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DIVIDING LAW SCHOOL FACULTIES INTO ACADEMIC DEPARTMENTS: A POTENTIAL SOLUTION TO THE GENDERED DOCTRINAL/SKILLS HIERARCHY IN LEGAL EDUCATION

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ABSTRACT

Most law school faculties in the United States are organized in internal hierarchies. At a given school, those professors who teach doctrinal subjects have the most power and benefits, while those who teach skills courses, such as legal writing and clinics, have the least. At many schools, this hierarchy has a gendered dynamic. Tenured doctrinal faculty are more likely to be male, while legal writing and clinical professors are more heavily female. This illegitimate status hierarchy is detrimental to students. The hierarchy is also well-documented through decades of scholarly articles on the subject.

This Article proposes a structural solution to the problem: the creation and use of academic departments in law schools. Modern universities organize themselves in this way in recognition that teaching and scholarship are often specialized. The teaching and research in the Physics Department are different from that in the Philosophy Department. Departmentalization allows for the development of specialized teaching and scholarship standards while treating those with teaching roles as equals, regardless of subject matter.

A law school could easily implement this type of structure by creating a Department of Legal Doctrine, a Department of Legal Writing, and a Department of Clinical Legal Education. Other possibilities exist, such as a Department of Academic Support and a department devoted to librarians with faculty status. Each department would have equal status but would be free to develop its own standards of excellence for teaching, scholarship, and service. Law school-wide committees for the curriculum, admissions, budget, and academic standards could be created, just as they exist now in colleges and schools within universities.

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INTRODUCTION

THIS Article builds on the many works before it that have documented the inequities associated with the way that law school faculties are structured.[1] At most schools, legal writing, clinical, and academic support faculty have lower salaries, are on contracts, cannot earn tenure, have fewer voting rights than tenure-stream faculty, may be relegated to undesirable offices, and might not even be permitted to call themselves "professor." Women are more likely to occupy this lower status than men.[2] This

1. Renee Nicole Allen, Alicia Jackson & DeShun Harris, *The "Pink Ghetto" Pipeline: Challenges and Opportunities for Women in Legal Education*, 96 U. DET. MERCY L. REV. 525 (2019); Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117 (1997); Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics*, 39 DUQ. L. REV. 329 (2001); Mary Beth Beazley, *"Riddikulus!": Tenure-Track Legal-Writing Faculty and the Boggart in the Wardrobe*, 7 SCRIBES J. LEGAL WRITING 79 (2000); Catherine Martin Christopher, *Putting Legal Writing on the Tenure Track: One School's Experience*, 31 COLUM. J. GENDER & L. 65 (2015); Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000) [hereinafter Durako, *Pink Ghetto*]; Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 UMKC L. REV. 253 (2004) [hereinafter Durako, *Dismantling Hierarchies*]; Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293 (2004); Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN'S L.J. 75 (1997); Jan M. Levine, *Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching*, 7 SCRIBES J. LEGAL WRITING 51 (2000); Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN L. 551 (2001) [hereinafter Levine & Stanchi, *Women, Writing & Wages*]; Nancy Levit, *Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics*, 49 KAN. L. REV. 775 (2001); Susan P. Liemer, *The Hierarchy of Law School Faculty Meetings: Who Votes?*, 73 UMKC L. REV. 351 (2004); Debra Branch McBrier, *Gender and Career Dynamics within a Segmented Professional Labor Market: The Case of Law Academia*, 81 SOC. FORCES 1201 (2003); Ann C. McGinley, *Employment Law Considerations for Law Schools Hiring Legal Writing Professors*, 66 J. LEGAL EDUC. 585 (2017); Teri A. McMurtry-Chubb, *On Writing Wrongs: Legal Writing Professors of Color and the Curious Case of 405(c)*, 66 J. LEGAL EDUC. 575 (2017); David T. Ritchie, *Who is On the Outside Looking In, and What Do They See?: Metaphors of Exclusion in Legal Education*, 58 MERCER L. REV. 991 (2007); David S. Romantz, *The Truth about Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 KAN. L. REV. 105 (2003); Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467 (2004) [hereinafter Stanchi, *Who Next, the Janitors?*]; Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 3 (2001) [hereinafter Stanchi & Levine, *Gender and Legal Writing*]; Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS'N LEGAL WRITING DIRS. 12 (2002); Kristen K. Tiscione & Amy Vorenberg, *Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty*, 31 COLUM. J. GENDER & L. 47 (2015).

2. *See* sources cited *supra* note 1; *see also* Edwards, *supra* note 1, at 75 ("As early as the mid-1980s, commentators, such as Richard H. Chused, warned that teaching legal writing was 'on its way to becoming a "woman's job."'" (quoting Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 548 (1988))).

hierarchy persists even though women now make up the majority of law students in the United States.[3]

To the extent that those who support this hierarchy are willing to defend it publicly, they do so on the grounds that teaching skills classes is "different"—and, in their view, necessarily lesser—than doctrinal subjects. They also assert, incorrectly, that skills faculty[4] are incapable or unwilling to produce quality scholarship. The result is a gendered, illegitimate status hierarchy[5] within many law schools where the tenured faculty are more heavily male and enjoy the most benefits at the top, while those who teach skills courses are mostly women and are relegated to a lesser status at the bottom.

The gender disparity created by the modern law school faculty hierarchy is well-established, but few workable solutions have been offered. This Article fills that gap. Many have advocated for converting contract faculty to the tenure track. And certainly, more and more schools have taken this welcome step. However, this approach is not without problems. The tenured faculty must be willing to cede voting power and other governance rights.[6] Tenure standards must also be rewritten to account for the fact that teaching writing or teaching in a clinic is different—not lesser, just different—from doctrinal teaching. Additionally, doctrinal faculty must become adept at evaluating teaching and scholarship of skills faculty, and vice versa once skills faculty earn tenure.

This Article proposes a different direction: the creation of academic departments based on subject matter. Universities, colleges, and schools—other than law schools—have departments where faculty are hired, promoted, and tenured based on standards that align with expectations in a given field. The teaching and scholarship of faculty members in the English Department will look very different from those in the Political Science, Music, or Chemistry Departments—and with good reason. But each discipline is treated equally in status, since each one is premised on quality teaching, engaged research, and committed service.

A law school with a traditional hierarchy could similarly divide into departments of, for example, Legal Doctrine and Legal Skills, with distinct

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3. Allen, Jackson & Harris, *supra* note 1, at 525.

4. In this Article, the author uses the term "skills faculty" to describe the full-time, non-tenure-track faculty who do not teach doctrinal subjects. The author acknowledges that the term is unsatisfactory in some respects. In doctrinal courses, students learn skills too, such as legal analysis. And skills courses, particularly clinics, also teach plenty of doctrine. "Faculty," for purposes of this Article, are those engaging in the three pillars of teaching, scholarship, and service.

5. Duncan Kennedy cautioned against misuse of terms like "hierarchy" and "discrimination." He preferred the term "illegitimate status hierarchy." Duncan Kennedy, *Introduction* to *Symposium: Dismantling Hierarchies in Legal Education*, 73 UMKC L. REV. 231, 234 (2004).

6. *See* Liemer, *supra* note 1, at 385 ("As historically was true in the greater body politic, those who enjoy the franchise on law faculties often are reluctant to let others into the club.").

expectations of teaching and scholarship for each. Hiring, promotion, and tenure decisions would occur first in the department before moving to the college and then the university. College-wide decisions around the curriculum and other governance issues would be made by representatives from the various departments.[7]

The solution proposed by this Article is a structural one. It attempts to use the organization of the institution to cure a persistent equity issue while addressing the legitimate argument that there are differences in the teaching and scholarship of those who teach skills courses compared to doctrinal subjects. It recognizes the relative expertise of the two groups while also ensuring that they are treated equitably.

There is a second benefit to a departmental structure within law schools. Given the differences between doctrinal and skills teaching, a departmental structure allows both groups of faculty to flourish and innovate within their spheres. There are ongoing changes to both types of teaching. With the American Bar Association's (ABA) new focus on assessment, doctrinal teaching is going through changes, with more and more faculty in this area using interim, formative assessments to measure and improve student learning. At the same time, there is continued improvement and specialization in skills teaching. With each group becoming more sophisticated, they have less in common yet would benefit from increased specialization within a framework of respect and equity.

This proposal is not without criticism. On its face, it strikes of "separate but equal," but as explained in this Article, this analogy to *Brown v. Board of Education*[8] is inapt. Elsewhere in higher education, universities divide their faculties for personnel matters by subject matter without issue. In this regard, law schools are the exception, not the norm. The other criticism is that this type of structure might exacerbate salary differentials because deans would have a justification for employing different salary scales by department, just as a business administration professor is likely to be compensated more than an English professor. However, salary discrepancy between departments is already the status quo. To the extent that skills faculty gain equal rights and responsibilities under a department system, they may have a stronger argument for pay equity. Finally, a departmental structure would need to deal with the situation where a person straddles the doctrinal/skills divide by teaching or writing in both areas. But our colleagues in higher education have addressed this challenge through joint appointments or the recognition that, with sufficient expertise, one can teach outside one's department.

This Article proceeds by, in Part I, setting forth the problem: the illegitimate hierarchy that exists at most law schools. Next, in Part II, it re-

7. The author is aware of a small number of law schools that have adopted some form of this solution. The author hopes to write a future article that, through surveys or other means, examines how law school departments operate in practice.

8. 347 U.S. 483 (1954).

views the higher education literature on academic departments, including their benefits and drawbacks. In Part III, the Article shows how a departmental structure would work, how it would address the problem of gender inequity, and how it would also provide additional benefits for the improvement of student learning. A conclusion responds to potential criticisms of the approach.

I. THE HIERARCHY OF LAW SCHOOL FACULTIES BY GENDER AND SUBJECT

Despite being overwhelmingly progressive, law school faculties are notorious for relegating female faculty members to lesser roles.[9] Women are more likely to be hired to teach skills, writing, and clinical courses. In turn, those positions typically carry a status with fewer benefits and privileges than the tenure stream, which is more heavily male. The result is a type of pyramid, with the mostly male tenured faculty at the top and the mostly female contract faculty at the bottom. Of course, exceptions exist, and there has been progress in recent years. Still, the hierarchy persists.

This Part does not break new ground in the scholarship. Over the last thirty years, countless articles have demonstrated that this gendered hierarchy exists, the unfairness and costs of it, and advocated for change.[10] This Part reviews this literature. Unsurprisingly, few commentators defend this hierarchy. Nevertheless, to the extent that defenses exist, those arguments will be advanced and rebutted.

A. *The Hierarchy*

Described as a "hierarchy,"[11] a "caste system,"[12] and a "dirty little secret,"[13] there are two categories of law professors in U.S. law schools. The tenure stream is composed of faculty who teach and write in doctrinal subjects, such as Contracts, Torts, and Criminal Procedure. Their classes

9. *See infra* notes 47–49 and accompanying text.

10. *See* sources cited *supra* note 1; *see also* Tiscione & Vorenberg, *supra* note 1, at 48–49 (describing how the overrepresentation of women in skills teaching and their underrepresentation in doctrinal teaching is "well[-]documented").

11. Durako, *Dismantling Hierarchies*, *supra* note 1, at 254. *Accord* Bryan L. Adamson, Bradford Colbert, Kathy Hessler, Katherine Kruse, Robert Kuehn, Mary Helen McNeal, Calvin Pang & David Santacroce, *The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy*, 36 J. LEGAL PRO. 353, 385 (2012) [hereinafter *Status of Clinical Faculty in the Legal Academy*].

12. Syverud, *supra* note 1, at 12 ("My thesis today is that the evolution and adoption of 'best practices' in legal education has been retarded by our unique caste system, which tends to categorize both people and teaching methods in ways that are harmful to the outcomes legal education should care most about."). Kent Syverud describes the castes as: tenured and tenure-track faculty, deans, clinical faculty, law library directors, legal writing directors and faculty, and adjunct faculty. *Id.* at 13 ("The untouchables, who are barely mentioned when we talk about what our institutions teach students, are, of course, the professional staff of law schools.").

13. Stanchi & Levine, *Gender and Legal Writing*, *supra* note 1.

look a lot like the Langdellian model that has existed for over a century.[14] Classes are taught by marching through casebooks. Students read judicial opinions and then apply those rules to hypothetical fact scenarios on high-stakes final exams. In these courses, students learn the foundations of the law they will encounter in practice. The second group of faculty consists of those who teach lawyering skills. Legal writing and clinical professors teach students how to take doctrinal knowledge and apply it to real-world situations. In legal writing, students learn how to turn their analysis and advocacy into documents that they would write in practice. In clinics, students learn by doing, representing real clients in real cases.[15]

Doctrine and skills are both important to legal education and law practice, yet the hierarchy treats them dissimilarly. Without a foundation of legal knowledge, even the best legal writers will be unable to practice law competently. On the other hand, without the ability to translate legal knowledge into real world outputs, students will be unable to practice law competently and effectively.[16] In recent scholarship, two commentators found, "Virtually all lawyers and judges acknowledge that legal writing is the single most important course in law school and agree that this course provides the fundamental underpinnings of law practice."[17] Clinics are embraced by the profession as providing critical legal skills in the context of working with real world clients.[18]

The ABA's *Standards and Rules of Procedure for Approval of Law Schools (ABA Standards)*, which govern law school accreditation, recognize the importance of both areas by setting out minimal learning outcomes for the juris doctor degree (J.D.) that include both substantive knowledge and

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14. *See* Romantz, *supra* note 1, at 106–07; Stanchi & Levine, *Gender and Legal Writing*, *supra* note 1, at 105–07 (introducing the model for legal education as formulated by Christopher Columbus Langdell).

15. There are, of course, other types of professors. Some teach externships, simulation courses (such as Trial Advocacy), academic skills, or legal research. The author groups these and Legal Writing and clinical faculty together, but one could easily argue that they are separate and distinct areas of teaching and, thus, departments.

16. *See* Edwards, *supra* note 1, at 82 ("This false dichotomy ignores the relationship between legal analysis and expression of that analysis. In fact, writing is a crucial part of the thought process." (footnote omitted)); Lucille A. Jewel, *Oil and Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies*, 31 COLUM. J. GENDER & L. 111, 112 (2015) (arguing that the doctrinal/skills divide produces an elitist knowledge hierarchy that prevents students from obtaining a holistic legal education); Romantz, *supra* note 1, at 126 (reviewing criticisms of the Langdellian case method).

17. Stanchi & Levine, *Gender and Legal Writing*, *supra* note 1, at 5; *see also* Tiscione & Vorenberg, *supra* note 1, at 48 ("A lawyer's ability to analyze the law and communicate effectively is the most critical tool lawyers have.").

18. *See* James Podgers, *Law School Accreditation Standards Breeze Through House of Delegates with Minimal Fuss*, A.B.A. J. (Aug. 12, 2014, 1:03 AM), http://www.abajournal.com/news/article/law_school_accreditation_standards_breeze_through_house_of_delegates [https://perma.cc/4SMS-54Z7].

skills.[19] Indeed, in recent years the ABA has required more skills teaching.[20] Licensing authorities also recognize that both doctrine and skills are important by including essays and performance tests on the bar exam.

Despite the seeming equality of importance between the two types of law teaching, the faculty who teach the subjects are treated differently.[21] At most law schools, doctrinal professors occupy the top of a hierarchical pyramid, enjoying the most benefits. They have the highest salaries and the strongest job security: tenure.[22] In contrast, those who teach skills have lower salaries and the least job protection.[23] They are typically on short- or long-term contracts,[24] which results in job insecurity.[25] According to a recent Association of Legal Writing Directors (ALWD) and Legal Writing Institute (LWI) annual survey, only 31.3% of legal writing pro-

19. AM. BAR ASS'N, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 17 (2022) (Standard 302) [hereinafter ABA STANDARDS].

20. This is, in part, a response to criticisms from the bar that lawyering skills cannot be left to on-the-job training. *See, e.g.*, Edwards, *supra* note 1, at 81.

21. *See* Durako, *Dismantling Hierarchies*, *supra* note 1, at 254.

22. Levine & Stanchi, *Women, Writing & Wages*, *supra* note 1, at 580 ("Superimposed, the data reveals two tracks in the legal academy: the 'woman track,' which is a low-paying, non-tenure-track legal writing position, and the 'man track,' a higher-paying, tenure-track doctrinal teaching position.").

23. *See* Edwards, *supra* note 1, at 78; Jewel, *supra* note 16, at 112; Bayer, *supra* note 1, at 355; Levine & Stanchi, *Women, Writing & Wages*, *supra* note 1, at 576 (describing results of a salary survey and concluding, "The salary figures reflect woefully low wages paid to a group that is composed of seventy percent women, while the higher wages are paid to a group that is seventy-four percent men."). The Association of Legal Writing Directors (ALWD) and Legal Writing Institute (LWI) survey documents the salary disparities for legal writing *directors* as well as non-director faculty compared to non-writing faculty. ASS'N LEGAL WRITING DIRS. & LEGAL WRITING INST., ALWD/LWI ANNUAL LEGAL WRITING SURVEY: REPORT OF THE 2017–2018 SURVEY, 75, 143 (2018), https://www.alwd.org/images/resources/ALWD-LWI-2017-18-Institutional-Survey-Report.pdf [https://perma.cc/T6Q2-44MN] [hereinafter ALWD/LWI SURVEY]. One can only estimate how much lower the salaries of non-directors are.

24. Full-time, non-tenure-track faculty are not unique to law schools. Sixty-nine percent of faculty in the United States are not on the tenure track. Of those faculty, 25% are nevertheless full-time employees of their universities. John S. Levin & Genevieve G. Shaker, *The Hybrid and Dualistic Identity of Full-Time Non-Tenure-Track Faculty*, 55 AM. BEHAV. SCIENTIST 1461, 1461–62 (2011). Research has confirmed, however, that these full-time professors have high credentials, engage in teaching and research, and enjoy their jobs. Nevertheless, research has also confirmed that "a substantial portion of those who are [full-time, non-tenure-track] experience a condition of dissonance in an occupation in which the work is satisfying but the conditions are not." *Id.* at 1480 (citation omitted). As a result, there is increasing interest in collective bargaining by these faculty. Joshua D. Morrison, *Faculty Governance and Nontenure-Track Appointments*, 2008 NEW DIR. HIGHER EDUC. 21, 22 (2008).

25. *See* Durako, *Dismantling Hierarchies*, *supra* note 1, at 267–68. Professors with short-term contracts are required to leave their law schools when their terms are up. Some may be able to apply for an extension or renewal. Bayer, *supra* note 1, at 355.

grams had tenure or "programmatic tenure" for their faculty.[26] Clinical faculty did not fare much better, as only 34% had tenure or programmatic tenure.[27]

The inequities go beyond salary and job security. Skills faculty may have less desirable offices,[28] may not be allowed to use the title "Professor,"[29] may not receive travel or research support,[30] and may not be included on law school websites or promotional materials.[31] They are also excluded from faculty governance.[32] At some schools, skills faculty are not allowed to attend faculty meetings or participate in committees.[33]

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26. ALWD/LWI SURVEY, *supra* note 23, at 11. "Programmatic tenure" is tenure that is "achieved through a separate track/using different standards than traditional tenure awarded to doctrinal faculty." *Id.* at viii.

27. ROBERT R. KUEHN, DAVID A. SANTACROCE, MARGARET REUTER, SUE SCHECHTER & CTR. FOR THE STUDY APPLIED LEGAL EDUC., THE 2016–17 SURVEY OF APPLIED LEGAL EDUCATION 43 (2017), https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/5da859d8ad42af693e72957d_Report_on_2016-17_CSALE_Survey.pdf [https://perma.cc/4AFA-C9JE] [hereinafter KEUHN, SANTACROCE, REUTER, SCHECHTER & CSALE, 2016–17 SURVEY]; Minna J. Kotkin, *Clinical Legal Education and the Replication of Hierarchy*, 26 CLINICAL L. REV. 287, 290 (2019).

28. Edwards, *supra* note 1, at 88; Durako, *Dismantling Hierarchies*, *supra* note 1, at 254; Stanchi, *Who Next, the Janitors?*, *supra* note 1, at 487; Bayer, *supra* note 1, at 346. Surveys have documented that, at many law schools, legal writing faculty are physically segregated from other faculty. They are often housed together, even though professors who teach other first-year students are not so grouped. Durako, *Dismantling Hierarchies*, *supra* note 1, at 255–58 (describing results of survey). And their offices are usually of inferior quality: smaller and windowless. *Id.*

29. Edwards, *supra* note 1, at 88; Durako, *Dismantling Hierarchies*, *supra* note 1, at 254; Bayer, *supra* note 1, at 359. Although doctrinal faculty are not called "Professors of Contracts" or "Professors of Torts" (unless they hold an endowed chair tied to a specific subject), those who teach legal writing or clinic have their subjects in their titles. Durako, *Dismantling Hierarchies*, *supra* note 1, at 258; Stanchi, *Who Next, the Janitors?*, *supra* note 1, at 487 (describing titles as a kind of "branding").

A recent study excluded legal writing, clinical, and other types of professors from their calculations. Paul J. Heald & Ted Sichelman, *Ranking the Academic Impact on 100 American Law Schools*, 60 JURIMETRICS 1 (2019). Merits of this exclusion aside, they refer to legal writing professors as "instructors" throughout their methodology section. Whether intentional or not, this conveys that those who teach this subject are something other than professors. (In their explanation for why they excluded these groups from their empirical study, they assert it is for the protection of schools that employ large numbers of "such personnel." *Id.* at 7. Nevertheless, their word choice is noteworthy.).

30. *See* Durako, *Dismantling Hierarchies*, *supra* note 1, at 269; ALWD/LWI SURVEY, *supra* note 23, at 83–86.

31. *See* Edwards, *supra* note 1, at 88.

32. *See* Durako, *Dismantling Hierarchies*, *supra* note 1, at 260; Christopher, *supra* note 1, at 71; Bayer, *supra* note 1, at 357.

33. *See* Durako, *Dismantling Hierarchies*, *supra* note 1, at 260; Stanchi, *Who Next, the Janitors?*, *supra* note 1, at 481; Liemer, *supra* note 1, at 368; ALWD/LWI SURVEY, *supra* note 23, at 83.

At other schools, they may be permitted to attend meetings but do not have a vote, including on matters affecting their own courses.[34]

There is a gendered nature to the entire hierarchy.[35] Men are more likely to be on the doctrinal tenure stream (with its higher status, prestige, and benefits), while women are more likely to teach skills (with its lower status, prestige, and benefits).[36] Despite the cries from the profession for more skills training, "the overwhelmingly male power structure in law schools disdainfully treats teaching [skills] as 'women's work,'" implying that it is lesser.[37] Of those faculty teaching legal writing, 72% are women.[38] Similarly, 65% of clinical faculty are women.[39]

Some argue that this arrangement is not by accident but is, instead, a result of deliberate sex segregation: "A common theme in the ghettoization literature is that as women enter male-dominated occupations employers preserve sex segregation by tracking them into the least desirable jobs within that occupation, while the most desirable jobs continue to be reserved for men."[40] The result is a "pink ghetto."[41]

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34. Durako, *Dismantling Hierarchies*, *supra* note 1, at 261.

35. *See* sources cited *supra*, note 1.

36. *See, e.g.*, Edwards, *supra* note 1, at 75; Christopher, *supra* note 1, at 65; Kornhauser, *supra* note 1, at 294. There is also a gendered component within doctrinal teaching. A 1997 study by Deborah Jones Merritt and Barbara F. Reskin found men were more likely to teach high-prestige courses like Constitutional Law, while women were more likely to teach "lower status" subjects such as Trusts and Estates and skills courses. Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 199–200 (1997).

37. Stanchi & Levine, *Gender and Legal Writing*, *supra* note 1, at 5.

38. ASS'N L. WRIT. DIR. & L. WRIT. INST., ALWD/LWI ANNUAL LEGAL WRITING SURVEY: REPORT OF THE 2014–2015 SURVEY (2015), https://www.alwd.org/images/resources/2015%20Survey%20Report%20(AY%202014-2015).pdf [https://perma.cc/UWC9-UXK3]. This number has held fairly constant through the years.

39. KEUHN, SANTACROCE, REUTER, SCHECHTER & CSALE, 2016–17 SURVEY, *supra* note 27, at 40; Deborah Archer, Caitlin Barry, G.S. Hans, Derrick Howard, Alexis Karteron, Shobba Mahadev & Jeff Selbin, *The Diversity Imperative Revisted: Racial and Gender Inclusion in Clinical Law Faculty*, 26 CLINICAL L. REV. 127, 139 (2019) (showing via table that by 2017, approximately 62% of clinicians were women). As Kristen Konrad Tiscione noted in her 2017 article, it is increasingly difficult to obtain statistics on faculty status by gender from the ABA or the American Association of Law Schools (AALS). Kristen Konrad Tiscione, *"Best Practices": A Giant Step Toward Ensuring Compliance with ABA Standard 405(c), a Small Yet Important Step Toward Addressing Gender Discrimination in the Legal Academy*, 66 J. LEGAL EDUC. 566, 570 n.28 (2017). Apart from the LWI and CSALE surveys, the best data from the ABA and AALS are from 2013 and 2008. *Id.* Nevertheless, there is no evidence that much has changed for the better since then.

40. McBrier, *supra* note 1, at 1202.

41. Durako, *Pink Ghetto*, *supra* note 1, at 563; Allen, Jackson & Harris, *supra* note 1, at 526–27. Kathryn Stanchi provided a theoretical framework for understanding how this status inequality came to be, drawing on sociological and feminist literature. Stanchi, *Who Next, the Janitors?*, *supra* note 1. She described how the stratification of law faculties meets the definition of a "patriarchal illegitimate status hierarchy." *Id.* at 476. Subordination is based on category (the type of course taught), which is turn is based on subjective criteria. Prestige and other rewards

Debra Branch McBrier described this segmentation as involving "primary" and "secondary" jobs. The primary ones—those at the top—enjoy the most prestige, benefits, mechanism for promotion, stability, security, and protection from outside competition. On the other hand, non-tenure-track positions occupy a secondary role. Relative to their tenure-track counterparts, the professors in these positions have less security, protection, autonomy, status, and power. Like other professions, law academia divides primary and secondary jobs largely on gendered grounds.[42] People in secondary jobs are not legally precluded from applying for primary jobs. And yet, McBrier found that "[w]omen move more slowly than men across the secondary-primary job boundary" in law schools.[43] McBrier's empirical study found that "[n]either choice nor structure, alone, accounts for women's slower rates of movement."[44] Instead, she found a mix of factors, "including family and geographic constraints, social capital, employment origins, and the structure of opportunity within the secondary labor markets," were at work.[45] Still, she found that male and female non-tenure-track faculty were more similar than different in characteristics, credentials, and constraints. Controlling for these factors, McBrier found "female non-tenure-track law teachers appear to be *directly* slowed because of their sex by way of separate mobility regimes."[46] In other words, merely allowing non-tenure-track women to apply for tenure-track jobs will not cure the disparity.

There is an unfortunate hypocrisy to this arrangement: Law professors, as a group, are more likely to identify as liberal and progressive.[47] In their teaching and scholarship, they often advocate equality.[48] When looking inward, though, they advance a faculty governance structure that creates two unequal tracks of professors.[49] Jo Anne Durako argued that

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are, in turn, awarded based on membership in the category. The positions of the two groups are locked in place by credentialism, making the designations appear to be based on merit. Those in the higher stratification get the rewards and then close ranks. The lower categories are stigmatized through labeling and degrading comments or behavior. *Id.* at 476–90.

42. *See* McBrier, *supra* note 1, at 1206.

43. *Id.* at 1240.

44. *Id.*

45. *Id.* at 1201.

46. *Id.* at 1240.

47. Adam Bonica, Adam Chilton, Kyle Rozema & Maya Sen, *The Legal Academy's Ideological Uniformity*, 47 J. LEGAL STUD. 1 (2018). This author does not mean to suggest that conservative faculty do not also care about equality. The point is that liberal faculty are often the most vocal around the issue, at least in other contexts.

48. Stanchi & Levine, *Gender and Legal Writing*, *supra* note 1, at 3 ("Law faculties, by contrast, have the reputation for 'pushing the envelope' in law—for producing scholarship that rejects the often discriminatory hierarchy of law and argues for radically egalitarian reforms.").

49. Nantiya Ruan, *Papercuts: Hierarchical Microaggressions in Law Schools*, 31 HASTINGS WOMEN'S L.J. 3, 12–13 (2020) ("At the core of legal education, law is taught as a system for justice. The contradiction in legal education is that law

law schools "have a responsibility to model nonsexist behavior and to acculturate law students into their new professional community."[50] Maintaining a pink ghetto with second-class citizens is "inherently suspect."[51] Kathryn Stanchi began her landmark article on the subject—*Who Next, the Janitors?*[52]—by issuing an invitation to "those in the legal academy who self-identify as egalitarian, as feminist, or as otherwise committed to equality in the law and the legal profession" to, first, observe and then change the "illegitimate status hierarchy" in American law schools.[53] She wrote, "Anytime a substantial cluster of women hold low-pay, low-status jobs, feminist and humanist alarms should ring. They should be ringing now."[54] Linda Berger echoed this statement by arguing, "As law professors committed to equal justice and full citizenship throughout society, we have an obligation to do no less at home."[55]

How did this arrangement come about? Doctrinal teaching existed long before the movement to introduce skills in the J.D.[56] Historically, it was understood that law schools existed to teach foundational knowledge of the law. Firms would then teach the nuts-and-bolts of law practice. As such, doctrinal classes enjoy a "pedigree" and "contemporary relevance," while newer kinds of courses—such as clinics—were suspect because "they more closely resemble the law apprenticeships that Langdell sought to replace."[57]

The lack of skills courses was satisfactory for many decades, but things changed in the 1970s and 1980s, when new attention was drawn to the need for professional skills instruction.[58] Law schools, however, were dragged kicking and screaming. In large part, the profession was the driver for more skills instruction. Law schools begrudged by hiring attorneys willing to teach in these areas. But from the beginning they paid lip

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faculty who believe in justice and equality fail to recognize or act when those ideals are violated in their own workplace.").

50. Durako, *Pink Ghetto*, *supra* note 1, at 585.

51. *Id.*

52. Stanchi, *Who Next, the Janitors?*, *supra* note 1. The title is a reference to a remark made by a law school dean at the ABA Council on Legal Education. The Council was considering a proposal that would require law schools to treat legal writing professors as professionals. Stanchi, *Who Next, the Janitors?*, *supra* note 1, at 467 n.*.

53. *Id.* at 467.

54. *Id.* at 468 (footnote omitted). Legal and risk management bells should also be ringing.

55. Linda L. Berger, *Rhetoric and Reality in the ABA Standards*, 66 J. LEGAL EDUC. 553, 554 (2017); Ruan, *supra* note 49, at 21 ("The law school workplace culture, while it should be aligned with equity and justice, instead reflects the legal hierarchy, rankism, and status hierarchy that puts job categories on a best to least desirable chain.").

56. *See, e.g.*, Stanchi & Levine, *Gender and Legal Writing*, *supra* note 1, at 7 ("Until fairly recently, full-time teachers of legal writing simply did not exist.").

57. Romantz, *supra* note 1, at 106.

58. Stanchi & Levine, *Gender and Legal Writing*, *supra* note 1, at 7–8.

service to skills teaching by offering minimal salaries and benefits to these new "instructors" or "staff attorneys."[59] Unlike hiring in other areas, law schools aimed to provide skills instruction at the lowest possible cost.[60] And they went out of their way to fill these jobs with women,[61] stereotyping that women were better suited to the "nurturing" required for skills instruction.[62] And since skills faculty had few governance rights, these newcomers to academia had no way to change the status quo through voting. Indeed, many were not even allowed to attend the mostly male faculty meetings at which governance decisions would be made. Meanwhile, the ABA—the accreditor of the J.D. in American law schools—permitted disparate treatment of faculty depending on the subjects they taught.[63]

In some respect, things have gotten better. With allies on the tenure stream, skills faculty at many schools have gained greater job security and benefits. Some schools have even seen the wisdom of converting contract faculty to the tenure-stream. This is, alas, not the norm at most schools.[64] And, yet, law schools have increasingly retooled themselves to promote the

59. Edwards, *supra* note 1, at 79–84; *see also* Durako, *Pink Ghetto*, *supra* note 1, at 564–65.

60. Edwards, *supra* note 1, at 79, 88–89.

61. *See* Durako, *Pink Ghetto*, *supra* note 1, at 564–65; Stanchi, *Who Next, the Janitors?*, *supra* note 1, at 488; Stanchi & Levine, *Gender and Legal Writing*, *supra* note 1, at 8 ("A concurrent and related phenomenon provided the solution to the dilemma. Beginning in the 1970s, women entered law school in ever-increasing numbers. These newly graduated women provided law schools with an excellent labor pool from which to hire skills teachers."). One dean is quoted as saying that he expected to fill legal writing teaching positions with "women who have taken leave of their employers in order to raise families." Stanchi, *Who Next, the Janitors?*, supra note 1, at 489 (citing Larry Smith, *Tulane Taps 'Mommy-Track' for Legal Writing and Research Instructors*, 8 LAWYER HIRING AND TRAINING REPORT 13, 13 (Aug. 1991)). Others have referred to legal writing as the "mommy-track." Stanchi, *Who Next, the Janitors?*, *supra* note 1, at 489–90.

62. Christopher, *supra* note 1, at 69; Jewel, *supra* note 16, at 119–21. This stereotype persists today. "Frequently students treat Legal Research and Writing instructors like their mothers. They come to expect herculean efforts, take them for granted, treat them with little respect, and save their best behavior for their 'real' professors (like they behave when the father comes home)." Levit, *supra* note 1, at 786 (quoting Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 356 (1996)).

63. *See infra* notes 137–142.

64. *Status of Clinical Faculty in the Legal Academy*, *supra* note 11, at 384. Adamson and co-authors state as follows:

> In excluding clinical faculty from full governance over issues involving the mission and direction of law schools, especially faculty hiring, retention, and promotion, law schools have created hierarchies in which one class of permanent faculty members makes decisions affecting another class of permanent members, often without reciprocity. Such hierarchies exist without reasonable and adequate justification.

Id.; *see also* ALWD/LWI SURVEY, *supra* note 23; KEUHN, SANTACROCE, REUTER, SCHECHTER & CSALE, 2016–2017 SURVEY, *supra* note 27, at 41 (finding that, in the 2016–17 academic year, only 23% of clinical faculty were tenured or tenure-track, with an additional 11% having some form of clinical tenure or tenure-track status).

"practice ready" skills of their graduates.[65] Thus, the problems described in this section may get worse over time as more schools focus on producing "practice-ready" graduates who have the skills necessary to pass the bar exam, get a job, and "hit the ground running" in the real world, and marketing that they do all of this to the legal world. More and more schools have turned to their existing or new skills faculty to implement many of the skills-focused learning outcomes mandated by the ABA. Therefore, the disparities associated with the doctrinal-skills hierarchy may become more pronounced over time. As they do, the irony and hypocrisy may become more pronounced of touting practice-ready skills while treating those who teach those skills with a lesser status.

B. *The Costs*

There are numerous costs to this hierarchical structure. One author, Lucille Jewel, said, "The skills/doctrine dichotomy harms all stakeholders in legal education."[66] Another, Peter Brandon Bayer, made an ethical case against the hierarchy:

> *[A]s a matter of academic ethics, informed by cardinal legal standards of decency*, the disparate treatment and adverse terms and conditions imposed on writing professors are not simply unfair but defy the ethical aspirations of American law schools. Specifically, as the construct for analysis, I will establish and utilize the proposition that the discordant status of legal writing professors fails to satisfy minimal professional ethics.[67]

For the skills professor, the hierarchy may result in less salary,[68] lower self-worth,[69] fewer resources to excel as a teacher or scholar, different aca-

65. Tiscione & Vorenberg, *supra* note 1, at 47–48. Tiscione and Vorenberg state as follows:

> Legal research and writing, as well as other skills programs, are typically featured in marketing materials and on websites. However, even as they are prominently represented in marketing efforts, [Legal Research and Writing] faculty continue to be underrepresented as full faculty members and suffer as a result in terms of lesser job status and lower salary.

Id.; *see also* KEUHN, SANTACROCE, REUTER, SCHECHTER & CSALE, 2016–17 SURVEY, *supra* note 27, at 289–90.

66. Jewel, *supra* note 16, at 133.

67. Bayer, *supra* note 1, at 331.

68. *See* Durako, *Dismantling Hierarchies*, *supra* note 1, at 265–66. An argument has been advanced that full-time, non-tenure-track faculty should be compensated greater than those on the tenure-track to offset the lack of tenure and job security. Morrison, *supra* note 24, at 25.

69. Kathryn Stanchi, *The Problem with ABA Standard 405(c)*, 66 J. LEGAL EDUC. 558, 561, 563 (2017). Kathryn Stanchi states as follows:

> But while the institutional cost of Standard 405[c] is worth noting, it isn't what makes Standard 405[c] such an embarrassment. Making broad categorical judgments about human beings—and their value—should be something we do only in rare instances because of the risk of bias and damage. We should interrogate ourselves carefully when we are tempted

demic titles,[70] inferior office space,[71] and less academic freedom.[72] Because students run law reviews, legal writing professors, clinicians, and other skills faculty are less able to publish scholarship, since the student-editors pick up on the hierarchy and judge the scholarship of skills faculty to be lesser.[73] The three categories of classification, segregation, and subordination describe the separate and unequal status of many skills faculty.[74]

At the same time, the structure of law faculties harms those at the top of the pyramid as well in that "those in the higher ranks are more likely to view those in the lower ranks less as individuals and more in terms of group characteristics or stereotypes."[75]

The lack of tenure is especially troubling. Tenure is a way to safeguard academic freedom.[76] It does so by "guaranteeing that a faculty

> to do this to make sure that it is a moral choice free from discriminatory effect. While it may be easier to generalize about people, lazy thinking is simply never a good enough reason to discriminate . . . .
>
> This constant reminder that the workplace has decided that certain faculty aren't as good, and never will be, damages self-conception. Faculty members on this track may begin to believe that they are less valuable. They may begin to believe they have nothing worth writing in scholarship, so they don't try. They may not speak up at faculty meetings or committee meetings because they question the worth of their input. This is a real problem with entrenched hierarchies. And it robs the institution of so much valuable input while also robbing the employees of their dignity and self-respect.

Id. (footnotes omitted); *see also*, Ruan, *supra* note 49, at 5.

70. Durako, *Dismantling Hierarchies*, *supra* note 1, at 254.

71. *Id.*

72. *Id.* at 262–64. This may range from not being able to select their own textbooks or teaching methods, or limits on the forms of scholarship they may undertake. For example, there may be restrictions against writing traditional law review articles on doctrinal subjects. *Id.* at 263. Recent ALWD/LWI survey documents the number of schools where legal writing faculty do not have full freedom to select textbooks (34.7%), assignments (63.4%), or even the content of their classes (34.6%). *See* ALWD/LWI SURVEY, *supra* note 23, at 15.

73. Stanchi, *supra* note 69, at 563.

74. Bayer, *supra* note 1, at 354. Bayer states as follows:

> The first mode of discrimination consists of the myriad disadvantageous terms of employment exacted on full-time legal writing professors solely because of their rank. Perhaps most importantly, very few programs permit writing professors to seek tenure, that most prized source of professional security and acknowledgment of excellence. It is no secret that tenure ranks high among benefits enjoyed by undergraduate and graduate professors. Indeed, tenure is integral to safeguarding academic freedom and a robust variety of scholarship.

Id. (footnote omitted).

75. Stanchi, *supra* note 69, at 563–64 (collecting studies).

76. Christopher, *supra* note 1, at 70; Richard K. Neumann Jr., *Academic Freedom, Job Security, and Costs*, 66 J. LEGAL EDUC. 595, 595 (2017); Stephen J. Leacock, *Tenure Matters: The Anatomy of Tenure and Academic Survival in American Legal Education*, 45 OHIO N.U. L. REV. 115, 118 (2019); Peter A. Joy, *ABA Standard 405(c): Two Steps Forward and One Step Back for Legal Education*, 66 J. LEGAL EDUC. 606, 607 (2017).

member's employment will not be terminated without just cause and due process."[77] Job security, through tenure, also promotes innovation and creative problem-solving. Tenure allows risk-taking in research and teaching.[78] Without tenure, academic freedom is jeopardized, and innovation is discouraged. This is not a theoretical concern. Clinics, for instance, have come under attack from politicians for their advocacy.[79]

These disparities exist on gendered grounds even within skills faculty ranks. Joanne Durako's 2000 empirical study found that female directors of legal writing earned substantially less than their male counterparts, even when controlling for tenure and years of practice and teaching experience.[80] The same study found that women had less job security, less prestigious titles, were more often restricted to teaching first-year courses, and had fewer voting rights.[81] The results were confirmed in the ALWD/LWI institutional survey of 2017–2018.[82]

For the institution, the cost is the loss of full participation of these professors in governance and the scholarly and teaching culture of the school. For schools that use short-term contracts for skills faculty, they lose out on the benefit of professors who have a long-term investment in the institution.[83] For schools that have adopted ABA 405(c)-compliant long-term contracts, there is an anomalous result where there exists presumptively permanent members of the faculty who have long-term ties to the institution but, yet, do not have "a voice on important matters affecting the future mission, identity, and direction of the law school."[84] There is also a risk that, if a particular teaching practice is associated with a lesser status, but is nevertheless a best practice, those higher in the hierarchy will decline to adopt it for fear of "breaking caste."[85] For example, doctrinal faculty may decline to assign quizzes or writing assignments out of concern that they will be associated with the lesser status of legal writing faculty,[86]

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77. Joy, *supra* note 76, at 608. The American Association of University Professors' *1940 Statement of Principles on Academic Freedom and Tenure* describes tenure as a "means to certain ends," specifically protecting the freedom to research and teach as well as ensuring a "sufficient degree of economic security" to make the professoriate an attractive career path. *See* AM. ASS'N UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940).

78. Neumann Jr., *supra* note 76, at 598.

79. *See generally* Adam Babich, *Controversy, Conflicts, and Law School Clinics*, 17 CLINICAL L. REV. 469 (2011).

80. Durako, *supra* note 1, at 572; *see also* Christopher, *supra* note 1, at 70.

81. Durako, *supra* note 1, at 574–77.

82. *See* AWLD/LWI SURVEY, *supra* note 23.

83. Tiscione & Vorenberg, *supra* note 1, at 57–58.

84. *Status of Clinical Faculty in the Legal Academy*, *supra* note 11, at 385.

85. Syverud, *supra* note 1, at 18.

86. *See id.* at 18.

despite the evidence showing that such active learning and formative assessments promote deep student learning.[87]

Faculty governance is critical, because it is the mechanism to ensure that the law school remains independent from "domination by its university or some other overarching entity."[88] Through faculty governance, the faculty set curricular policy and "otherwise fashion the law school's educative and scholarly society."[89] When subsets of the faculty are not able to participate in the process, the voice of the full faculty is distorted and not representative of the true whole. There is also a signaling when only some faculty can vote: it "shows who the faculty thinks has the requisite professional expertise to help run the school."[90]

For students, who often catch on to the hierarchy, they may question being taught by "instructors" or "staff attorneys" and give less time and attention to the courses those professors teach.[91] They may also challenge the professors who teach skills courses, in large part because those faculty are more likely to be women.[92] This is particularly the case given that many skills courses, especially legal writing, require a great deal of work.[93] Students perceive an imbalance between skills courses and doctrinal courses and hold it against their professors.[94]

The current hierarchy reinforces and promotes class, race, and gender segmentation.[95] At many schools, student representatives attend and may even vote at faculty meetings. During faculty meetings, professors (hopefully) model professionalism for the students. And yet "[t]he faculty hierarchies that students see in action may communicate a different set of values than those they learn about in employment law, discrimination law, civil rights, and feminist legal theory courses."[96] On the other hand, law schools have an opportunity to model nonsexist behavior for new profes-

87. *See generally* Renee Nicole Allen & Alicia R. Jackson, *Contemporary Teaching Strategies: Effectively Engaging Millennials Across the Curriculum*, 95 U. DET. MERCY L. REV. 1 (2017).

88. Bayer, *supra* note 1, at 358.

89. *Id.*

90. Liemer, *supra* note 1, at 366.

91. Tiscione & Vorenberg, *supra* note 1, at 58 (noting that law schools may be sending subtle messages to students that skills are not important).

92. Edwards, *supra* note 1, at 96. Edwards states as follows:

> Students are more likely to challenge their legal writing teachers than other law teachers, both in and out of the classroom. This is due in part to the predominance of women as legal writing teachers, because studies have shown that students are more likely to complain about women teachers than their male counterparts.

Id. (footnote omitted) (compiling surveys on student attitudes towards male and female faculty).

93. *See id.* at 99.

94. *See id.*

95. *See* Jewel, *supra* note 16, at 111.

96. Liemer, *supra* note 1, at 373.

sionals by promoting equality between the doctrinal/skills divide.[97] Doing so will also demonstrate to students that all of their legal tools—doctrinal knowledge and skills—are valuable and necessary to successful law practice.[98]

Beyond the costs of the gendered hierarchy, there is also the fact that it raises a host of legal issues involving employment law.[99] Analogies have been made to *Brown v. Board of Education*.[100] Kathryn Stanchi and Jan Levine argue:

> [The current hierarchy is] a version of gender discrimination that no law firm or corporation would dare to institutionalize or rationalize, let alone put into print. Unlike any law firm or corporation, the legal academy has an explicit and de jure two-track system for its lawyers: a high-status, high-pay professorial track made up overwhelmingly of men, and a low-status, low-pay "instructor" track made up overwhelmingly of women.[101]

The hierarchical structure raises issues of systemic disparate treatment under Title VII, disparate impact theory under Title VII, and Title IX liability.[102]

C. *The Defenses*

The gendered hierarchy among law faculties is not typically defended in the open. Instead, it is the subject of hushed discussions in the hallways of law schools. To the extent that defenses exist, few are published. Nevertheless, they are advanced, but have little merit.

A typical argument made is that skills teaching is less demanding—both in time and mental energy—than doctrinal teaching.[103] Doctrinal teaching requires intellectual firepower, the argument goes, while skills teaching is rote.[104] Legal writing, in particular, is viewed as involving the

97. Durako, *Pink Ghetto*, *supra* note 1, at 585.

98. Jewel, *supra* note 16, at 134.

99. This was noted by a report of the ABA's Commission on Women in the Profession in 1996. Durako, *Pink Ghetto*, *supra* note 1, at 563. It cautioned law schools that it they should be "free of both actionable discrimination and subtle barriers to equal opportunity that operate to create a 'pink ghetto' for women faculty." *Id.*

100. 347 U.S. 483 (1954); *see* Durako, *Dismantling Hierarchies*, *supra* note 1, at 271–78 (arguing that *Brown* should be used as "educational wisdom" about the role of unequal treatment in schools).

101. Stanchi & Levine, *Gender and Legal Writing*, *supra* note 1, at 4.

102. McGinley, *supra* note 1, at 590–94.

103. Stanchi, *Who Next, The Janitors?*, *supra* note 1, at 480; Bayer, *supra* note 1, at 370; Ruan, *supra* note 49, at 5.

104. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 41 (1994). Rideout and Ramsfield explain:

> These traditional views that legal writing is a skill, that it cannot be taught, and that it is divorced from analysis suggest another traditional view: Teaching legal writing is not intellectual. Some go so far as to say

mere teaching of commas and proper spelling.[105] Willard Pedrick went so far as to contend that there was no such thing as "legal writing."[106] In 1982, he wrote, "persuasive writing is neither legal nor illegal but just writing."[107] As such, he believed that instruction in the subject, which he condescendingly called "donkey work," was a waste of time and came at a cost to overall faculty productivity.[108] A related criticism is that, since writing is writing, the teaching of writing in law schools is inherently remedial in nature.[109] Others articulate views that legal writing should only involve drafting specific kinds of legal documents, such as wills.[110] Others have taken the opposite position that writing is an innate skill and cannot be taught.[111]

In fact, the modern legal writing field is sophisticated and rigorous. Most of the actual work of legal writing faculty focuses on converting legal analysis into organized, effective written presentation.[112] This requires attention to hierarchy of authority, organization, creating accurate descriptions of cases, identifying relevant facts, applying those facts in an accurate

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> that it is anti-intellectual because it distracts students from the real business of learning substantive law by competing with the rest of the curriculum for their study time. Lurking within this view is also the fear that the "trade-school" mentality will prevail and that students will learn more about the practical side of their careers and not enough about the theoretical, which they will never revisit.

Id. at 47. Before the professionalization of legal writing instruction, writing courses (to the extent they even existed) were taught by doctrinal faculty. A 1970 survey of faculty confirmed that they found legal writing less stimulating than their doctrinal courses. *See* Edwards, *supra* note 1, at 84. Kathryn Stanchi described the situation as,

> Why the need to legislate our second-class status if it is a given? The answer is that at some point it was decided, without a shred of support, that legal writing and clinics were not as rigorous, intellectually challenging, or valuable as other subjects. And so a vicious hierarchical cycle began.

Stanchi, *supra* note 69, at 559.

105. Beazley, *supra* note 1, at 80; Rideout & Ramsfield, *supra* note 104, at 38.

106. *See generally* Willard Pedrick, *Should Permanent Faculty Teach First Year Legal Writing? A Debate*, 32 J. LEGAL EDUC. 413 (1982).

107. *Id.* at 413.

108. *Id.* at 414. He also dismissed complaints from the bar that graduates had poor writing skills. He called it a "perennial" concern because practitioners will, by definition, have more experience than recent law graduates. *Id.* at 413.

109. *See id.* at 413; Rideout & Ramsfield, *supra* note 104, at 42 (in articulating the views of opponents, "Classes on legal writing should therefore focus mostly on grammar, the manifestation of poor sentence structure, transitions, and so on. Neither the legal writing process nor its context matters, suggests this view, so any kind of writing exercise will do. Legal research techniques and *Bluebook* conventions are the only law-specific items to be added to the class, plus perhaps some new legal bulary. That is all."); Romantz, *supra* note 1, at 107.

110. Rideout & Ramsfield, *supra* note 104, at 40.

111. *See* Tiscione & Vorenberg, *supra* note 1, at 57.

112. Beazley, *supra* note 1, at 80; Edwards, *supra* note 1, at 80. A related argument is that skills are "anti-intellectual." *Id.* at 80. The mountains of high-quality scholarship on clinical and legal writing pedagogy and theory belie this notion.

way, addressing counterarguments, applying analogies, and presenting information in a clear way that is reader-focused. This is time-intensive teaching, since the best learning occurs when students receive feedback on their individual writing.[113] David Romantz made the point that both doctrinal courses and legal writing courses are rigorous; the difference is in their pedagogical approaches. Doctrinal courses are more inductive in nature: students examine individual pieces of legal authority, such as cases and statutes, and then create a structure and "holistic doctrinal frame" to describe the body of law.[114] In contrast, legal writing is more deductive: students learn legal analysis, writing, and research in a "doctrine-neutral" manner in which they produce written analyses of narrow legal problems.[115]

Clinical teaching is also demanding and rigorous, since students represent real clients under supervision.[116] Students assume the role of lawyers, not assistants.[117] Students in a clinic do not just perform work. They must learn, practice, and reflect upon every aspect of the lawyer-client experience from intake to disposition. This requires real-world application of skills like client counseling, interviewing, investigating, working with opposing counsel, appearing in court, and drafting documents, such as emails to opposing counsel and letters to judges, which are not often taught in other courses.[118] At the same time, they also reflect upon and gain a deeper understanding of the lawyering role.[119] Clinical teaching, like legal writing, is time-intensive, since professors are attorneys of record and must not only ensure competent representation of their clients but also engage in the reflection required by the ABA and good pedagogy, often undertaken in one-on-one meetings.[120]

An argument can be made that skills teaching is even more demanding than doctrinal teaching, given the time and energy involved. While a "casebook" professor can basically teach the same course year-to-year, thus putting less and less time into it, writing and skills instruction will always be time-intensive given the more direct nature of student contact. For

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113. Kathryn Stanchi quantified the work of legal writing faculty. Assuming forty-four students and ten to eleven papers each over the course of an academic year, a professor would be expected to grade and comment on 3,000 pages of student writing. In addition, writing faculty may spend about 100 hours in conference with students, in addition to seventy hours preparing for class. This leaves little time for scholarship. *See also* Stanchi, *Who Next, The Janitors?*, *supra* note 1, at 484.

114. Romantz, *supra* note 1, at 107.

115. *Id.*

116. *Status of Clinical Faculty in the Legal Academy*, *supra* note 11, at 363.

117. *See id.* at 364.

118. *Id.*

119. Elliott S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. LEGAL EDUC. 375, 377 (2001).

120. *Status of Clinical Faculty in the Legal Academy*, *supra* note 11, at 366.

instance, each year, a legal writing professor must develop new problems and provide individualized feedback on students' papers.

Another argument is that doctrinal professors engage in scholarship, while skills faculty do not.[121] First, this argument is factually incorrect at many schools, where skills faculty—often without receiving support from their administration and having to battle the demands of teaching labor-intensive courses[122]—produce high-quality scholarship, including in doctrinal subjects.[123] And it also does not explain the doctrinal faculty members who do not publish a single word after receiving tenure.[124] But there is also a chicken-and-egg problem with this argument. One of the reasons why skills faculty may not engage in scholarship is because they are not given the time or resources to do so. Then the same people who do not provide that support point the finger and say that skills faculty have not produced scholarship.[125] It is, thus, the fault of the skills faculty themselves for their predicament, they argue.[126] Skills faculty may also face a catch-22 if they do publish. If they publish about writing or clinical pedagogy, their areas of expertise, their scholarship may not "count."[127] If they write in a doctrinal subject, they may be accused of lacking the competency to do so.

One version of this argument is that the scholarship of skills professors may be different from those of their doctrinal colleagues. And this is sometimes true. Legal writing professors, for instance, often write on pedagogy, given the unique nature of the courses they teach. Clinical faculty often write more practitioner-oriented scholarship since they are closer to the practice of law. But at the same time there are also numerous skills professors who write long-form law review articles on theoretical or policy topics, just as many doctrinal professors do. There are also doctrinal professors who write practitioner-oriented pieces or, after getting tenure, simply stop writing altogether; yet there is no argument that these professors should lose tenure. Law schools have been slow to adopt meaningful post-tenure review. Professors losing tenure for lack of scholarly production are few and far between.

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121. *See* Christopher, *supra* note 1, at 70; Bayer, *supra* note 1, at 381.

122. Stanchi, *supra* note 69, at 559 ("Scholarship is time-consuming and difficult, particularly for clinicians and legal writing faculty, whose teaching duties are labor- and time-intensive.").

123. Liemer, *supra* note 1, at 368.

124. *See* Stanchi, *Who Next, The Janitors?*, *supra* note 1, at 483; Liemer, *supra* note 1, at 368; Ruan, *supra* note 49, at 11 ("[F]or every example of a legal writing professor who produces scholarly articles cited by the U.S. Supreme Court, there is a corresponding example of a long-tenured doctrinal professor who has failed to produce a full-length law review article since their tenure piece.").

125. Stanchi, *Who Next, The Janitors?*, *supra* note 1, at 483; Christopher, *supra* note 1, at 70.

126. Stanchi, *Who Next, The Janitors?*, *supra* note 1, at 483 (noting that at some schools, contract faculty may not receive research assistance or summer stipends).

127. *Id.* at 485.

Opponents also argue that skills faculty lack the expertise to evaluate doctrinal faculty in their hiring, promotion, and tenure steps, particularly as to scholarship. Yet the opposite is not applied. Non-skills faculty are presumed qualified to evaluate skills faculty.[128] Bryan Adamson and co-authors also noted that the "expertise rational" is flawed in its assumptions:

> The expertise rationale ignores the many important ways in which votes on hiring and, to a lesser extent, retention and promotion are expressions of institutional values and identity, and it underestimates the ability of all faculty members to use tools like peer and student assessment to aid the exercise of their judgment. The expertise rationale assumes that the ability to judge the potential and performance of other faculty members inheres in faculty status, rather than developing over time and through the repeated experience of reviewing potential candidates, hiring them, and assessing how they perform. It ignores the important role that peer evaluation of scholarship plays in assisting faculty members' judgment of promotion and tenure decisions when they evaluate scholarly achievement outside their area of legal expertise. It also ignores the fact that votes on hiring are often choices among equally well-qualified candidates about the deployment of resources and institutional fit, issues in which all permanent faculty members have a stake and can capably evaluate.[129]

Finally, there is a market-driven argument. Some claim that tenure-track positions are not needed because the existing market is attracting high-quality people even without the benefit of tenure or other benefits.[130] There are two responses to this argument. First, law schools should want to attract even more high-quality people to the profession, and an equal status will help them to do so.[131] Second, if we were to apply market forces to the doctrinal side of the law school, there might be an argument to be made to provide fewer benefits and protections for those who teach torts, contracts, and other subjects. After all, there are many more qualified candidates for tenure-track teaching jobs each year than there are available positions. Supply and demand work both ways.[132]

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128. *Status of Clinical Faculty in the Legal Academy*, *supra* note 11, at 384.

129. *Id.* at 384–85.

130. Beazley, *supra* note 1, at 83; Christopher, *supra* note 1, at 69. An additional argument that is sometimes raised is that contract faculty have inferior credentials, which is factually untrue. Bayer, *supra* note 1, at 360. A study found that "many more legal writing professors have traditional tenure-line credentials than actually hold tenure-line appointments." Susan P. Liemer & Hollee S. Temple, *Did Your Writing Professor Go to Harvard? The Credentials of Legal Writing Faculty at Hiring Time*, 46 U. LOUISVILLE L. REV. 383, 425 (2008).

131. Christopher, *supra* note 1, at 74.

132. Beazley, *supra* note 1, at 85.

D. *Potential Solutions*

One obvious solution to this problem is to convert skills faculty to the tenure track. And some schools have done so.[133] Typically, the process works by requiring skills faculty to reapply for their jobs, this time on the tenure-stream. They then go through the typical review of their teaching and scholarship, including external reviews.[134]

There can be a tension in this process, though, in determining how skills faculty are evaluated on teaching, scholarship, and service. The teaching, as this author has pointed out, is very different. Yet the standards for promotion and tenure may focus on doctrinal teaching and what is expected in such classrooms. Likewise, the standards for scholarship may be directed at the types of scholarship more likely to be produced by tenure stream faculty, but which may be of little interest to skills faculty. The result is tension as the school tries to fit the proverbial square peg into the round hole.

Some schools have, thus, adopted two different tenure standards. Both require high-quality instruction and scholarship, but, depending on the stream, the teaching and writing benchmarks may be different.[135] Programmatic tenure, though, is less beneficial than regular tenure. If a university eliminates the program, those with programmatic tenure are terminated.[136]

Some schools go for a middle ground: 405(c) or 405(d) status. Under Standard 405(c),[137] the *ABA Standards* require for full-time clinicians a "form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members."[138] An interpretation clarifies that "reasonably similar to tenure" includes a separate tenure-track (i.e., programmatic tenure) or presumptively renewable long-term contracts of at least five years in length.[139] 405(c) is close to tenure, but is still a lesser status, since it is

133. Edwards, *supra* note 1, at 100; Christopher, *supra* note 1.

134. Christopher, *supra* note 1.

135. Edwards, *supra* note 1, at 101 (describing how some schools have created separate tenure tracks while others review skills faculty using the same criteria as other tenure-track professors).

136. AM. ASS'N UNIV. PROFESSORS, TENURE AND TEACHING-INTENSIVE APPOINTMENTS (2010), https://www.aaup.org/report/tenure-and-teaching-intensive-appointments [https://perma.cc/36YV-F7Z6] (St. John's University section) ("[I]f their program is discontinued, the administration is not obligated to attempt to relocate them to a place elsewhere in the university. The faculty are eligible to participate in university-wide shared governance bodies.").

137. Standard 405(a) requires a law school to have conditions "adequate to attract and retain a competent faculty," while Standard 405(b) requires a policy on academic freedom. ABA STANDARDS, *supra* note 19, at 31 (Standard 405). For a history of Standard 405, including recent attempts to amend it, see Donald J. Polden & Joseph P Tomain, *Standard 405 and Terms and Conditions of Employment: More Chaos, Conflict and Confusion Ahead?*, 66 J. LEGAL EDUC. 634 (2017).

138. ABA STANDARDS, *supra* note 19, at 31 (Standard 405).

139. *Id.* at 32 (Standard 405, Interpretation 405-6).

based on a contract rather than indefinite tenure.[140] And there are plenty of schools that have 405(c) status but still discriminate against skills faculty in other ways, such as salary, office space, travel funds, and scholarship support. Matters of faculty governance, especially voting rights, are also a hodgepodge. "There seem to be almost as many ways to configure who votes on what at faculty meetings as there are law schools."[141] Still, many schools with clinical faculty on 405(c) status grant those professors the right to vote on all matters except those involving personnel matters of the tenured or tenure-track faculty, which continues to perpetuate the gendered hierarchy described earlier.[142]

Some schools treat their legal writing faculty under 405(c), providing them with long-term, presumptively renewable, contracts, even though 405(c) speaks of clinical faculty. But the *ABA Standards* do not require this. Instead, Standard 405(d) permits a law school to provide legal writing "teachers" with "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 . . . and (2) safeguard academic freedom."[143]

There is no requirement in the *ABA Standards* for security of position for academic support or library faculty,[144] except for a law school's law librarian.[145] The only employee in a law school that must have tenure, absent extraordinary circumstances, is the dean.[146]

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140. Moreover, there is evidence that some schools are not complying with the letter of Standard 405(c). Tiscione, *supra* note 39, at 568–69.

141. Liemer, *supra* note 1, at 361. Susan Liemer described the results of her study on voting rights:

> At some schools, everyone votes; at others, no one off the traditional tenure track votes. At one school the clinicians vote, and the legal writing professors do not. At another school the legal writing professors vote, and the clinicians do not. There are schools where some professors who are not on the traditional tenure track do not even attend faculty meetings. Depending on the school, these may be the clinicians or the legal writing professors or the librarians, or some combination of them. In general though, in ascending order, librarians appear to be the least likely to vote, legal writing professors more likely, and clinicians the most likely.

Id. at 361. A comprehensive survey of legal writing voting rights is contained in the ALWD/LWI institutional survey of 2017–2018. *See* ALWD/LWI SURVEY, *supra* note 23, at 79.

142. Liemer, *supra* note 1, at 366. Interpretation 405-8 clarifies that full-time clinical faculty members shall be afforded "participation" in faculty meetings, committees, and other aspects of governance in a manner "reasonably similar to other full-time faculty members." ABA STANDARDS, *supra* note 19, at 31–32 (Standard 405, Interpretation 405-8).

143. ABA STANDARDS, *supra* note 19, at 31–32 (Standard 405).

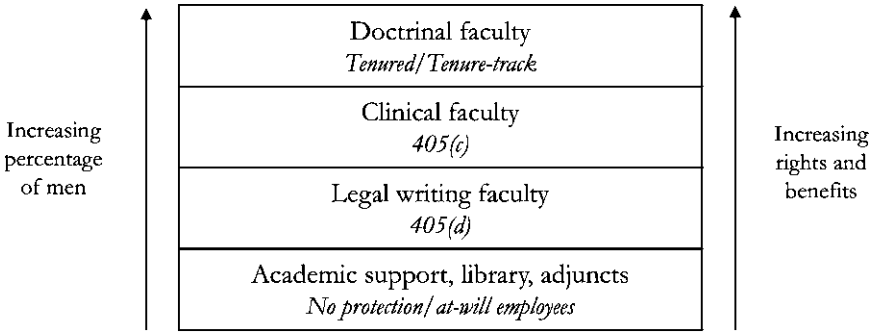
144. *See* Allen, Jackson & Harris, *supra* note 1, at 537.

145. ABA STANDARDS, *supra* note 19, at 42 (Standard 603(d)) ("Except in extraordinary circumstances, a law library director shall hold a law faculty appointment with security of faculty position.").

146. *See id.* at 12–13 (Standard 203).

Thus, our own accreditation standards provide for a hierarchy, with the dean and doctrinal faculty at the top, 405(c) clinical faculty in the middle, 405(d) legal writing next, and everyone else (academic support, library, adjuncts) at the bottom. Figure 1 illustrates this hierarchy:

Figure 1. Existing Hierarchy in Law Schools and ABA Standards



Linda Berger has argued that the rhetoric of the *ABA Standards*, particularly Chapters 3 and 4, "creates, maintains, and perpetuates hierarchies . . . [that] subordinate some categories of faculty members and the courses they teach."[147] The result is a separate and decidedly less equal status for professors who teach subjects deemed "lesser." Kathryn Stanchi went further, calling out Standard 405

> for what it is: an institutional bar to professional advancement divorced from any reasonable measure of merit.
>
> If all law faculty members, regardless of subject matter taught, were hired on the same track, whether tenure or Standard 405(c), that would be different. Or if all faculty members, regardless of subject taught, were given the option of tenure or Standard 405(c), that would be different. Or if all law faculty members were hired on Standard 405(c) with tenure awarded to the most accomplished and productive, the standard would at least have some claim to surface fairness. But this isn't how Standard 405(c) currently works. Instead, Standard 405(c) singles out certain faculty for lesser status based purely on what subject they teach.[148]

It also discourages upward movement and "embeds the existing hierarchy."[149]

But this is not the way it works in the rest of higher education. It turns out our colleagues in other colleges and schools have been using, for many years, a structure that mostly obviates this problem.

147. Berger, *supra* note 55, at 557.
148. Stanchi, *supra* note 69, at 558.
149. *Id.* at 559.

II. ACADEMIC DEPARTMENTS ACROSS THE MODERN UNIVERSITY

Law schools are an anomaly in higher education. An individual law school is likely organized as a "faculty of the whole" without departments of any kind.[150] In contrast, other units in a university are organized into academic departments. A business school might have departments of management, accounting, and finance, while a typical undergraduate arts and sciences college will have such myriad and varied departments as art, biology, English, history, music, physics, and political science.

Numerous higher education scholars have noted the foundational nature of the academic department in the United States. Barbara Walvoord described academic departments as "organiz[ing] people of similar disciplinary interests to serve multiple constituencies in ways that allow both innovation and predictability."[151] Kay Anderson described them as the "basic administrative unit of the college, housing a community of scholars that is relatively autonomous and responsible for instruction and research within a specialized field of knowledge."[152] Louis Benezet described them as "an essential educational working unit with built-in centrifugal tendencies that need to be countered."[153] Martin Trow called the academic department the "central building block—the molecule—of the American university."[154]

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150. *See* Jan M. Levine, *"You Can't Please Everyone, So You'd Better Please Yourself": Directing (or Teaching In) a First-Year Legal Writing Program*, 29 VAL. U.L. REV. 611, 618 (1995). Levine argues that a legal writing "program" is a close analog to a "department." Like department chairpersons, legal writing program directors can sometimes set semi-uniform standards for the content, textbooks, and assignments of the introductory legal writing course sequence. *See id.* at 619. This is in stark contrast to the doctrinal part of the curriculum, where faculty "zealously preserve each professor's right to determine the content and teaching style of his or her own courses." *Id.* Although Torts is typically a first-year course at law schools, there is no "Torts Program" or "Torts Program Director" to dictate minutiae of how that "program" is to be taught.

Levine notes that there are interrelated issues that must be addressed when designing a legal writing program: (1) the mechanisms for student workload and performance, (2) the relationship between the course and others in the first year, (3) the status and number of those teaching the course or courses, (4) the relative focus of analysis, research, and writing, (5) goals and review of writing assignments, and (6) available texts. *See id.* at 621–24.

151. BARBARA E. WALVOORD, ANNA K. CAREY, HOKE L. SMITH, SUZANNE W. SOLED, PHILIP K. WAY & DEBBIE ZORN, ACADEMIC DEPARTMENTS: HOW THEY WORK, HOW THEY CHANGE iii (Adrianna J. Kezar ed., 2001).

152. Kay J. Andersen, *In Defense of Departments*, *in* ACADEMICS DEPARTMENTS: PROBLEMS, VARIATIONS AND ALTERNATIVES 1, 2 (Dean E. McHenry ed., 1977).

153. Louis T. Benezet, *Uses and Abuses of Departments*, *in* ACADEMIC DEPARTMENTS: PROBLEMS, VARIATIONS AND ALTERNATIVES 34, 34 (Dean E. McHenry ed., 1977).

154. Martin Trow, *Departments as Contexts for Teaching and Learning*, *in* ACADEMICS DEPARTMENTS: PROBLEMS, VARIATIONS AND ALTERNATIVES 12, 12 (Dean E. McHenry ed., 1977).

Throughout higher education, departments are the backbone of American universities.[155] Faculty are hired, promoted, and tenured in their departments.[156] The department is the locus for faculty action around curricula in programs, such as majors and graduate degrees.[157] A department has the benefit of providing "familiarity, formal simplicity, and a clearly defined hierarchy of authority,"[158] since they are the "first-line administrative units of a complex organization."[159] In addition, through unity, a department can serve as a check against administrative overreach as compared to faculty members acting individually.[160] Faculty and departments are increasingly specialized, which is from where they draw their credibility and authority.[161] This, in turn, leads to collegiality, autonomy, and academic freedom.[162]

Departments play a particularly important role in the hiring and orienting of new faculty.[163] "Because faculty are experts in their field, they can claim that only peers in the field can accurately judge their work."[164]

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155. *See* ORGANIZATION AND ADMINISTRATION IN HIGHER EDUCATION 36 (Kristina Powers & Patrick J. Schloss eds., 2d ed. 2017); Andersen, *supra* note 152, at 8; *see also* Benezet, *supra* note 153, at 34.

156. Benezet, *supra* note 153, at 34 ("For untenured professors, they offer at once a ladder to a safe berth on board and a shaky perch from which one's career can be pitched into the sea—not always by natural forces.").

157. Richard Edwards, *The Academic Department: How Does It Fit Into The University Reform Agenda?*, 31 CHANGE MAG. HIGH. LEARN. 17, 18 (1999) ("The department, then, serves as the crucial terrain, giving identity and community to the local representatives of the discipline. Indeed, achieving departmental status becomes the key signifier that one's discipline is taken 'seriously' by the university, and so such status typically becomes the central goal of scholars in new or emergent disciplines."); Trow, *supra* note 154, at 15 (describing the important role of departments in graduate education).

158. Andersen, *supra* note 152, at 9.

159. Edwards, *supra* note 157, at 18; Trow, *supra* note 154, at 15 ("The department, then, was as much an organizational as an intellectual necessity, an efficient unit for making decisions about the curriculum, student careers, and the appointments and promotion of staff, decisions that could no longer be made effectively or credibly by the president.").

160. *See* Andersen, *supra* note 152, at 9. This may not necessarily be a good thing if a university administration has adopted a necessary reform agenda. Edwards, *supra* note 157, at 21. "[D]epartments prove to be unusually effective points of resistance; their faculties have little turnover and substantial autonomy from higher levels of administration, so they develop a deep consciousness of themselves as 'we' versus the 'they' of the rest of the institution." *Id.*

161. Trow, *supra* note 154, at 14 (in describing the development of departments, "the growth of knowledge broke the boundaries of the old classical curriculum and led to a specialization in scholarship that disrupted the intellectual unity reflected in the broad 'schools' (corresponding roughly to the 'faculties' of European universities)").

162. *See* WALVOORD, CAREY, SMITH, SOLED, WAY & ZORN, *supra* note 151, at 16.

163. Andersen, *supra* note 152, at 9.

164. WALVOORD, CAREY, SMITH, SOLED, WAY & ZORN, *supra* note 151, at 25; *see also* Andersen, *supra* note 152, at 9 ("[A] scholar's achievement and promise cannot be appraised wisely except by his professional colleagues within the discipline."); *see* Trow, *supra* note 154, at 16 ("The training of a historian is different

Thus, the department will exert "strong and jealous control" of tenure-track hiring: developing the job description, interviewing candidates, establishing the criteria by which candidates are evaluated, and making the first recommendations for hiring.[165] This continues during the promotion and tenure process for faculty.[166]

This is not to say that the school or greater university does not have a say in such matters as personnel actions and curriculum. They do. There are school-wide committees that address matters of concern for the entire college, such as curriculum, academic standing, and admissions.[167] There is also typically a school-wide personnel committee to which departmental recommendations of tenure and promotion go.[168] Those bodies, in turn, forward recommendations to university bodies; at the author's former university, it was the University Personnel Committee.[169]

Central to the running of the academic department is the chairperson.[170] Chairs play a key leadership role in both the department and broader university, influencing everything from policies and procedures to recommendations for appointment, promotion, and tenure of faculty.[171]

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from that of an anthropologist or a chemist; and each type of training obviously involves the candidate in unique relations with the existing body of knowledge and with his fellow students and teachers.").

165. WALVOORD, CAREY, SMITH, SOLED, WAY & ZORN, *supra* note 151, at 72; *see also* AM. ASS'N UNIV. PROFESSORS, STATEMENT ON GOVERNMENT OF COLLEGES AND UNIVERSITIES (last updated 1990), https://www.aaup.org/report/statement-government-colleges-and-universities [https://perma.cc/3HLZ-H7TV] ("Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy. Furthermore, scholars in a particular field or activity have the chief competence for judging the work of their colleagues; in such competence it is implicit that responsibility exists for both adverse and favorable judgments.").

166. Trow, *supra* note 154, at 19 ("The department is the locus of the academic career. In the leading universities it is the department that initiates the appointment of new members to the staff and then recommends them for promotion to higher rank. The department may have to gain the approval of its recommendations from academics in other departments and from academic administrators. But if an individual lacks the recommendation of his departmental colleagues, and especially of his senior colleagues, he will not be given the initial appointment or subsequent promotion.").

167. *See, e.g.*, ST. JOHN'S UNIV., ST. JOHN'S UNIVERSITY STATUTES 37 (2018), https://www.stjohns.edu/sites/default/files/2019-02/final_clean_version_12.12.18.pdf [https://perma.cc/59WH-P9SL].

168. *See, e.g.*, *id.*

169. *See, e.g.*, *id.*

170. *See* Mimi Wolverton, Robert Ackerman & Spencer Holt, *Preparing for Leadership: What Academic Department Chairs Need to Know,* 27 J. HIGHER EDUC. POL'Y MGMT. 227, 227 (2005); *see also* ORGANIZATION AND ADMINISTRATION IN HIGHER EDUCATION, *supra* note 155, at 36; Andersen, *supra* note 152, at 5.

171. *See* Wolverton, Ackerman & Holt, *supra* note 170, at 228.

They also create class schedules and assignments.[172] However, they often lack formal training in management or leadership. There have been calls for more attention paid to the role of the chairperson, including their training.[173]

Departments have their historical origins in the universities of Europe. The medieval university in Salerno, as well as the numerous universities established in the Middle Ages, found that "[m]asters grouped themselves, spontaneously at first, into relatively autonomous faculties of arts, canon law, medicine, and theology with responsibility for setting standards for their own degrees."[174] On the other hand, Oxford and Cambridge did not become departmentalized.[175] In the United States, departments began to emerge in the nineteenth century, adopting the German model of "formalized graduate programs with distinct research boundaries."[176] But prior to the twentieth century, departments were rare. In 1767, Harvard had only four departments: Latin, Greek, Logic/Metaphysics, and Natural Philosophy. Harvard began more fully embracing a department-based structure in 1824, when a committee recommended division of faculty into departments, each one headed by a chair "responsible for the direction of studies, instructors, and students."[177] When it first opened, the institution that became the University of Pennsylvania had only two departments: Latin/Greek and Philosophy.[178] In the twentieth century, with faculty specializing into even narrower areas, departments grew in importance.[179]

So why, despite the history and prevalence of departments, have law schools not adopted these structures? Probably because, at most schools, there is one primary "program": the juris doctor degree. Thus, there is

172. *Id.*; Edwards, *supra* note 157, at 18. If law schools not only adopt departments but also department chairs who are responsible for preparing part of the class schedule, it could alter drastically the role of the associate dean for academic affairs.

173. Andersen, *supra* note 152, at 5; Edwards, *supra* note 157, at 18. One of the areas of concern is whether a chairperson's loyalty is to the greater university or to the department. Andersen, *supra* note 152, at 10.

174. Andersen, *supra* note 152, at 4–5.

175. *Id.* at 5 ("Even today, the colleges within the Oxbridge universities are self-governing and autonomous, but because the colleges cannot separately employ enough fellows to teach every subject, they cooperate in certain subjects; and in modern languages and science, they leave teaching and research largely to the university or university institutes. Similarly, in Canada the University of Toronto has sought to maintain the Oxbridge pattern: although each student matriculates in a college within the University of Toronto, he finds himself taking courses in other colleges and in one or more of the nineteen 'university departments' not associated with any particular college.").

176. Edwards, *supra* note 157, at 18; *see also* Trow, *supra* note 154, at 13 (noting that departmentalism coincided with graduate education and the research-oriented university).

177. Andersen, *supra* note 152, at 3.

178. *Id.*

179. WALVOORD, CAREY, SMITH, SOLED, WAY & ZORN, *supra* note 151, at ix.

one curriculum to administer. However, with the growth of non-J.D. programs,[180] this is changing. As to the faculty, law professors have been considered a unitary lot. Law schools do not have "professors of contract law," for instance. Everyone, except the skills faculty, is a "professor of law." To deal with these new disciplines—legal writing, clinical, skills, academic support, library—lesser tracks were created.[181] Thus, historically, there was never a need for departments because law faculties organized themselves in hierarchical rather than lateral ways.

Departments are not without their critics. They can be insular[182] and impede interdisciplinary teaching and scholarship,[183] although the creation of extra-departmental structures, like institutes and centers, can be homes to such interdisciplinarity.[184] This is problematic, though, for newly hired faculty who wish to engage in interdisciplinary research and may find their work impeded by more traditional colleagues in their departments.[185] Similarly, departments can become overspecialized and get in the way of research into real world problems that do not fit neatly in

180. Sara Randazzo, *Law Schools Find a Way to Fill Seats (No Lawyers Required)*, WALL ST. J. (Dec. 20, 2018, 12:19 PM), https://www.wsj.com/articles/law-schools-find-a-way-to-fill-seats-no-lawyers-required-11545301800 [https://perma.cc/8LLM-H87C].

181. *See supra* notes 56–63 and accompanying text.

182. *See* Andersen, *supra* note 152, at 6. This is especially the case if a department obtains significant numbers of grants or outside contracts. *See* Benezet, *supra* note 153, at 40–42; *see also* Trow, *supra* note 154, at 20–21.

183. WALVOORD, CAREY, SMITH, SOLED, WAY & ZORN, *supra* note 151, at ix (describing criticisms from the 1970s about departments as barriers to interdisciplinary teaching and research); Edwards, *supra* note 157, at 19. Indeed, for this reason, some schools have gone in the reverse direction. *Id.* at 23 (describing Rockefeller University, which has no departments). When it was established, Hampshire College was proposed to have four schools (humanities and arts, natural science and mathematics, social science, and language studies), with no departments within them. Charles R. Longsworth, *Academic Organization by Schools at Hampshire College*, *in* ACADEMICS DEPARTMENTS: PROBLEMS, VARIATIONS AND ALTERNATIVES 117, 124 (Dean E. McHenry ed., 1977). The schools are currently called: Natural Science; Cognitive Science; Social Science; Humanities, Arts, and Cultural Studies; and Interdisciplinary Arts. *See Chapter I: The Academic Program*, HAMPSHIRE COLLEGE, https://www.hampshire.edu/chapter-1-academic-program#41d [https://perma.cc/HXP5-T87J] (last visited Oct. 13, 2022). Hampshire College is part of the Five College Consortium. *See Welcome to the Five College Consortium*, FIVE COLLEGE CONSORTIUM, www.fivecolleges.edu [https://perma.cc/ZA66-7G8X] (last visited Oct. 13, 2022). At least one author has looked to law schools, which do not have departments, as a model. While a university could divide into colleges and schools (or divisions), further subdivision is not necessary into departments, so the argument goes. Edwards, *supra* note 157, at 24. An obstacle, though, is expected backlash from specialized accreditors and professional societies, who expect to see a self-contained department in their field. *Id.* at 24. Other suggestions include creative incentives for interdisciplinary work and moving out the business functions of departments (personnel processing, accounting, development, etc.) into more centralized administrative units. *Id.* at 25.

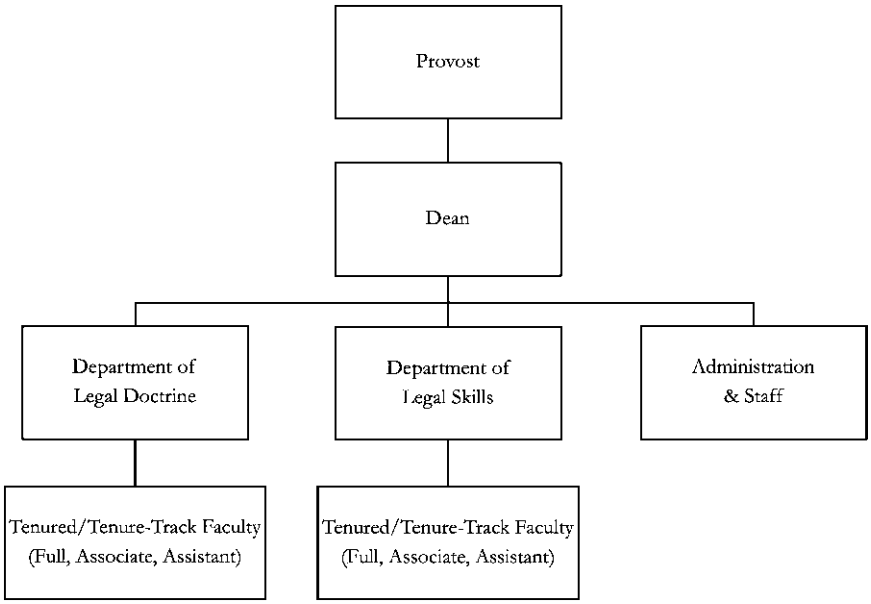
184. Andersen, *supra* note 152, at 6.

185. Edwards, *supra* note 157, at 19.

any one specialization.[186] However, a scholar whose work bridges two fields can be tenured in one department and given a courtesy appointment in another. Joint appointments are also possible at some institutions, although faculty may "grump"[187] that their colleagues with joint appointments are not pulling their weight in their home departments.[188]

III. ACADEMIC DEPARTMENTS IN LAW SCHOOLS: A PROPOSAL

Academic departments are a structural solution to the problem of hierarchies within law schools. It removes the pyramid structure described above[189] and replaces it with separate, co-equal departments in which personnel action—hiring, promotion, tenure—takes place. Instead of a stacked structure or pyramid, a law school might look instead like this:



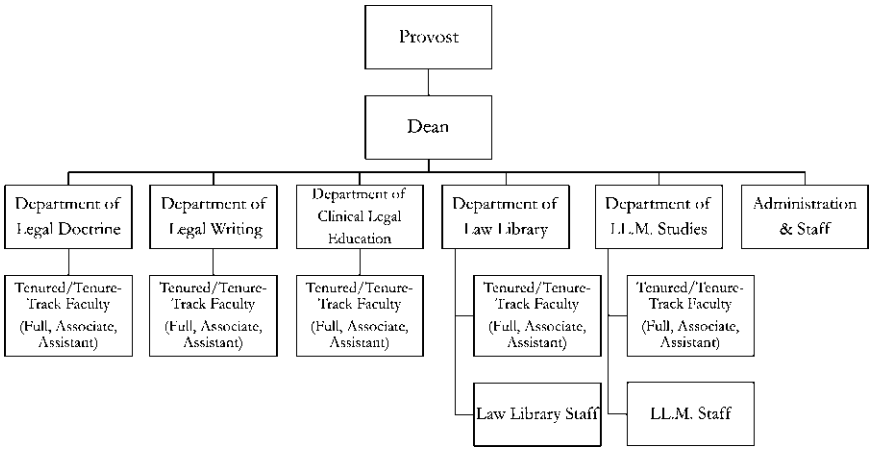
186. *See* WALVOORD, CAREY, SMITH, SOLED, WAY & ZORN, *supra* note 151, at ix, 25; *see also* Andersen, *supra* note 152, at 6; *see also* Fred Harvey Harrington, *Shortcomings of Conventional Departments*, *in* ACADEMICS DEPARTMENTS: PROBLEMS, VARIATIONS AND ALTERNATIVES 53, 56 (Dean E. McHenry ed., 1977).

187. Kotkin, *supra* note 27, at 296.

188. Edwards, *supra* note 157, at 19.

189. *See supra* Figure 1. Technically, it is probably best described as a "reverse pyramid," since those at the top (the tenured/tenure-track faculty) typically outnumber the skills faculty.

Larger schools might benefit from further structure, such as:[190]



It is important that departments are not too small or specialized.[191] Therefore, a school should give careful thought to how many departments to create.

A newly hired professor would be hired into one of the departments. In turn, each department would set discipline-specific standards for excellence in teaching, scholarship, and service. Those standards would reflect the unique characteristics of each department. It is against those standards that faculty would be promoted and tenured (or not). For example, the Department of Legal Doctrine might place a greater emphasis on traditional law review scholarship, while the Department of Legal Skills may focus instead on research and scholarship on pedagogy.[192] A Department of Clinical Legal Education may count practitioner-oriented materials as scholarship.

Teaching standards may also be different. The best learning in Legal Writing occurs when students produce documents and receive feedback on them from their professors. Thus, a Department of Legal Writing might want to include in its tenure evaluation the quality of instructor feedback on student papers. Likewise, a Department of Clinical Legal Education may choose to evaluate the quality of one-on-one reflection meet-

190. Other possible departments could include academic support, professional skills, and externships. An interesting issue would be how to handle LL.M. programs. Depending on how those programs are structured, a separate department of faculty who primarily teach in graduate programs could be created.

191. Edwards, *supra* note 157, at 19 (arguing departments that are too small are inefficient).

192. To an extent, some schools are already showing signs of utilizing different methods for evaluating candidates for hire. For example, this author is aware that at one school doctrinal candidates present traditional "job talk" papers over lunch, while legal writing candidates teach a mock class. Some schools vary their course evaluations by subject. While they all have a set of common questions, there are also specific questions for writing, skills, and clinical courses.

ings. The Department of Legal Doctrine might decide to focus its teaching evaluations on aspects of large classes, such as the Socratic Method, or the quality of interim assessments.

To be crystal clear: this author would move towards a departmental model only if the departments would be treated equally in status and governance rights. The model does not accomplish anything if it perpetuates a hierarchy of "greater" and "lesser." For example, if one department's faculty could earn tenure, but another's is capped at 405(c) status, the status quo's hierarchy is continued, and nothing is solved.

The key to eliminating the governance effects of the hierarchy is that each department would only have voting authority among its own members. Doctrinal faculty would only vote on the appointment, promotion, and tenure of its faculty, and the same for those in the skills departments. This is a key distinction with the status quo, in which at many schools, tenured, doctrinal faculty can vote on the hiring and renewal of contract faculty who teach skills, but not vice versa.[193] Instead, under the departmental model, each department would be responsible for personnel actions of its members. There would, thus, be separate appointments committees that would be primarily responsible for the hiring within those departments.

But that is not to say that the buck stops with the department. As in business schools and liberal arts and sciences colleges, a departmentally structured law school would need to have school-wide committees to review the work of the departmental personnel committees. But ideally there would be a certain amount of deference given to the work of the departments. There would also need to be law school-wide committees on matters that pertain to the J.D. curriculum, grading standards, retention of at-risk students, and admissions.

By creating separate, co-equal departments, skills faculty would gain all of the same rights and responsibilities of their doctrinal counterparts, including tenure and voting rights on school-wide matters. But it may also require skills faculty to adapt. If they have not previously conducted research and written scholarship, they would have to start, but it would be incumbent on the dean to provide the resources to do so.[194]

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193. *Supra* notes 128–129 and accompanying text.

194. *Supra* note 125 and accompanying text (describing chicken-and-the-egg problem with skills faculty undertaking scholarship without support). There is the question of what to do if a school does not want to establish a scholarship expectation for its skills faculty. Arguably a co-equal department model should not be used in such a situation since the skills faculty would not be engaging in all three core aspects of the faculty role. Tenure exists to predict academic freedom, and academic freedom is most clearly linked to scholarship. On the other hand, political attacks against impact litigation clinics demonstrates the need for some job security. This author will leave for another day whether the theoretical framework presented in this article should apply to faculty who teach but do not engage in scholarship. This presents a much bigger question of what it means to be a professor.

With the adoption of a departmental structure would come four primary shifts in power. *First*, the doctrinal faculty would no longer have power over skills professors' hiring, promotion, and tenure, except to the extent that they are on the school-wide or university-level personnel committees. But some might welcome this shift. They may feel uncomfortable and unqualified under the status quo of evaluating their colleagues who teach skills. *Second*, skills faculty would give up whatever (typically minimal) power they currently have in the hiring of doctrinal faculty. But skills faculty may welcome this development if it meant achieving equal status. *Third*, the gender disparity associated with a hierarchical structure would be eliminated, since departments would be co-equal. *Fourth*, students would see skills instruction as equally valued at the school.

There would be an additional benefit of creating subject-specific departments. They could take a more formal role with the curriculum in their area. A school may recognize the relative institutional competence of each set of faculty to make decisions over the courses in their area, including their adoption and overseeing assessment in them. This curricular and assessment work would be subject to a school-wide curriculum committee that ironed out potential conflicts between courses. This would take advantage of the specialization inherent in locating power and responsibility by subject area.

An interesting question would be whether to have departmental chairpersons and what role they would have. In other schools, chairpersons have significant responsibilities, including setting the schedule and hiring adjunct faculty. But these are typically because each department is responsible for more programs, such as undergraduate majors or graduate degree programs. If a law school has only one degree program, it might not make much sense to have department chairpersons setting the class schedule. In fact, it might cause chaos. Still, a department chairperson could be helpful with providing the associate dean for academic affairs with input and advice on particular doctrinal and skills courses to offer. Chairpersons could also shoulder the burden of managing the appointments and personnel processes of new and current faculty.

One question is the degree of authority a chairperson, if such a role existed, would have over members of the department and how they teach their courses. As Jan Levine noted in a 1995 article, department chairpersons in universities often have wide authority to set the content, coverage, teaching style, attendance, and books that are to be used, especially in introductory courses where semi-uniform standards are prized among sections.[195] Legal writing programs are often highly uniform among sections. For programs staffed by adjuncts or faculty on short-term contracts, those curriculum and pedagogical decisions are often made by the legal writing program director, who may be the closest analog to a department

195. Levine, *supra* note 150, at 619.

chairperson in modern law schools.[196] A question for another day is whether, in adopting a departmental model and awarding tenure-track eligibility for legal writing faculty, the legal writing course should continue to have uniformity or, instead, be treated like Torts and Contracts. At most schools, Torts and Contracts faculty can largely choose their own textbooks, teaching techniques, and even interim assessments. Their boundary is only the broad and sometimes vague course description in the academic catalog. This author sees these questions—faculty structure and uniformity of introductory courses—as separate and not necessarily linked. A department could be organized for personnel-related purposes only: curricular decisions would be made at the faculty at-large level, such as through a school-wide Curriculum Committee, and skills faculty would have the same discretion as all other faculty. On the other hand, a school could require uniformity across sections of some or all courses, including doctrinal subjects like Contracts and Torts.[197] There is also a middle ground where faculty teaching the same course collaborate and agree on semi-uniform standards.[198] Resolution of that question is beyond the scope of this Article.[199]

There is the question of what to do with faculty who teach both doctrinal and skills courses.[200] If a professor splits his or her time fairly evenly between the two, then a joint appointment makes the most sense; presumably, the faculty member would have to meet the tenure standards of both departments, unless the appointment in one is on a courtesy basis. However, if a person occasionally teaches one subject but mainly teaches the other, it might be preferable to "house" the faculty member in the primary

196. *See id.*

197. Charleston School of Law requires every mandatory course to have an interim assessment. The dates for those assessments are set by the administration to ensure some orderliness to the process.

Jan Levine describes how a strong, centralized legal writing program may be especially necessary if most of the faculty teaching in the program are new and turnover regularly. Uniform standards are developed by experienced, full-time faculty "who cannot afford to let a constantly changing group of inexperienced teachers learn the same complex pedagogical lessons by trial and error." Levine, *supra* note 150, at 620.

198. *See id.* ("The need for a program or a director might be reduced if a law school was willing to grant tenure status to a group of legal writing professionals, and if those teachers were rewarded for remaining committed to teaching legal writing. It is possible that the group of professional high-status legal writing teachers would thereby create formal or informal mechanisms to promote some level of uniformity."). There is no reason such collaboration cannot be fostered in the doctrinal subjects. At Charleston, many of the professors in our subject matter "pods" (e.g., Torts) discuss and collaborate over what they will teach and how.

199. The author's only caveat is that if a professor's discretion is to be narrowed, there should be a clear and legitimate process for doing so. Consideration should also be given, as Jan Levine does, to whether an overly uniform program may affect recruitment and retention of faculty who wish to have more discretion and latitude to design and implement their courses. *See* Levine, *supra* note 150, at 620 n.33.

200. The author counts himself in this category.

department and simply have the faculty member teach in the other department on an as-needed basis. There is a related issue of a faculty member who, say, teaches legal writing but produces scholarship that is more akin to that produced by doctrinal faculty. This issue is addressed in the next section.

Division into academic departments would also address one criticism of tenure protection for skills faculty: that they will insist on teaching subjects other than those for which they are initially hired.[201] It also deals with the concerns about block voting that some doctrinal faculty have about simply converting all skills faculty to tenure status.[202]

CONCLUSION AND CRITICISMS

Even without the gender disparity, the existing faculty hierarchy is unethical, bad policy, and counter to the "practice ready" direction of higher education. Adding in the gendered nature of the hierarchy, the situation is even less tolerable and probably illegal. Converting all skills faculty to tenure or tenure-track positions has proven to be workable at some schools. Their faculty and administrations have found the courage to work through some of the significant concerns around block voting and relative expertise in evaluating faculty candidates from the "other" area.

Not all schools are in a position, politically, to convert to a unitary tenure-track system. Arguments that teaching skills is different and impliedly lesser are easy to dispense with. There are, however, legitimate issues that tenure-track faculty and deans may raise. *First*, they may struggle with how to amend the tenure standards to account for this "new" form of teaching and a different kind of scholarship without diluting the standard to something generic and unworkable, like "excellence in teaching, scholarship, and service." *Second*, there may be objections on competence grounds to skills faculty evaluating doctrinal faculty and vice versa. At the appointment stage, schools with 405(c) status have allowed clinical and other skills faculty to evaluate doctrinal, tenure-track candidates. But this author sees a valid concern at the tenure stage, where there are higher stakes and more difficult decisions to make. This works both ways, by the

201. *See* Beazley, *supra* note 1, at 82. This criticism is misplaced for several reasons. First, faculty routinely migrate courses based on individual interests and the needs of the institution. But doing so requires the assent and cooperation of the scheduler, typically the associate dean for academic affairs. Moving a faculty member into a new area is not something that associate deans take lightly. *See id.* at 83. Second, hiring departments can and should take into account whether a person has a genuine interest in teaching the subject or is merely using it as a steppingstone to a different position. Third, to the extent that there becomes equality between the departments, there will be less of an incentive for skills faculty to seek doctrinal teaching positions.

202. Liemer, *supra* note 1, at 385 ("At some schools, voting faculty members may fear block voting by clinicians, writing professors, or research professors. Those who harbor this fear continue to discount their tenure-ineligible colleagues' expertise and professionalism." (footnote omitted)).

way. This author has had doctrinal faculty express to him privately their discomfort with evaluating the teaching and scholarship of legal writing and clinic faculty going up for promotion.

For those schools struggling with these issues but who, in the words of Kathryn Stanchi, "self-identify as egalitarian, as feminist, or as otherwise committed to equality in the law and the legal profession" and wish to do something about the illegitimate status hierarchy,[203] this author offers a departmental model as a possible middle ground. It achieves the goals of equity and providing tenure to all professors, regardless of subject matter, without the problems associated with programmatic tenure.[204]

This is not to say this Article's proposal is without criticism. It strikes of "separate but equal."[205] This phrase is true at the highest level of generality, but it misses the mark. The segregation at issue in *Brown* was on racial grounds, which implicates all sorts of constitutional and moral concerns that separating faculty by subject matter does not. Moreover, law schools would not be breaking new ground in this area. Business schools, colleges of arts and science, and schools of education have divided their faculties by subject matter for over a century without complaints about "separate but equal" if departments are, in fact, treated equally.

A related objection might be that a departmental structure may actually encourage further disparity in salary between doctrinal and skills professors. Throughout universities, it is not unheard of for business faculty to be paid more than English professors based on the market and benchmarking. But this exists in the status quo. Hopefully if a law school dean sees the "departments" as having equal value, he or she would try to bring salary parity between the two. This, however, might be costly.

In addition, even with departments, one can see gender disparities across universities. Predominantly male departments may receive greater recognition and resources (e.g., the hard sciences) than those that lean more female (e.g., English). Even with departments, there are still inequities as shown by the number of deans, provosts, and presidents broken down by gender. In this respect, though, this author does not offer departments as a cure all for every form of discrimination in higher education. Instead, it is one step of many toward achieving equality.

Another concern is that departmentalism would lead to insularity and impede cross-discipline collaboration. Bryan Adamson and his co-authors cautioned against programmatic tenure on these grounds.[206] This author

203. Stanchi, *Who Next, the Janitors?*, *supra* note 1, at 467.

204. *Supra* note 136 and accompanying text.

205. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

206. *Status of Clinical Faculty in the Legal Academy*, *supra* note 11, at 385–86. The authors also expressed hesitance about separate tracks because doing so often results in clinical and other skills faculty having fewer governance rights. To be clear: this is not what this Article is proposing. This Article is suggesting, instead, that all faculty would have equal governance rights but that much of personnel-related decision-making would occur at the department level.

is less concerned. First, there is not much collaboration going on between doctrinal and skills faculty to begin with. To the extent there is, it might happen more organically if faculty saw each other as equals. And there would still need to be law school-wide committees on curriculum.

There is the final issue of what to do with titles. Would those who currently call themselves "professors of law" have to update their business cards to say: "professors of legal doctrine" (or whatever the department is called at a school)? On the one hand, there is an easy theoretical answer: yes. Either everyone has their subject in their title, or no one does. ("Professor of Law" is an overbroad title if there are also "Professors of Legal Writing" and "Professors of Clinical Legal Education," since legal writing and clinics are also key parts of teaching law.) One solution, therefore, is to call everyone a "Professor of Law" regardless of department. This would run counter to how most universities structure their faculty appointments, where there are Professors of Biology and Professors of Music. Finally, if this was the only impediment to equality, this author would be willing to allow doctrinal faculty to keep the moniker "Professor of Law" if it would mean making the structural reforms necessary to achieve equity.

The current system at most schools is in dire need of reform. The question is whether doctrinal faculty and deans at such schools are willing to look inward, consider the moral and practical harms associated with the illegitimate status hierarchy that they perpetuate, and do something about it. A departmental structure, while not perfect, is a path forward for schools with faculty and administrators committed to true equity.