limited or no access to faculty perquisites such as sabbatical leave, course load reductions, travel money, and summer research money. Their absence for legal writing faculty creates yet another roadblock to their scholarly output. Further, fighting for these rights and opportunities imposes painful costs on time and emotional energy.⁵⁰

47. I highlight this difference to complain about unfairness, not poverty. I note, however, that I owe my solvency in large part to my children, who both chose to attend the university where I was teaching, and who each received some scholarship support on top of the reduced tuition perquisites given to children of all faculty and staff.

48. Men who choose to teach legal writing suffer from this low pay as well. Further, unlike casebook faculty, who may receive an initial salary bump based on experience or years since law school graduation, legal writing faculty are often hired at a pre-set, entry-level salary regardless of their previous employment. A male friend who was recently hired to teach legal writing—after a lengthy and impressive career in legal education, with stellar teaching evaluations—was given a take-it-or-leave-it offer of \$75,000, while at that same law school, tenure-line assistant professors with much less experience receive \$127,000. Another friend, who had achieved the status of full clinical professor at her law school, withdrew her name from an application to another school when she learned she would have to start over as an assistant clinical professor.

49. See Nantiya Ruan, *Papercuts: Hierarchical Microaggressions in Law Schools*, 31 HASTINGS WOMEN'S L.J. 3, 5 (2020) (“[The law school’s caste system] results in rankism when those higher in the hierarchy, without recognition of the power difference, abuse their power to the detriment of those lower in the hierarchy . . . not only [via] the larger discriminatory effects of pay inequity, job insecurity, and other employment metrics, but also in the everyday slights experienced by those with less power. . . . [T]he ‘papercut harms,’ or microaggressions, inflicted by those with greater status on lesser-status faculty include comments about what they teach, their roles in the institution, their lesser status, and the perceived value of their contributions.” (footnotes omitted)).

50. For many legal writing faculty, the arrival of a new dean means it is time to start writing memos justifying their existence, their course load, their academic

B. *The Indirect Impacts of Inequality*

As noted above, about 72% of legal writing faculty are women, and only about 12% of legal writing faculty are people of color.⁵¹ Of faculty who teach in clinics, the numbers are not as stark, but there are far more women in those positions than there are in tenure-line slots.⁵² The disproportionate number of women, and the scarcity of faculty of color, in legal writing and clinical faculty positions extend the harm of the 405 carveouts beyond those directly affected. At law schools with a significant presence of legal writing and clinical positions, the faculty almost inevitably includes a critical mass of low-status women faculty.

This critical mass of low-status women exacerbates the harmful divide between the haves and the have-nots on law school faculty, and it particularly separates tenure-line women from non-tenure-line women, dividing them almost in half at many law schools. Non-tenure-line faculty members may expect that tenured women will speak up for them when made aware of the injustices that legal writing and clinical faculty face. Alas, with too few exceptions, that has not been the case.⁵³ Further, even if tenured women do speak up, they may not have the power to effect change.

The inability or unwillingness of tenured women to help non-tenure-line women is a symptom of women's lack of access to power. Even tenured women may believe that they do not have the political capital⁵⁴ to

decisions, and more. I once discovered that an exiting dean had laid budget shortfalls at my feet, despite always approving the funding requests for my adjunct faculty and never giving me any sort of budget to stay within. I received a memo from the new dean asking how I was going to restructure "my" budget to take care of "my" debts. Fortunately, a thoughtful associate dean cleared up the misunderstanding.

51. Entrikin et al., *supra* note 3, at 4–5; ALWD/LWI SURVEY, *supra* note 41, at 69.

52. Entrikin et al., *supra* note 3, at 5 (citing ROBERT R. KUEHN ET AL., CTR. FOR STUDY OF APPLIED LEGAL EDUC., THE 2016–17 OF APPLIED LEGAL EDUCATION 40 (2017)), <https://repository.law.umich.edu/other/139/> [<https://perma.cc/D9GS-EXPF>] (noting that "[w]omen represent 65% of clinical faculty (an increase from 56% in 2008)"); DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR STUDY OF APPLIED LEGAL EDUC., REPORT ON THE 2007–2008 SURVEY 28 (2008), <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf> [<https://perma.cc/6GPK-SRDB>]).

53. And I have been lucky to work with some of them, for example, Ann C. McGinley, *Employment Law Considerations for Law Schools Hiring Legal Writing Professors*, 66 J. LEGAL EDUC. 585, 590 (2017) ("[A]n individual plaintiff or a class of plaintiffs could bring a Title VII or Title IX claim alleging that the law school's policies and practices have a disparate impact on women. In either case, law schools may be liable for illegal discriminatory employment practices.").

54. *E.g.*, Edwards & McGinley, *supra* note 45, at 1909 ("[W]omen [in the tech industry] explain that they must learn to act like men. They avoid and look down on other women, knowing that their professional success depends on withstanding aggressive male behavior."); Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 27 (2018) ("[W]omen do sometimes demean and ostracize other women, especially in sex-segregated job settings where they lack power and feel they must compete for favor on stereotypical female terms.").

spend on low-status women: they may believe that their complaints will be seen as self-serving, because they seek to benefit a group with whom they share an obvious gender connection. This actual or perceived lack of support hurts relationships between the two biggest groups of women in legal education, thus stunting any collective power they might wield, hurting their ability to advocate not only for their colleagues but also for themselves and their students.

Tenured women faculty seem not to realize the way that low status affects the work lives of legal writing and clinical faculty. First, faculty who have less job security may be less likely to speak out in faculty meetings or to rock the boat in their teaching, scholarship, and service. Powerless faculty are silent faculty. Second, and more significantly, legal writing and clinical faculty are often not allowed to vote; even when they can vote, they may not be allowed to vote on faculty hiring decisions.⁵⁵ This reality means that when law schools are deciding who to hire for tenure-line positions, it is likely that a significant number of women who teach full time at the law school may not be able to vote on those decisions. This dilution of the women's vote may well have an impact on how many women are hired for future tenure-line positions, diluting women's power once more.

If it is important for women to *be* on law faculties, it is important for them to have *equal power* on those faculties. Supporting equal status for legal writing and clinical faculty promotes women's equality both directly and indirectly.

III. HOW INEQUALITY HURTS THE NEXT GENERATION OF LAWYERS

The unequal treatment of this subclass can also have an impact on the next generation of lawyers. Consciously or unconsciously, students see that a critical mass of the women on the full-time faculty are clustered in

55. The most recent ALWD/LWI Survey does not ask explicitly whether legal writing faculty are allowed to vote on hiring. The last time the question was asked directly, in 2015, Respondents at 125 law schools, or almost 69% of the 182 schools responding, reported that legal writing faculty could not attend faculty meetings at all (12 schools) could not vote at all (30 schools) or could not vote on hiring decisions (83 schools). Of the 98 schools that reported information on faculty meeting attendance for non-tenure-line directors, 79, or 80% of those schools, reported that directors either could not attend faculty meetings at all (5 schools), could not vote at all (16), or could not vote on hiring decisions (58 schools). See ALWD/LWI SURVEY, *supra* note 41, at 63, 84. As for clinicians, see Minna J. Kotkin, *Clinical Legal Education and the Replication of Hierarchy*, 26 CLINICAL L. REV. 287, 299 (2019) ("A 2012 study found that only 15% of these long-term contract clinical faculty have voting rights on all matters of faculty governance. Sixty-nine percent are permitted to vote on all matters except the hiring and promotion of doctrinal faculty. Five percent are permitted to vote on administrative matters only and 11% are not permitted to vote on anything, although they can attend faculty meetings. The most recent . . . data does not break down voting rights by status, but it does show a significant decline in those clinical teachers entitled to vote on all matters." (footnotes omitted)).

the low-status, “women’s work” jobs.⁵⁶ This worldview can stunt the ambition of our women students, and warp the worldview of all students.

Students of color may be impacted in additional ways. Law schools pay lip service to the importance of diversity on their faculties, purportedly because diverse faculty can anticipate diverse student needs and teach accordingly. And yet, faculty of color are, appropriately, discouraged from pursuing careers in legal writing; certainly, they have no need to seek out other opportunities for discrimination in their lives.⁵⁷ As Professor Lorraine Bannai noted, women of color who choose to teach legal writing are “challenged times three.”⁵⁸

Thus, legal writing as a field lacks both gender and racial diversity, and we are all the poorer for this lack.⁵⁹ What message do students—and especially students of color—receive from the lack of men and the lack of faculty of color in legal writing? That faculty of color are not sufficiently accomplished to teach legal writing, or that legal writing is not worthy of the attention of people of color, or of men?

56. See e.g., Ruan, *supra* note 49, at 31 (“[T]he entrenched hierarchies in law schools and the disparate statuses of faculty are experienced not just by faculty, but students as well. Students notice where faculty offices are located, the titles of their teachers, and are aware of relationships in the building. . . . Law students receive the message that skills education is less important, which harms the law school mission in several ways: by diminishing experiential learning goals; by decreasing the chance that students will be the best advocates they can be in the legal system; and by perpetuating legal hierarchies. Equally important is that by allowing microaggression to continue in their community, the promotion of injustice is advanced, in direct contrast to the mission of law schools.”).

57. E.g., Teri A. McMurtry-Chubb, *Writing at the Master’s Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 DREXEL L. REV. 41, 45 (2009) (“[M]y professional mentors unanimously warned me not to take a job as a legal writing professor. . . . [O]ne said, . . . ‘[w]hat law school would want you as a doctrinal faculty member after you have taught in a legal writing program?’ Still another said, ‘Because you are a Black woman, any law school faculty will not think that you are as capable and intelligent as they are. Why make life more difficult for yourself by taking a short-term contract position with no chance of tenure that carries the perception of inferiority?’”).

58. Lorraine K. Bannai, *Challenged X 3: The Stories of Women of Color Who Teach Legal Writing*, 29 BERKELEY J. GENDER L. & JUST. 275, 275–76 (2014) (acknowledging issues faced by women of color who are tenure-line doctrinal law faculty, but continuing, “I also know (1) that untenured women of color who teach Legal Writing face additional challenges because of their lower status in the academic hierarchy; (2) that those additional challenges are often invisible to, or ignored by, others, even those who might be allies on issues of race and gender; and (3) that their lack of status can demean and silence them, as well as prevent their institutions from benefiting from all they can contribute as scholars, teachers, and colleagues”).

59. E.g., Bannai, *supra* note 58, at 288 (noting that faculty of color “feel a particular responsibility to mentor and support students of color at their institutions,” but that lack of a critical mass of diverse faculty imposes extra burdens on those faculty); Meera E. Deo et al., *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANA/O-LATINA/O L. REV. 1, 10–11 (2010) (discussing importance of diverse law school faculty).

These inequities grow more ironic. Each revision of Chapter 3 of the ABA standards gives more and more significance to legal writing and clinical courses and the formative assessment they typically include.⁶⁰ In contrast, Chapter 4 continues to condemn the faculty who do this teaching to the lower classes. Notably, during this pandemic year, some have argued in favor of diploma privilege, noting that graduating law students need no further test of their ability to enter legal practice.⁶¹ The faculty who are most able to speak to their students' qualifications for practice, however, are those with the least voice to do so.

IV. HOW INEQUALITY HURTS THE (SUPPOSED) EDUCATIONAL GOALS OF LAW SCHOOLS

The ABA Council's Standards for Legal Education lay out the requirements for each law school's "Program of Legal Education," in Chapter 3, and for faculty, in Chapter 4. The language of both show that the Council seemingly values teaching over scholarship. Standard 301(a) requires that each law school "shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession."⁶² New language, in Standard 301(b), requires law schools to "establish and publish learning outcomes designed to achieve these objectives."⁶³ Chapter 4 devotes many more pixels to teaching than it does to scholarship. Variations on the words "teaching" and "assessment" appear over twenty times, while variations on the word "scholar" appear fewer than ten times.

Standard 404(a) lists the "core responsibilities" of law faculty, and the first item on that list "requires" that faculty "fulfill" the core responsibility of "[t]eaching, preparing for classes, being available for student consultation about those classes, assessing student performance in those classes, and remaining current in the subjects being taught."⁶⁴ The second item references academic advising and lists a core responsibility of "assessing student learning at the law school."⁶⁵ Item three focuses on scholarship

60. Marie Summerlin Hamm et al., *The Rubric Meets the Road in Law Schools: Program Assessment of Student Learning Outcomes as a Fundamental Way for Law Schools to Improve and Fulfill Their Respective Missions*, 95 U. DET. MERCY L. REV. 343, 344 (2018) (describing these changes as a shift in focus); Judith Welch Wegner, *Contemplating Competence: Three Meditations*, 50 VAL. U. L. REV. 675, 679 (2016) (describing recent changes to the ABA standards that promote formative assessment).

61. See, e.g., Claudia Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The Need for Immediate Action*, (Ohio State Public Law, Working Paper No. 537, 2020), <https://dx.doi.org/10.2139/ssrn.3559060> [<https://perma.cc/W7XU-BSRP>] (offering suggestions for how jurisdictions might continue licensing new lawyers in the face of the COVID-19 pandemic).

62. 2019 ABA Standards, *supra* note 6, at 15.

63. *Id.*

64. *Id.* at 26.

65. *Id.*

alone, but its requirement is only that a faculty member must be “[e]ngaging in scholarship, as defined by the law school.”⁶⁶ I am not opposed to scholarship; it is a vital part of the service that law schools provide to the profession and to society. But too many law faculty do not recognize the bargain we strike with those who support legal education—especially our students. In exchange for the freedom to engage in scholarship, law faculty agree to engage in teaching and assessment as part of our core responsibilities as law faculty.

Tenure-line faculty seem not to realize that by denying tenure opportunities to growing numbers of full-time law faculty, they are indirectly sowing the seeds of tenure’s demise. Perhaps they don’t care about future generations of law faculty; after all, they have theirs, right? I refuse to take such a cynical view. Or perhaps my cynicism takes a different shape; I know many second-generation law faculty,⁶⁷ and I imagine many of them would hate to see their children denied the benefits of a tenure-line job. I must conclude that they do not realize that a threat to tenure in one subject area is a threat to tenure in all subject areas. More particularly, why should tenure be required for faculty who teach subjects that are optional if it is not required for those who teach subjects that are mandatory?⁶⁸

Many casebook faculty justify the lack of tenure in legal writing and clinical courses by pointing out what they perceive to be significant differences between their courses and ours. These differences, however, only highlight the ways in which legal education is changing, while The Faculty stays the same. In too many casebook courses, faculty ignore the strides made in andragogical theory,⁶⁹ ignore the pleas for more experiential learning and formative assessment, and continue using only the nineteenth-century, vicarious-teaching model.⁷⁰ The separation of casebook

66. *Id.* The rest of standard 404(a) lists other faculty requirements, with subsections (4)–(6) focused on service.

67. I hosted a Take-A-Daughter-To-Work Day session sometime around the turn of the twentieth century. I asked the women on the panel to tell the story of how they ended up on a law faculty. I discovered that the two tenure-line faculty were children of law professors; the contract faculty member was the daughter of a judge, but she was married to a tenured faculty member whose father was a law professor. I spoke last; the first words out of my mouth were “my Dad is a salesman and my Mom is an artist.”

68. I readily agree that courses taught by casebook faculty are important. Teaching legal writing, however, is specifically required by Standard 302(2) and 302(3).

69. *E.g.*, Anthony S. Niedwiecki, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 WIDENER L. REV. 33, 47 (2006) (explaining that “andragogy” describes methods of helping adult learners).

70. *E.g.*, Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 S.D. L. REV. 347, 351 (2001) (describing the “[v]icarious [t]eaching/[s]elf-[l]earning [m]odel” and noting that it “assumes some sort of rebound learning effect. . . . [It] presupposes that the . . . students [not engaged in Socratic dialogue with the professor] know to play along, answering the queries in their heads and learning to think like lawyers by experiencing vicariously what the speaking student actually experiences.”). I

faculty from legal writing and clinical faculty separates casebook faculty from modern teaching methods and thwarts the effectiveness of legal education.

The vicarious, one-exam-per-semester method promotes fixed mindsets and prevents law faculty from recognizing the significance of effective teaching and assessment in legal education.⁷¹ Those with fixed mindsets tend to believe that when people are taught a new concept or skill, they either “get it” or they don’t, and if they don’t get it, there’s no need to keep trying. Many casebook faculty no doubt were people who “got” a lot of intellectual things at the first crack, and this experience may have started in kindergarten and continued through law school and beyond.

When faculty who have fixed mindsets teach a one-exam-only course, they have no way to understand what aspects of their teaching helped or hurt their students’ learning, making it is easy for them to believe that teaching doesn’t matter.⁷² In contrast, if they used multiple, formative assessments, they would see their students’ knowledge advance over the course of the semester, and they could adjust their teaching methods as they learned more about when and how various teaching methods helped their students to make leaps in their learning.⁷³

But the changes to teaching methods highlight another problem with fixed mindsets. Many faculty may also have fixed mindsets about their own ability as law professors. They may believe that they “got” the Socratic, vicarious teaching method right away, and they may fear failure if they try to change, believing they will be unable to “get” formative assessment methods as easily. I have had many, many casebook faculty comment to me about my teaching methods, telling me “there’s no way I could do what you do.” This reaction simply reveals their fixed mindsets: they seem to think that legal writing and clinical faculty have some natural affinity for direct teaching, while they are capable of only vicarious teaching.

They are wrong. Those who have never conducted formative assessment would have to learn how to do it, just as legal writing and clinical faculty had to learn when they first started teaching. They might face some stumbles along the way. But I am confident that they could do so, if

note that many casebook faculty engage in some formative assessment, and some engage in quite a lot of it, but they do it in spite of the law school rewards structure, not because of it.

71. See generally CAROL S. DWECK, PH.D., *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* (2007).

72. See Mary Beth Beazley, *Better Writing, Better Thinking: Using Legal Writing Pedagogy in the “Casebook” Classroom (Without Grading Papers)*, 10 *LEGAL WRITING: J. LEGAL WRITING INST.* 23, 35 (2004) (“[B]ecause most casebook professors do not teach students how to write the examination, it is difficult for faculty to see a cause-and-effect between the process of their classroom teaching and the product of the final examination.” (footnote omitted)).

73. See *id.* at 35–36 (noting that the multiple student products reviewed in legal writing courses give faculty “instant feedback” on the effectiveness of their teaching methods, feedback that they can use to improve their teaching).

they believed that learning how to conduct formative assessment was worth their while. The only way learning formative assessment would be worth their while, however, is if providing formative assessment in their teaching offers the same financial rewards, job security, and prestige that their vicarious teaching does.

Whether we like it or not, legal education is changing. Formative assessment was perhaps one stage of the ongoing revolution. The technological revolution that allows Zoom courses, asynchronous lectures, and online quizzes is the next stage, and it should worry faculty who engage only in vicarious teaching. Casebook faculty—and the Socratic lectures they conduct—were once the new technology; they replaced the labor-intensive, one-on-one apprenticeship.⁷⁴ By lecturing to large groups, faculty could cheaply and efficiently convey much information to a large group. The onerous task of once-a-semester grading was well-worth the cost savings of a large teaching ratio.

The technological value of the lecture hall may fade, however, when measured against sophisticated distance-learning methods, methods that may be gaining ground during the pandemic quarantine. Ad hoc, distance-learning methods may evolve into permanent fixtures. Faculty who currently develop casebooks may also develop a semester's worth of asynchronous classroom teaching materials. These faculty could create videos of well-planned Socratic discussions with a curated group of students, perhaps supplemented with video annotations and online quizzes; the teaching package could be made available worldwide with the touch of a button. If teaching is solely or even mostly vicarious, why does each law school need to keep a full complement of casebook faculty when it could simply buy effective video courses at a much lower cost?⁷⁵ Let me make clear that I believe that many if not most casebook faculty *are* providing valuable teaching, but that teaching is not as valuable as it could or should be. Law schools have stubbornly resisted the standards that would require all faculty to articulate exactly what they are teaching in their courses and whether that teaching has been successful.

All faculty should engage in some level of formative assessment. The bifurcated rewards system allowed by the standards, however, discourages tenure-line faculty from being able to articulate or measure the benefit their teaching provides to their students; thus, it discourages them from improving their teaching. The caste system that the standards create leads many faculty to associate formative assessment with being low-caste; this ingrained disdain inhibits both their willingness and their ability to learn

74. Richard K. Neumann Jr., *Osler, Langdell, and the Atelier: Three Tales of Creation in Professional Education*, 10 *LEGAL COMM. & RHETORIC: JALWD* 151, 180 (2013) (noting Langdell's argument that teaching "masses of students" in large classes would be financially efficient).

75. Yes, faculty do scholarship, but we do not need all of the scholarship that we are currently producing. Faculty could still give the world a lot of help with a lot less focus on scholarship and a lot more focus on teaching.

from their legal writing and clinical colleagues. Until law schools give fair treatment to those who teach legal writing and clinical courses, they are sending the explicit message to casebook faculty that formative assessment and other skilled teaching methods are not worth their time. This treatment also sends the fixed mindset message that good teaching is not that important, that some students will get it, some won't, and that smart faculty shouldn't spend too much time worrying about students who are having trouble learning. This message, of course, directly contradicts not only the ABA's professed concerns about gender equity but also the messages about experiential learning, formative assessment, and bar preparation that the ABA—and law schools—say that they care about.

By denying equality to faculty who play such a significant role in legal education, law schools stunt the progress of all faculty, and thus of their students and the profession. It is time for a change.

V. HOW CAN WE CHANGE?

Law schools—and the ABA accreditation process—can go in any of three directions. First, they can continue to chip away at the protections of tenure by hiring more and more faculty without the protections of tenure, until no faculty, or only a very few, have that protection. Second, they can continue the status quo, sanctioning the ever-deepening divide between the haves, in the guise of the so-called “research faculty,” and the have-nots, the so-called “teaching faculty.” Finally, the third and best way to proceed is to change rules, practices, and norms so that the status, salary, and security of a full-time faculty member is not controlled by the courses taught or by the teaching method used. There are several steps that could hasten the achievement of this goal.

A. *The ABA Should Appoint More Non-Deans to the Council on Legal Education and Admission to the Bar*

As of this writing, only two of the members of the ABA's Council on Legal Education and Admission to the Bar have served as faculty members without also serving as law school deans.⁷⁶ The Council has an admirable number of practitioners and is diverse in many ways, but almost one-third of its twenty members are deans or former deans, who may think only of budget problems when they are asked to consider equality.⁷⁷ Even so, the ABA standards in Chapter 3 have changed significantly in this century to encourage law schools to focus more on experiential learning and forma-

76. A list of the current members is available at *Council Biographies for the Section of Legal Education and Admissions to the Bar—Leadership*, AM. B. ASS'N, https://www.americanbar.org/groups/legal_education/about_us/leadership/ [https://perma.cc/UJY7-K9Z6] (last visited July 28, 2020).

77. See Brent E. Newton, *The Ninety-Five Theses: Systemic Reforms of American Legal Education and Licensure*, 64 S.C. L. REV. 55, 121–23 (2012) (arguing that the Council should include more members of the legal profession as opposed to academics).

tive assessment. What the Council must do, however, is make sure that the standards in Chapter 4 stop drawing lines that encourage law schools to discriminate against the faculty whose courses are described as vital or even required in Chapter 3. One way to promote this goal is to reduce the dominance of law school deans on the Council and to increase the presence of law school faculty—particularly legal writing and clinical faculty.

B. *The ABA and the AALS Must Collect More Data*

In 1996, the ABA entered into a consent decree with the Department of Education.⁷⁸ The purpose of the decree was to prevent the possible antitrust violation of having the ABA impose salary requirements on law schools. I have no opinion on whether the consent decree was good, bad, or evil. The consent decree—which expired in 2006—did not prevent the ABA from addressing inequitable salaries within law school faculties. On the contrary, its language specifically provides that nothing in the decreed should be construed to prohibit the ABA “from collecting and considering compensation information that is relevant to . . . allegations of discrimination in order to determine whether the school that is the subject of the complaint complies with Standards 211–213 or Interpretations thereunder that prohibit discrimination.”⁷⁹ The decree was never a permission slip to ignore complaints about sexist patterns in hiring, status, and compensation.

Further, even if the ABA is hesitant to ask about salaries directly, it can ask indirectly about the relationships between salary and sex, and salary and courses taught. Likewise, the AALS could serve equality by collecting data to help determine whether women or minority faculty are clustered in positions that receive substandard salaries and substandard treatment. It is not surprising, for example, that women faculty might dominate in gender and the law courses, or that people of color might dominate in courses on race and the law. But there is no rational reason for women to dominate, and faculty of color to be absent, from legal writing courses.⁸⁰

Likewise, the AALS could collect data on the voting rights of full-time faculty, to determine, for example what percentage of full-time women faculty are not eligible to vote, or to vote on hiring decisions. It may make sense for non-tenure-line faculty to be denied the vote on whether candi-

78. See *United States v. Am. Bar Ass’n*, 934 F. Supp. 435 (D.D.C. 1996), *modified by* 135 F. Supp. 2d 28 (D.D.C. 2001), *and modified by* No. CIV. A. 95-1211 (RCL, 2001 WL 514376 (D.D.C. Feb. 16, 2001)).

79. *Id.* at 436–37.

80. Entrikin et al., *supra* note 3, at 31 (“By segregating full-time faculty based on teaching assignments in a manner that has a discriminatory effect on women, Standard 405(d) directly conflicts with federal regulations implementing Title IX of the Education Amendments Act of 1972, one of the federal laws the ABA must enforce as the law school accrediting body designated by the Department of Education.”).

dates for tenure should receive that tenure. It makes no sense, however, for full-time faculty of any status to be denied votes on which faculty candidates should be invited to join their school's faculty. I have sat in too many faculty meetings where tenure-line faculty of a few months' vintage were allowed to vote on new faculty hires, while legal writing and clinical faculty of ten or twenty years' service—and at a school where these faculty were almost all women—were denied the ballot or asked to leave.⁸¹ If a significant percentage of the women on law school faculties are not allowed to vote on such important matters, the AALS should know, and it should take steps to stop this discriminatory behavior.

C. *Faculty Must Share Their Salaries and Their Status Publicly, and with Each Other*

At a faculty meeting many years ago, as part of a failing fight to get my then-law school to hire its new legal writing faculty on the tenure track, I pointed out the unfairness of clinical salaries, noting that full clinical professors of more than ten years' standing were paid less than brand new tenure-line assistant professors. I remember many eyes in the room turning away in embarrassment. One faculty member, a woman, told me later she had no idea the salary differential was so high. I asked another faculty member, a man, if he had been aware. "No," he immediately replied, in a tone that sounded as if I had been talking about bodily functions, "I don't like to talk about salary." I shook my head. "Biff,"⁸² I said, "that's how The Man wins."⁸³ Faculty who work at public institutions (as this institution was) know that their salaries are public record. But all faculty should be willing to make their salaries public, to help provide the data that can ferret out and destroy the inequities that have lingered too long in legal education.

Further, faculty members must investigate the realities at their own institutions. Seek out those with different titles and learn about their status and their job security, their salaries and their working conditions. When I gave birth to my second child early in a winter semester, my university did not have formal maternity leave. My casebook faculty friend had given birth the previous August, receiving a semester's research leave so that she had no teaching duties. I had used up my extra sick leave after the birth of my first child, and I did not dare to ask for more time off for

81. At this very conference, a woman dean was asked how she supported non-tenure-line faculty who were subjected to ill treatment. In a somewhat dispiriting reply, she answered that she took care to warn lower-status faculty before meetings during which they would be asked to leave.

82. Not his real name.

83. E.g., Sarah Lyons, *Why the Law Should Intervene to Disrupt Pay-Secrecy Norms: Analyzing the Lilly Ledbetter Fair Pay Act Through the Lens of Social Norms*, 46 COLUM. J.L. & SOC. PROBS. 361, 374 (2013) (discussing Justice Ginsburg's dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), and noting that employers may have policies forbidding salary disclosure and that "workplace social norms may create a taboo against frank and open salary discussion among co-workers").

fear that I would be let go; as the primary breadwinner for my family, I could not take that chance. As a result, I was back in the classroom with a two-week old in my arms. Faculty greeted me warmly in the halls; none questioned why I was back at work only two weeks after childbirth.⁸⁴

For meaningful change to happen, faculty have to first see the status quo, and then question it.

D. *Tenured Male and Female Faculty Must Stand Up for Non-Tenure Line Faculty*

As noted earlier, tenured women have often not stood up for non-tenure line faculty, and there may be multiple reasons for this failure. One reason may be the reality of the human need for status. Some may think, consciously or unconsciously, “as a woman, I am treated with less respect: but at least I don’t teach legal writing There is someone lower on the totem pole.” Another reason, as this conference makes clear, is the reality that tenured women, on the whole, are not yet equal to tenured men. Until tenure-line women can feel secure in their own positions, they may not believe they have the political capital to spend on helping others; on the contrary, they may feel they have to prove their bona fides by siding with those in power against those not in power.

For the sad reality in legal education is that tenured men still hold most of the power. I exhort those men to use their power for good and not for evil—and being for the status quo means being for evil. Perhaps it is too much to ask that hotshot male faculty add an equity rider⁸⁵ to their contracts when they are hired, but tenured men—and women—can and should push for equal status for all full-time faculty.

Perhaps this is too big of an ask. As the lawsuit at the University of Denver has shown, many tenure-line women are paid significantly less than their male counterparts. One benefit of segregated faculty is that it keeps women from uniting with one voice, just as the rich try to divide the poor, so that those on top can reap more rewards.⁸⁶ Are those in power afraid of women being united, are they greedy, or both?

84. I recognize that many women in the United States face similar—or far worse—circumstances. I know I was lucky to be able to bring my child to work with me; as the weeks went by, my husband took sick leave to stay with our daughter in my office while I was in the classroom. But I still find that difference in treatment to be extraordinary; even more extraordinary was the way it was accepted without question by the law school administration, by faculty, by my students, and by me.

85. Chris Lee, *What’s the ‘Inclusion Rider’ Frances McDormand Mentioned in Her Best Actress Speech*, VULTURE (Mar. 5, 2018), https://www.vulture.com/2018/03/what-is-inclusion-rider-frances-mcdormand.html#_ga=2.167088958.1474437665.1589749459-1812578552.1589749459 [<https://perma.cc/E28A-AWT6>] (suggesting that men in Hollywood add an equity rider to their contracts to promote equal inclusion of women and minorities in film).

86. See Angela Mae Kupenda, *Equality Lost in Time and Space: Examining the Race/class Quandary with Personal Pedagogical Lessons from A Course, A Film, A Case, and an Unfinished Movement*, 15 SEATTLE J. FOR SOC. JUST. 391, 435 (2016) (describ-

Faculty who write and teach about civil rights and equality must practice what they preach.⁸⁷ Tenured men and women both must stand up and be counted in favor of equality, to say that full-time faculty in all subject areas deserve to be treated with the same respect as themselves.

E. *Students Must Learn What is Happening at Their Own Schools and Voice Their Discontent*

To my knowledge, no one has surveyed students about their awareness of divisions on law faculties. I remember being on a committee with a student who said, “I don’t care about anyone’s status; I just want people who are going to do a good job teaching.” What she did not realize is that there is a connection between power and effective teaching. Just as unionized teachers can argue for better conditions for teachers and students at the high school level, tenured faculty have the power to change the credits, curriculum, and course requirements in ways that can improve teaching throughout the law school.

Both students and tenure-line faculty are often ignorant of the impact of status issues; indeed, students are often ignorant of status differences at all. They may call all faculty members “professor,” and not notice the array of modifiers used to separate non-tenured faculty from *Professors of Law*. Legal writing and clinical faculty may hesitate to educate their students on this issue, fearing repercussions if they point out status differences to their students.

But students can ask, and they can raise their voices. They can learn much simply from websites. Note the different labels used: *Professor of Law* is typically (though not always) associated with tenured status. Schools use a variety of labels for “other” positions, including *Assistant Dean*, *Director*, *Lecturer*, *Instructor*, *Professor* (without the “of Law” following), *Clinical Professor*, *Professor of Practice*, or *Professor from Practice*. Students can talk to their legal writing and clinical faculty, and ask direct questions about salaries, security, and voting rights. If they find inequities, I hope they are willing to challenge their Deans and other law school administrators, to find out why so many women are clustered in positions where they are paid less and denied the vote, and why there are fewer men and faculty of color in those positions.

And finally, prospective law students can vote with their feet. The legal writing and clinical faculty are the ones who do the direct teaching

ing problem of power structures that use “poor whites . . . as agents to further inequality and to further separation from others who struggle with inequality”).

87. E.g., McGinley, *supra* note 24, at 3–4 (2005) (noting the “‘dirty little secret’ in legal academia that the law school, generally a bastion of liberalism and feminist theory, operates by segregating women faculty into low paying positions. A prime example of this phenomenon is the location of legal writing faculty in the organizational hierarchy of most law schools.” (footnote omitted) (citing Jan M. Levine & Kathryn M. Stanchi, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 1, 4 (2001))).

and who know their students, their work ethic, their ability to think and write like lawyers, and perhaps most significantly, their ability to learn. Students should choose schools that treat those faculty equally. Schools that value faculty who provide formative assessment are likely to provide their students better learning opportunities in all of their courses, improving both legal education and the practice of law.

CONCLUSION

Law schools that purport to teach their students about fairness and equity must practice what they preach. The standards enacted by the Council of Legal Education and Admission to the Bar have created and perpetuated a caste system in legal education that makes a mockery of law schools' praise for equality and the calls for fairness and diversity in Chapter 2 of the standards.⁸⁸ Students already subsidize the salaries of law faculty; low-caste faculty should not forfeit hundreds of thousands of dollars over the course of their careers to prop up the salaries of high-caste faculty. By chance or by design, this caste system results in exactly the kind of sex segregation that Title IX condemns,⁸⁹ and it blunts the power of all women on law faculties, hurting both them and future generations of lawyers.

The caste system embodied in the ABA standards also inhibits progress in legal education. Chapter 3 of the ABA standards recognizes the need for that progress, requiring formative assessment and experiential learning. Unfortunately, those standards were watered down in ways that allow the new teaching methods to be cabined in legal writing and clinical courses.⁹⁰ Further, Chapter 4 draws lines that encourage law schools to divorce formative assessment from tenure, divorcing tenure-line faculty from opportunities to learn how to teach more effectively. These contra-

88. See 2019 ABA Standards, *supra* note 6, at 11 (“A law school shall *foster and maintain equality of opportunity* for students, faculty, and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability.” (emphasis added)).

89. Entrikin et al., *supra* note 3, at 31 (highlighting Standard 405(d)'s ability to violate Title IX through its express language). I note that the current President of the AALS, in her presidential address, has condemned the caste system in legal education. Darby Dickerson, 2020 AALS Presidential Address, ASS'N AM. L. SCHOOLS, <https://www.aals.org/about/publications/newsletters/aals-news-winter-2020/20-aals-presidential-address/> [<https://perma.cc/3QCZ-ZCK7>] (last visited Nov. 28, 2020) (noting that “abolishing the caste system is both a realistic call for action and one that will benefit our students and the legal profession”). The AALS should follow up these excellent words with actions that will promote that goal.

90. See Beazley, *supra* note 12, at 280 (“Even during this time of market correction, the practice-related ABA requirements—the teaching of writing, the formative assessment, the clinics, the outcomes-focused teaching, and the experiential opportunities—have too often been cabined in courses taught by low-caste faculty, while the Brahmins go on with their Socratic lectures and their theoretical scholarship as if nothing had changed at all.”).

dictions and the caste system they create hurt the affected law faculty directly, and they hurt law students and the profession indirectly.

When casebook faculty refuse to adapt to changes in educational methods, they may be snobbing themselves out of a job. In the modern classroom, a faculty member's value lies in direct interaction with students, not in providing information or in demonstrating skills; information and demonstrations are easily available in books or online. The best value that faculty can provide is by seeking a balance in their scholarly and teaching roles, adopting new teaching methods so that each new generation of teachers is more effective than the last.

I do not scorn scholarship. On the contrary, I side with The Clerk—the student—in Chaucer's *Canterbury Tales*, of whom it was said, “gladly wolde he lerne and gladly teche.”⁹¹ We must create a system of legal education that encourages all full-time faculty to produce scholarship and produce better lawyers.

Change in the practice of law requires change in the practices of law schools. It is time.

91. GEOFFREY CHAUCER, *THE CANTERBURY TALES*, Prologue, line 308 (F.N. Robinson ed., Riverside Press 1933) (circa 1387).