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# Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty


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## PODIA AND PENS: DISMANTLING THE TWO-TRACK SYSTEM FOR LEGAL RESEARCH AND WRITING FACULTY<sup>1</sup>

KRISTEN K. TISCIONE AND AMY VORENBERG\*

*At the 2015 AALS Annual Meeting, a panel was convened under this title to discuss whether separate tracks and lower status for legal research and writing (“LRW”) faculty make sense given the current demand for legal educators to better train students for practice. The participants included law professors, an associate dean, and a federal judge.<sup>2</sup> Each panelist was asked to respond to questions about the “two-track” system—a shorthand phrase for the two tracks of employment at many law schools whereby full-time LRW faculty are treated differently than tenured and tenure-track faculty. The panelists represented differing views on the topic. This Article grows out of the conversation, information, and ideas that emerged.*

### INTRODUCTION

Under increasing economic pressure to attract law students, law schools are aggressively marketing their “practice ready” programs. Legal research and writing, as well as other

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1 “Podia” here denotes faculty teaching traditional, doctrinal courses; “pens” denotes faculty teaching legal research and writing.

2 Panel participants included the authors; The Honorable Ketanji Jackson, of the United States District Court for the District of Columbia; Professor Lyrissa Lidsky, Stephen C. O’Connell Professor and Associate Dean for International Programs, University of Florida College of Law; Professor Orin Kerr, Fred C. Stevenson Research Professor of Law, George Washington University Law School; and Lisa McElroy, Associate Professor at Drexel University School of Law. In conjunction with this panel, the authors and Professor McElroy were invited to make a statement at the Crosscutting Program at the same annual meeting, entitled “The More Things Change . . . : Exploring Solutions to Persisting Discrimination in Legal Academia,” and to publish these remarks. The panelists at the *Podia and Pens* session offered valuable perspectives that contributed greatly to this Article, and we thank them for their contribution to this discussion. Although many of the ideas and information here came out of that discussion, this Article does not represent specific views of all the panelists.

skills programs, are typically featured in marketing materials and on websites. However, even as they are prominently represented in marketing efforts, LRW faculty continue to be underrepresented as full faculty members and suffer as a result in terms of lesser job status and lower salary. The vast majority of LRW faculty are women, many with credentials, practical experience, and teaching loads similar to male faculty. However, female faculty teaching LRW, as well as podium courses, usually have a lower status and earn significantly less than their male counterparts.

A lawyer's ability to analyze the law and communicate effectively is the most critical tool lawyers have.<sup>3</sup> The academy's treatment of LRW faculty, who are singularly focused on preparing students from their first day of law school to think and communicate like lawyers acting on their client's behalf, thus represents a significant equality problem. The current emphasis on skills training makes the status and salary disparity more apparent and more troublesome. While gender-based status and salary disparity is common throughout the United States, law schools should be working to remedy these disparities, particularly since their faculty can be presumed to know the law on gender discrimination. Even those who argue that women law faculty are not at a disadvantage have stated as a matter of principle that "[t]o be foreclosed from rising in an organization because of an inflexible two-tier system is unfair, psychologically and organizationally damaging, and for what it is worth, un-American."<sup>4</sup>

### **I. The Continuing Disparity in Gender, Status, and Salary**

The over-representation of women in skills teaching positions, particularly legal research and writing, and their under-representation in podium, tenure-track positions are

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3 See, e.g., Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools' Dirty Little Secrets*, 16 BERKELEY WOMEN'S L.J. 1, 5 (2001).

4 Dan Subotnik, *Do Law Schools Mistreat Women Faculty? Or, Who's Afraid of Virginia Woolf?*, 44 AKRON L. REV. 867, 881–82 (2011).

well documented.<sup>5</sup> Legal scholars have been writing about this for over twenty years,<sup>6</sup> referring to legal research and writing and its faculty as a “permanent underprivileged stratum of untouchables,”<sup>7</sup> the “pink ghetto,”<sup>8</sup> and one of law schools’ “dirty little secrets.”<sup>9</sup> Yet the perception that teaching legal research and writing is unintellectual “women’s work”<sup>10</sup> continues as part of the social fabric of law schools.

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5 See, e.g., AM. ASS’N OF LAW SCH., 2008–2009 AALS STATISTICAL REPORT ON LAW FACULTY [hereinafter AALS 2008–2009 REPORT] (reporting on discrepancies in gender, title by gender, and security of position by gender and indicating that women then comprised 37% of full-time law faculty and 28% of tenure or tenure-track faculty) (on file with the authors); ALWD/LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY 59 (2014), <http://www.lwionline.org/surveys.html> [<http://perma.cc/T2QU-WFYV>] [hereinafter ALWD/LWI 2014 SURVEY] (indicating that in 2014, women comprised 71% of full-time legal research and writing faculty); AM. BAR ASS’N, Section of Legal Education and Admissions to the Bar, LAW SCHOOL FACULTY AND STAFF BY ETHNICITY AND GENDER (2013), [http://www.americanbar.org/groups/legal\\_education/resources/statistics.html](http://www.americanbar.org/groups/legal_education/resources/statistics.html) [<http://perma.cc/R3NQ-PAHD>] [hereinafter 2013 ABA REPORT] (indicating that in 2013, women comprised 41% of full-time law faculty and 36% of tenure or tenure-track faculty); LAW SCH. ADMISSIONS COUNCIL, AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE UNITED STATES 14 (Oct. 2011), [http://www.americanbarfoundation.org/uploads/cms/documents/after\\_tenure\\_report-final\\_abf\\_4.1.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/after_tenure_report-final_abf_4.1.pdf) [<http://perma.cc/BM2C-NZ6Z>] [hereinafter 2011 LSAC REPORT] (indicating that about 25% of all tenured law professors were women in 2002–2003).

Although more men may apply for law teaching jobs (*see* Meera E. Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER L. & JUST. 352, 360 (2014)), any argument that the gender disparity is due to fewer potential women law professors is unsupported. Women have been attending law school at almost the same rate as men since roughly the 1990s. *See* AM. BAR ASS’N, Section on Legal Education and Admissions to the Bar, FIRST-YEAR-ENROLLMENT/TOTAL ENROLLMENT/DEGREES AWARDED, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/enrollment\\_degrees\\_awarded.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf) [<http://perma.cc/K84K-Z7TM>] (last visited Mar. 4, 2015); *Admitted Applicants by Ethnic and Gender Group*, LAW SCHOOL ADMISSIONS COUNCIL, <http://www.lsac.org/lsacresources/data/ethnic-gender-admits> [<http://perma.cc/XU7U-UBLH>] (last visited Mar. 4, 2015).

6 See, e.g., Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988).

7 Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 118 (1997) (quoting ARTHUR S. WILKE, *THE HIDDEN PROFESSORiate—CREDENTIALISM, PROFESSIONALISM, AND THE TENURE CRISIS* xii (1979)).

8 Jo Anne Durako, *Second Class Citizens in the Pink Ghetto*, 50 J. LEGAL EDUC. 562, 563 (2000) (quoting A.B.A. COMM’N ON WOMEN IN THE PROFESSION, *ELUSIVE EQUALITY: THE EXPERIENCE OF WOMEN IN LEGAL EDUCATION* 4 (1996)).

9 Stanchi & Levine, *supra* note 3, at 5.

10 Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 477 (2004). This perception plagues women in clinical and academic support positions as well. *See, e.g.*, Deborah Maranville, Ruth Anne Robbins & Kristen K. Tiscione, *Faculty*

Figure 1

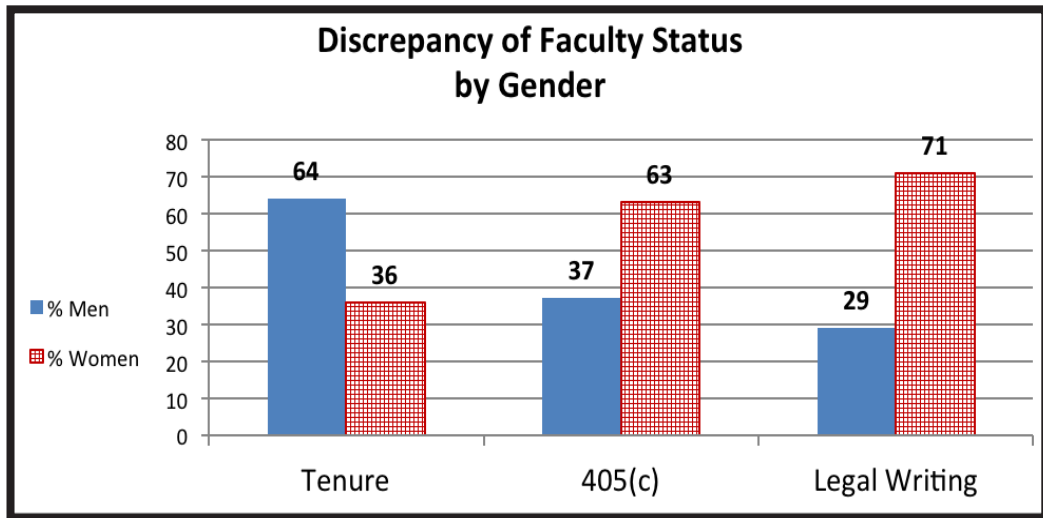


Figure 1 above illustrates the current disparity in status (i.e., rank or security of position) between male and female law faculty. As faculty status decreases, from tenure to 405(c)<sup>11</sup> and then to LRW faculty, most of whom are on short-term contracts,<sup>12</sup> the percentage of women increases from 36% to 71%.<sup>13</sup> Conversely, the percentage of men decreases from

*Status and Effectiveness*, in *BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD* (Deborah Maranville, Lisa Radtke Bliss, Carolyn Wilkes Kaas & Antoinette Sedillo López eds., 2015). Despite similar status issues between women in legal research and writing and clinical positions, this Article addresses the former group of faculty, with its own unique history and set of concerns.

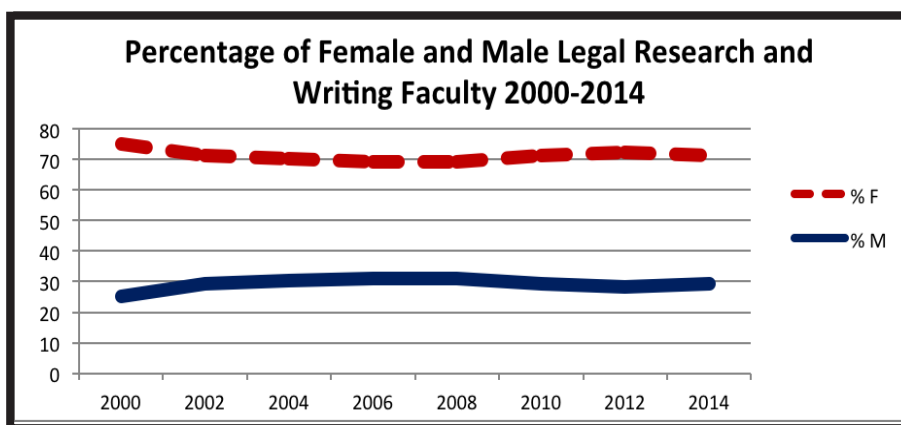
11 ABA Standard 405(c) requires that law schools provide “full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members.” AM. BAR ASS’N, REVISED STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 27, Standard 405(c) (2014–2015). [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/201406\\_revised\\_standards\\_clean\\_copy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201406_revised_standards_clean_copy.authcheckdam.pdf) [<http://perma.cc/K62R-N4LD>] [hereinafter ABA, 2014 REVISED STANDARDS AND RULES]. 405(c) status often translates into long-term, renewable contracts of at least five years for clinical faculty. *See id.* at 28, Interpretation 405-6. Most legal research and writing faculty do not have 405(c) status.

12 Although 35% of law schools report having some legal research and writing faculty with 405(c) status or on that track, 78% report having legal research and writing faculty on short-term contracts. *See* ALWD/LWI 2014 SURVEY, *supra* note 5, at 64.

13 *See* 2013 ABA REPORT, *supra* note 5; ALWD/LWI 2014 SURVEY, *supra* note 5, at 59.

64% to 29%. What is surprising is that the percentage of women teaching legal research and writing has hovered at the 70% mark at least since 2001.<sup>14</sup> (See Figure 2 below.) With respect to clinical faculty, an annual survey conducted by the Center for the Study of Applied Legal Education indicates that the percentage of women in clinical faculty positions has actually risen from 55.75% in 2008 to 63% in 2014.<sup>15</sup> This upsurge may be yet more evidence that women are experiencing barriers to entering law school academia through the traditional tenure route and accepting less secure, lower-paid positions instead.

Figure 2



Fewer women teach podium courses than men. When they do teach these courses, they earn significantly less than their male counterparts. LRW faculty, who are predominantly women, earn substantially less than both male and female podium faculty. Available data for 2014 suggest that female faculty teaching podium courses earn, on average, 77 to 80 cents on the dollar compared to their male counterparts, and LRW faculty as a whole earn 55 cents on that dollar.<sup>16</sup> (See Figure 3.) The Society of American Law Teachers conducts

14 See ALWD/Legal Writing Inst., REPORT[S] OF THE ANNUAL LEGAL WRITING SURVEY, Question 57 (2000–2014), <http://www.lwionline.org/surveys.html> [<http://perma.cc/D55S-SHL5>].

15 CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., 2013–14 SURVEY OF APPLIED LEGAL EDUCATION 39 (2014) and THE 2007–08 SURVEY OF APPLIED LEGAL EDUCATION 29 (2008), <http://www.csale.org/results.html> [<http://perma.cc/CV58-6HKW>].

16 See, e.g., John W. Curtis, *Persistent Inequity: Gender and Academic Employment*, AM. ASS'N OF UNIV. PROFESSORS 1, 5 (2011), [http://www.aaup.org/NR/rdonlyres/08E023AB-E6D8-4DBD-99A0-24E5EB73A760/0/persistent\\_inequity.pdf](http://www.aaup.org/NR/rdonlyres/08E023AB-E6D8-4DBD-99A0-24E5EB73A760/0/persistent_inequity.pdf) [<http://perma.cc/MXU7-V6TF>] (indicating that “since women are also overrepresented

an annual survey of law faculty salaries, but only a small fraction of schools respond to it. In 2014, for example, 56 out of 200 schools (28%) responded.<sup>17</sup> The highest-ranked, private law schools typically do not respond to the survey, and for that reason, the average tenured faculty salary is likely significantly higher. The average salary of law professors could be as high as \$172,677<sup>18</sup> at New York Law School, for example, and \$235,482 at Berkeley.<sup>19</sup> When the data are compiled by region, the highest average salary of legal research and writing directors is \$119,659, which is 80% of the known average salary of tenured faculty.<sup>20</sup>

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in low-paying part-time faculty positions, the gender gap in earnings is actually even larger than [20%]”); Jacqueline A. Berrien, Chair, EEOC, *Statement on the 50th Anniversary of the Equal Pay Act* (indicating that in 2012, on average, women earned 77% of men’s wages), [http://www.eeoc.gov/eeoc/newsroom/release/statement\\_equal\\_pay\\_2013.cfm](http://www.eeoc.gov/eeoc/newsroom/release/statement_equal_pay_2013.cfm) [<http://perma.cc/A62Z-4VMT>]; *Gender and Salary Study*, CASE WESTERN RESERVE UNIV. 19–20 (2011–2012), <http://www.case.edu/provost/ideal/doc/facsalanalysis2011-2012Finalv5%282%29.pdf> [<http://perma.cc/HSJ6-Q8BS>] (self-reporting significantly lower salaries for female law faculty, particularly those without tenure); 2011 LSAC REPORT, *supra* note 5, at 51 (indicating that tenured male law faculty earn twice what females earn at the high end of the pay scale); 2013-14 SALT Salary Survey, 2014 SALT EQUALIZER (Soc’y of Am. Law Teachers, St. Paul, Minn.), May 2014, at 1, <http://www.saltlaw.org/wp-content/uploads/2014/05/SALT-salary-survey-2014-final.pdf> [<http://perma.cc/47NM-PTC9>] [hereinafter EQUALIZER] (reporting the median base salary for tenured law faculty at fifty-six law schools nationwide, the average of which is about \$147,822); ALWD/LDI 2014 SURVEY, *supra* note 5, at 71 (indicating the average salary for legal research and writing faculty to be \$82,007) and 98 (indicating that the average salary of female LRW directors is 77% of the average salary of male LRW directors).

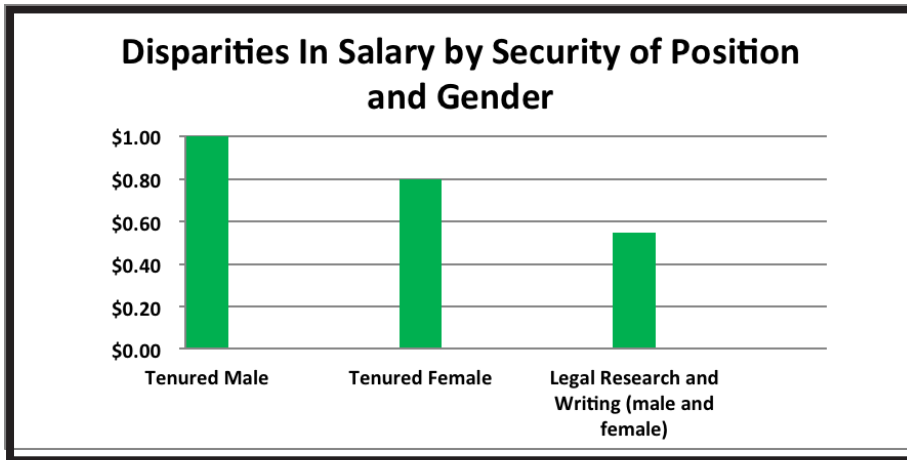
17 EQUALIZER, *supra* note 16, at 1.

18 David Savenijie, *10 Universities with the Highest Faculty Salaries*, EDUC. DIVE (Dec. 14, 2012), <http://www.educationdive.com/news/10-universities-with-the-highest-faculty-salaries/82288/> [<http://perma.cc/9FQV-RBBG>] (last visited Jan. 24, 2015).

19 David Lat, *How Much Does Your Law Professor Make?*, ABOVE THE LAW (Apr. 24, 2013), <http://abovethelaw.com/2013/04/how-much-does-your-law-professor-make-berkeley-law-edition/> [<http://perma.cc/QC3Z-9LC6>] (last visited Jan. 24, 2015).

20 2014 ALWD/LWI SURVEY, *supra* note 5, at 38; EQUALIZER, *supra* note 16.

Figure 3



The American Bar Association accreditation rules permit law schools to maintain this status quo.<sup>21</sup> While legal research and writing is one of only two specific courses required for ABA accreditation, and law schools must also provide “at least one additional writing experience after the first year,”<sup>22</sup> the rules regarding faculty provide no incentive for law schools to provide better security of position for faculty teaching those courses.<sup>23</sup> This is largely a function of ABA Standard 405 that directs law schools to establish a faculty policy “with respect to academic freedom and tenure,”<sup>24</sup> but exempts LRW faculty. LRW faculty are covered under a different rule, 405(d), which states that law schools need only provide “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 . . . and (2) safeguard academic freedom.”<sup>25</sup>

21 See, e.g., Stanchi & Levine, *supra* note 3, at 13–16.

22 ABA, 2014 REVISED STANDARDS AND RULES, *supra* note 11, at 15, Standard 303(a)(2).

23 ABA, 2014 REVISED STANDARDS AND RULES, *supra* note 11, at 14, Standard 303(a)(1) (professional responsibility) and 15, Standard 303(a)(2) (legal research and writing).

24 ABA, 2014 REVISED STANDARDS AND RULES, *supra* note 11, at 27–28, Standard 405.

25 ABA, 2014 REVISED STANDARDS AND RULES, *supra* note 11, at 27–28, Standard 405. For an article on the lack of justification for treating clinical and legal research and writing faculty differently, see Melissa H. Weresh, *Form and Substance: Standards for Promotion and Retention of Legal Writing Faculty on Clinical*



The Interpretation of Section 405(d) goes even further to undermine the status of LRW faculty by stating that it “does not preclude the use of short-term contracts for legal writing teachers, nor does it preclude law schools from offering fellowship programs designed to produce candidates for full-time teaching by offering individuals supervised teaching experience.”<sup>26</sup> Most law schools have taken advantage of this interpretation, and some of the highest-ranked schools still use fellows to teach legal research and writing as stepping-stones to podium positions.<sup>27</sup> Thus, despite the recognized importance of teaching these skills, the faculty who teach them continue to have the least security of position under Standard 405. Twenty-one percent of clinical faculty (63% of whom are female) are tenured,<sup>28</sup> while 10% of LRW faculty (71% of whom are female) likely have tenure.<sup>29</sup> Only twelve schools hire LRW faculty exclusively on a tenure track.<sup>30</sup>

The situation for legal research and writing (and clinical and academic support) faculty is likely to get worse. The ABA recently rejected efforts to abolish or limit tenure under Standard 405(b)<sup>31</sup> and made no changes to 405(d). It did, however, impose new requirements for “one or more experiential course(s) totaling at least six credit hours,”<sup>32</sup> on top of the relatively new requirement that law schools establish and publish learning outcomes in all aspects of legal education.<sup>33</sup> Experiential courses include simulation courses, clinics, and field placement,<sup>34</sup> and simulation courses are those that provide “substantial experience not

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*Tenure Track*, 37 GOLDEN GATE U. L. REV. 281, 283 (2007).

26 ABA, 2014 REVISED STANDARDS AND RULES, *supra* note 11, at 27–28, Standard 405.

27 See, e.g., Harvard Law School’s *Climenko Fellowship and First-year Legal Research and Writing Program*, <http://www.law.harvard.edu/academics/degrees/jd/fylrwp/climenko-fellowship/index.html> [<http://perma.cc/7UJD-9XPU>].

28 See 2013–14 SURVEY OF APPLIED LEGAL EDUCATION, *supra* note 15, at 40.

29 This figure is a good-faith estimate based on answers to Questions 10–11, 65, and 71(b) on the ALWD/LWI 2014 SURVEY, *supra* note 5. Calculations are on file with the authors.

30 ALWD/LWI 2014 Survey, *supra* note 5, at 5.

31 Standard 405(b) requires law schools to “have an established and announced policy with respect to academic freedom and tenure.” ABA, 2014 REVISED STANDARDS AND RULES, *supra* note 11, at 27–28, Standard 405.

32 ABA, 2014 REVISED STANDARDS AND RULES, *supra* note 11, at 15, Standard 303(a)(3).

33 ABA, 2014 REVISED STANDARDS AND RULES, *supra* note 11, at 14, Standards 301(b) and 302.

34 ABA, 2014 REVISED STANDARDS AND RULES, *supra* note 11, at 15, Standard 303(a)(3).

involving an actual client<sup>35</sup> such as legal research and writing (although the same course may not be used to satisfy more than one requirement under Standard 303).<sup>36</sup> Additional skills training requirements, coupled with current economic challenges due to decreases in applications and enrollment, may tempt law schools to rely on the faculty with the most experience at providing this training and who are also those with the least status and compensation. Anecdotal evidence of this trend is growing.<sup>37</sup> At least one law school has considered increasing the teaching load for its contract faculty without additional compensation. Tenured faculty or law school administrations facing serious deficits may also consider eliminating contract faculty positions as a cost-savings measure and asking those contract faculty left to assume their responsibilities. Another school has terminated and not replaced a legal research and writing professor with 405(c) status without faculty notice or input. It is conceivable and unfortunate from the students' standpoint that some administrators and faculty would support replacing legal research and writing faculty with teaching fellows or adjuncts<sup>38</sup> regardless of the negative impact this would have on student learning.<sup>39</sup>

## II. Rationale for the Current Two-Track System

The minimal protections currently afforded clinical and LRW faculty have been hard won. Although the Carnegie Foundation for the Advancement of Teaching identified the need for skills training in law schools as early as 1921, law schools have consistently resisted broadening their focus to include it.<sup>40</sup> A precursor to current Section 405(c) for clinicians that stated law schools “should” afford “a form of security of position reasonably

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35 ABA, 2014 REVISED STANDARDS AND RULES, *supra* note 11, at 15, Standard 303(a)(3).

36 ABA, 2014 REVISED STANDARDS AND RULES, *supra* note 11, at 15, Interpretation 303-1.

37 Given the lack of security that professors in this situation face, no reportable data are available.

38 See, e.g., David Frakt, *Cost Cutting in an Age of Declining Law School Enrollment*, FACULTY LOUNGE (Jan. 15, 2015), <http://www.thefacultylounge.org/2015/01/cost-cutting-in-an-age-of-declining-law-school-enrollment.html> [<http://perma.cc/KED8-9MTX>] (questioning the value of full-time legal writing “instructors”).

39 See Arrigo, *supra* note 7, at 136–37; Susan P. Liemer & Jan M. Levine, *Legal Research and Writing: What Law Schools Are Doing and Who is Doing the Teaching*, 9 SCRIBES J. LEGAL WRITING 113, 129–33 (2003); David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 130–36 (2003); David Horton, *Fellows Versus Permanent Legal Writing Faculty*, PRAWFSBLAWG (Oct. 22, 2010), <http://prawfsblawg.blogs.com/prawfsblawg/2010/10/fellowships-versus-permanent-legal-writing-faculty.html> [<http://perma.cc/S39P-L7G8>].

40 Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 186 (2008).

similar to tenure” was not adopted until 1984.<sup>41</sup> The “should” was replaced with “shall” in 1996,<sup>42</sup> when the ABA also adopted then Section 405(d), requiring that law schools “provide conditions sufficient to attract “well-qualified” legal research and writing faculty.<sup>43</sup> In the last several years, market forces and external public pressure seem to have persuaded law schools to focus sincerely on preparing students to practice law.<sup>44</sup>

Law schools began to incorporate non-clinical skills training in their required curricula in the 1970s and 1980s.<sup>45</sup> Because these courses were regarded as largely remedial, unintellectual, and tedious, both administrators and faculty wanted to staff them at little expense and, consequently, with low-status positions.<sup>46</sup> At the same time, there was a large supply of female lawyers in need of work and whose family obligations likely required that they take more flexible, yet lower paying positions.<sup>47</sup> Undervalued from their inception and staffed predominantly with women, LRW positions have now become essentially “female.”<sup>48</sup> In feminist jurisprudential terms, once a job becomes female, it is “mythologized as easier, unskilled and worthless.”<sup>49</sup>

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41 *Id.* at 205.

42 *Id.* at 212.

43 Marina Angel, *The Glass Ceiling for Women in Legal Education*, 50 J. LEGAL EDUC. 1, 4–5 (2000).

44 *See, e.g.*, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, AM. BAR ASS’N, FINAL REPORT AND RECOMMENDATIONS 1, 1 (2014), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf) [<http://perma.cc/NT7L-YF8T>] (“At present, the system faces considerable pressure because of the price many students pay for their education, the large amount of student debt, consecutive years of sharply falling applications, and dramatic changes, possibly structural, in the market for jobs available to law graduates.”); Katherine Mangan, *Law Schools Revamp Their Curricula to Teach Practical Skills*, 57 CHRON. HIGHER EDUC. 1 (Mar. 4, 2011); David Segal, *What They Don’t Teach Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), [http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&_r=0) [<http://perma.cc/5ALE-9M6Y>].

45 *See, e.g.*, Pamela Edwards, *Teaching Legal Writing as Women’s Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN’S L.J. 75, 79–80 (1997).

46 *See, e.g., id.* at 79–85.

47 Stanchi & Levine, *supra* note 3, at 7–9.

48 Stanchi, *supra* note 10, at 475.

49 Stanchi, *supra* note 10, at 475.

Despite the ABA's adoption of 405(c), many reasons are given to maintain the two tracks for legal research and writing: writing "cannot be taught";<sup>50</sup> legal research and writing faculty are less credentialed,<sup>51</sup> less smart, and work less hard (if they were smarter, they would not be teaching writing);<sup>52</sup> legal research and writing teachers have no need for academic freedom since they teach a technical skill,<sup>53</sup> and their scholarship is not of the same caliber as traditional scholarship. These views, particularly that writing is an innate skill that serves only to express fully formed ideas, persist "in the face of cogent analyses that refute them."<sup>54</sup> Podium faculty with little experience teaching writing (and who may not have had a first-year writing course in law school) often still assume that legal research and writing courses teach grammar, punctuation, and Bluebooking.<sup>55</sup> And certainly the expense of equal status, which potentially includes equal compensation and voting rights,<sup>56</sup> is at the crux of the problem.

### III. Benefits of a Unitary Track

Disparities in status and compensation, both by-products of the two-track system, have a detrimental effect on law students, legal education, and the profession of law. First, because of the short-term status of LRW faculty positions, students do not get the benefit

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50 J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 47 (1994).

51 Arrigo, *supra* note 7, at 155. For an article disputing the lesser credentials of legal research and writing faculty, see Susan P. Liemer & Hollee S. Temple, *Did Your Writing Instructor Go to Harvard?: The Credentials of Legal Writing Faculty at Hiring Time*, 46 U. LOUISVILLE L. REV. 383 (2008).

52 Arrigo, *supra* note 7, at 159; Kristen Konrad Robbins (now Tiscione), *Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty*, 3 J. ALWD 108, 111 (2006).

53 Edwards, *supra* note 45, at 80; Rideout & Ramsfield, *supra* note 50, at 44–48.

54 Edwards, *supra* note 45, at 80.

55 The belief that expression is simply a matter of style dates back to Plato, who thought the art of persuasion—legal argument—lacked intellectual substance. *See, e.g.*, PLATO, *Phaedrus*, in COMPLETE WORKS 796–97, §§ 450d–451d (John M. Cooper & D.S. Hutchinson eds., Hackett Publ'g. Co. 1997). In law school, this attitude manifests in the perception that legal research and writing faculty teach students how to express knowledge ("the law") gained from their doctrinal faculty. Edwards, *supra* note 45, at 82; Tiscione, *supra* note 52, at 114–15. For an article on the generative nature of writing, see Linda L. Berger, *Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155 (1999).

56 *See, e.g.*, Arrigo, *supra* note 7, at 171.

of teachers who have a long-term investment in the school and its graduates.

Second, law schools send subtle messages to students that despite what they have heard from practitioners about the importance of their legal research and writing course, it is not as important as their other courses. Legal research and writing is often under-credited,<sup>57</sup> particularly at higher-ranked schools, and its faculty usually have lesser titles, such as professor of legal writing, lecturer, or instructor.<sup>58</sup> By devaluing skills training, law schools ignore what we now know to be true—that knowledge is created as a function of expression.<sup>59</sup> Students understandably put less time and effort into a class they perceive the administration values less than their podium courses—a dynamic they find confusing and that does little to prepare them for practice.

Third, as a practical matter, the lesser status of LRW faculty harms students when they seek internships, externships, clerkships, and permanent employment. Often a student's LRW professor knows that student's abilities as well as any other professor. However, the lesser status of LRW faculty affects the student's willingness to seek a recommendation from them as well as the weight of that opinion outside the academy.

Fourth, the two-track system places unnecessary barriers between subject areas of law and misleads students about the nature of legal writing. The rhetoric adopted by many law school faculties that identifies certain courses (e.g., torts, constitutional law, property) as “doctrinal” or “substantive” and legal research and writing as “skills” encourages the view that legal writing does not teach doctrine or substance. To the contrary, teaching the substance of law—including doctrine, statutory construction, and common law analysis—is central to every legal writing course.<sup>60</sup> Legal writing “inhabits both the realm of substance and skill, theory and practice, revealing that the mutually exclusive dichotomy between doctrine and writing is false.”<sup>61</sup> Law faculties and students could benefit from robust discourse about

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57 The majority of law schools award four or five credits for a full year in legal research and writing. ALWD/LWI 2014 SURVEY, *supra* note 5, at 7–8.

58 ALWD/LWI 2014 SURVEY, *supra* note 5, at 65.

59 See, e.g., Berger, *supra* note 55.

60 See, e.g., Linda H. Edwards, *Legal Writing: A Doctrinal Course*, 1 SAVANNAH L. REV. 1, 5 (2014); Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181, 194–97 (2014); Lucille A. Jewel, *The Doctrine of Legal Writing: Book Review of Linda H. Edwards's Readings in Persuasion: Briefs that Changed the World*, 1 SAVANNAH L. REV. 45 (2014).

61 Jewel, *supra* note 60, at 49 (“Legal doctrine as orthodoxy rests on an impoverished conception of legal knowledge and law practice.” Legal knowledge is “not an abstract system or scheme of rules” but is instead an “inherently unstable structure of thought and expression . . . built upon a distinct set of dynamic and dialogic

their subject areas; mutual respect would foster support and encouragement of colleagues' research and teaching. Treating legal research and writing as separate and different from "doctrinal" teaching deprives legal education as a whole of the potential benefits of this form of interaction.

Finally, employers need well-prepared graduates. When asked what skills are most important to be an effective advocate, practicing lawyers inevitably cite legal analysis, writing, and communication as among the most important. Lawyers and judges are frequently surprised by the lack of good analytical and writing skills of their new lawyers, and law students often return from summer employment wishing they had understood how important LRW would be to them. Given the emphasis, both in terms of credits and prestige, on podium courses, law students understandably make choices that impact their skills learning.

If current economic conditions demand that law graduates have better skills, then law schools should do more than just require increased experiential learning. They should staff those classes with professors who meet the same job requirements and demands as their tenured counterparts and offer them the same job security and salary. Doing so will encourage stable, innovative writing programs. Conversely, staffing writing programs with adjuncts, recent law school graduates, or poorly-paid short-term contract teachers leads to higher turnover. Most law teachers need two to three years to gain the experience needed to develop effective teaching strategies for the range of students they meet in the classroom.

#### IV. Obstacles to Integration<sup>62</sup>

One obstacle to integration is the belief that legal research and writing faculty are not as well educated or credentialed as podium faculty.<sup>63</sup> In a recent study, traditional credentials

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tensions.”).

62 As the scholarship we cite here demonstrates, most of the obstacles discussed here are not new.

63 See, e.g., Arrigo, *supra* note 7, at 155–59; Liemer & Temple, *supra* note 51, at 383; Mitchell Nathanson, *Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor*, 11 J. LEGAL WRITING 329, 353 (2005) (explaining that as podium faculty continue to hire podium faculty “who attended law schools that were more likely to consider their legal writing faculties as somewhat inferior . . . it is only natural that these faculties would adopt a similar view of their present legal writing colleagues”); Subotnik, *supra* note 4, at 876 (questioning whether legal research and writing faculty are “as trained and productive as doctrinal faculty”); AnonProf, Comment to *Cost Cutting in an Age of Declining Law School Enrollment*, *supra* note 38 (Jan. 15, 2015, 4:15 PM), <http://www.thefacultylounge.org/2015/01/cost-cutting-in-an-age-of-declining-law-school-enrollment.html> [<http://perma.cc/5ALE-9M6Y>] (suggesting a common belief

of podium faculty were compared to LRW faculty, specifically law school degree, law review or moot court participation, and clerkships. The study found that “many more legal writing professors have traditional tenure-line credentials than actually hold tenure-line appointments.”<sup>64</sup> The real question is to what extent traditional credentials are the best predictor of good teachers and successful teaching careers in any subject area.

Another obstacle is a strong belief among many that legal research and writing is not a distinct discipline, fueled perhaps by misconceptions about what is being taught. This is an extension of the belief that writing is merely a vehicle for thought, and it dates back to Plato. Plato’s views—that knowledge and its expression are separate and that persuasion manipulates truth<sup>65</sup>—were implicitly incorporated into American legal education with the adoption of Langdell’s “scientific approach” to discovering true principles of law.<sup>66</sup> Podium faculty can thus be perceived as teaching “the law,” and legal research and writing faculty teaching its expression.<sup>67</sup> Despite prevailing postmodern views on the relativity of truth, “the indeterminacy of law,”<sup>68</sup> and the artificial distinction between theory and practice, the common perception persists: that legal writing merely conveys, rather than creates, truth.

The third obstacle is the related belief that the subject of legal research and writing cannot form the basis for traditional scholarship. Since the 1970s, legal research and writing faculty have amassed an impressive body of increasingly sophisticated scholarship.<sup>69</sup>

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that legal research and writing faculty “do not tend to have as impressive resumes as the doctrinal professors”).

64 Liemer & Temple, *supra* note 51, at 425 (finding that 28% of the legal writing faculty surveyed have J.D. degrees from top-twenty law schools, 8% have other advanced degrees from top twenty law schools, but only 17% hold tenure-track positions).

65 See, e.g., PLATO, *Gorgias*, in COMPLETE WORKS, *supra* note 55, at 96–97, §§ 450d–451d and *Phaedrus*, *supra* note 55, at 539, § 262c.

66 Bruce A. Kimball, *Christopher Langdell: The Case of an ‘Abomination’ in Teaching Practice*, 20 NEA HIGHER EDUC. J. 23, 25 (2004).

67 Tiscione, *supra* note 52, at 114–15.

68 See, e.g., DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (2004); ROBERTO UNGER, KNOWLEDGE AND POLITICS (1975); Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1518 (1991).

69 See, e.g., Linda L. Berger, Linda H. Edwards & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 J. LEGAL WRITING 521 (2010) (describing the first, second, and third generations of legal research and writing scholarship); Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming A Professor of Legal Writing*, 26 FLA. ST. U. L. REV. 1067, 1082 (noting that “the phenomenal intellectual growth of the field continues to accelerate”); Michael R. Smith, *The Next Frontier:*



The subject of legal research and writing is as broad as the subject of rhetoric, yielding scholarship on law school pedagogy applicable both to skills and doctrinal courses, the profession of skills teaching, legal writing scholarship and its evolution as a body of scholarship, and the substance of legal writing itself.<sup>70</sup> Yet legal research and writing faculty often encounter the view that their scholarship is not intellectual, should not count toward tenure or long-term contract review, and is not fit for publication in mainstream law journals.<sup>71</sup> If the goals of scholarship can be summarized as contributing to and advancing knowledge in a particular subject of study, informing a scholar's teaching in a way that benefits students, and having a positive, lasting impact outside the academy, legal research and writing scholarship achieves those goals.

A fourth obstacle often cited by law school deans and faculty is market forces.<sup>72</sup> Perhaps due to the increased supply of female lawyers seeking flexible employment in the 1970s and 1980s (and the unwillingness of podia faculty to teach writing), law schools were able to hire LRW faculty at salaries below those paid to traditional law faculty.<sup>73</sup> And as long as lawyers continue to apply for lower paying legal research and writing positions, the argument might go, the market is functioning efficiently. The problem is that an ample supply of applicants for podium positions has not had the same effect in reducing their starting salaries.<sup>74</sup> Where a “substantial majority of employers do whatever they want and

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*Exploring the Substance of Legal Writing*, 2 J. ALWD 1 (2004) (cataloguing various genres of legal research and writing scholarship, focusing on scholarship on the substance of legal writing).

70 See, e.g., Berger, Edwards & Pollman, *supra* note 69 (describing the field of legal writing scholarship as rooted in rhetorical theory as it relates to the composition and interpretation of legal texts); Smith, *supra* note 69 (describing scholarship on the substance of legal writing addressing best practices, the nature of legal writing audiences, the rhetorical analysis of texts, ethics and professionalism, legal method, and appellate practice and procedure).

71 See, e.g., Toni M. Fine, *Legal Writers Writing: Scholarship and the Demarginalization of Legal Writing Instructors*, 5 J. LEGAL WRITING 225, 234 (1999) (“There is little doubt that the legal academy today looks more generously on articles that are more theoretical than practical.”); Nathanson, *supra* note 63, at 334 (explaining that “law review articles that are practice-based, as opposed to theoretical, are generally less well-regarded”); Stanchi, *supra* note 10, at 485; Subotnik, *supra* note 4, at 877 (seeming to agree that “scholarship by legal writing professionals has in fact not been particularly intellectual”).

72 See, e.g., Arrigo, *supra* note 7, at 171–72; Durako, *supra* note 8, at 584; Liemer & Temple, *supra* note 51, at 387; Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 348 (2000).

73 See, e.g., Stanchi & Levine, *supra* note 9, at 6–9.

74 See Durako, *supra* note 8, at 584; Neumann, *supra* note 72, at 348 (“[Where a] substantial majority of employers do whatever they want and use the market as an excuse, a free market is—to that extent—not



use the market as an excuse, a free market is—to that extent—not actually operating.”<sup>75</sup> Finally, as Maureen Arrigo stated eighteen years ago,

If any employers have an ethical obligation to rise above mere capitalistic “maximization of utility” by getting the most work for the least pay . . . it ought to be the very institutions in which men and women are being trained to identify and combat injustice.<sup>76</sup>

Similarly, the fact that many law schools are struggling to balance their budgets is no excuse to continue to treat legal research and writing faculty differently.

A fifth obstacle is a sort of social inertia. At many law schools, podium and LRW faculty work side-by-side mirroring a sort of parallel play.<sup>77</sup> Aside from individual friendships that inevitably do form and without apparent conflict or hostility, they can work “together” for years without ever really interacting as groups. It is common for faculty of both groups to self-segregate at faculty meetings, workshops, and luncheons. For this reason, they remain largely unaware of each other’s situations, personal beliefs, assumptions, etc. When such discussions do occur, misunderstanding persists on both ends of the spectrum—from believing legal research and writing faculty are compensated the same as podium faculty to believing that legal research and writing faculty teach grammar and citation.

Under current ABA Standard 405, there is no incentive for abolishing the two-track system. By excluding LRW faculty from 405(a), which requires schools to establish and maintain conditions “adequate to attract and retain a competent faculty,”<sup>78</sup> the ABA has legitimized a status hierarchy designed to preserve the power and “purity” of the higher-ranked group.<sup>79</sup> Title, security of position, compensation, and faculty entitlements are the cultural capital withheld from LRW faculty both to prove their inferiority and to make

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actually operating.”).

75 Neumann, *supra* note 72, at 348.

76 Arrigo, *supra* note 7, at 186–87.

77 We can imagine, although not speak from personal experience, that this phenomenon occurs with some clinicians, librarians, and academic support faculty.

78 ABA, 2014 REVISED STANDARDS AND RULES, *supra* note 11, at 27–28, Standard 405.

79 See Stanchi, *supra* note 10, at 471.

existing law school hierarchies appear merit-based.<sup>80</sup>

Finally, one might think that the new curricular emphasis on training students for law practice would legitimize the value of skills training and begin to change attitudes toward those who teach skills. Perhaps because this shift is the result of external pressures and economic downturns, the opposite is occurring. Increased institutional anxiety about shrinking law schools has led to infighting and almost a “save yourself” mentality, at least in the blogosphere.<sup>81</sup> Yet reducing or eliminating full-time legal research and writing faculty would represent a huge step backwards for writing instruction in law schools at a time when incoming students are considered less academically prepared.<sup>82</sup>

### CONCLUSION

For the above reasons, altering the long-standing culture of inequity faced by predominantly female LRW, as well as clinical, faculty has been difficult and may become even more challenging. Dismantling the two-track system is the first step toward true and permanent progress. We propose that this process take the following form:

- Partner with faculty, employers, and alumni to encourage the ABA to amend Standard 405;
- Regardless of ABA Standards, improve the status of existing LRW directors and faculty by giving them the opportunity for tenure or tenure-like security that includes academic freedom and governance rights;
- Attract better credentialed candidates for LRW directors and faculty by

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80 See Stanchi, *supra* note 10, at 481.

81 See, e.g., David Barnhizer, *A University President's Frank Look at Law Schools*, LAWNEXT (Feb. 5, 2015), <http://lawnext.org/a-university-presidents-frank-look-at-law-schools/> [http://perma.cc/6KEG-U2YK] (“Legal Writing and clinical programs need to be looked at carefully in terms of their resource intensity and the extent to which LW particularly has come to have a heavy influence on law school decision making.”) (last visited Mar. 4, 2015); Frakt, *supra* note 38 (“Back in the days before full-time legal writing professors, clinical/experiential opportunities for every student, robust academic support programs, and burgeoning faculty and administrator salaries, law schools used to be very inexpensive to run, and tended to generate a significant surplus.”); *Just saying . . .*, Comment to Frakt, *supra* note 38 (Jan. 15, 2015, 3:38 PM) (“There is no reason why legal writing has to be taught by full time instructors and not adjuncts. Faculties need to be cut in relation to the decline in enrollment . . .”).

82 See, e.g., Susan Stuart & Ruth Vance, *Bringing a Knife to the Gunfight: The Academically Underprepared Law Student & Legal Education Reform*, 48 VAL. U. L. REV. 41 (2013); Symposium, 53 DUQ. L. REV. 1 (2015) (symposium issue on *Teaching the Academically Underprepared Law Student*).

improving the status of those positions at hiring time;

- Commit to eliminating the salary gap between male and female law faculty;
- Commit to eliminating the salary gap between podia and LRW faculty, including Directors;
- Encourage and mentor scholars in LRW director and faculty positions by including them in faculty conferences, workshops, and symposia; and
- Foster positive contact among podia and LRW faculty.

We are confident that these changes will bring about qualitative changes in attitude about the value LRW faculty bring to legal education and mutual respect among all faculty. Going forward, the burden is on both podia and pens to bridge this gap.