No Matter How Loud I Shout: Legal Writing as Gender Sidelining

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"*Hello. My name is Leslie . . . and I love teaching legal writing." A lump in my throat wells up as I awkwardly wait for the ailing and supportive community to reply in unison, "Hi Leslie." I take my seat*. This is what it feels like every time I mention to someone outside the legal writing community that I actually chose to teach legal writing. I am frequently met with empathy (or smugness) as though I have been afflicted by some genetic disposition that rendered me helpless to make a different choice. I suspect many of my colleagues in the discipline can relate. There is an internal conflict and frustrating tension between passionately loving the subject matter we teach and, paradoxically, feeling the need to defend our reputation against a traditionally doctrinal outsider who may presume we are simply unqualified to teach across the broader curriculum. This tension can create layers of exhaustion.

To start, there exists a false need to parade our accolades of law review, moot court, clerkships, legal practice, and so forth, to demonstrate our credibility within the academy. Moreover, legal writing faculty often wade through the drudge of defending our scholarship as real scholarship,[1] and strategically navigating the narrative that our work (particularly if it falls outside the legal writing discipline) is an attempt to breach the intellectual barrier that divides the haves and the have-nots. This academic unsteadiness for legal writing faculty is the socially constructed byproduct of legal writing training falling outside the masculine vision of traditional case method study for law schools,[2] combined

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1. *See* Kristen K. Tiscione, *The Next Great Challenge: Making Legal Writing Scholarship Count As Legal Scholarship*, 22 J. Legal Writing Inst. 50, 51 (2018).

2. Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a 'Woke' Legal Academy?*, 21 Scholar 255, 270-1 (2019) (exposing popularity of Christopher

with the overrepresentation of women as legal writing faculty. In this way, legal writing is gender sidelined.[3]

In this essay, I argue that viewing legal writing as a mode of gender sidelining uncovers the urgency for law schools to provide unitary tenure for legal writing programs across all law schools. I recognize that many legal writing faculty are employed under ABA Standard 405(c),[4] a seemingly second-best option to traditional tenure tracks. As Professor Kathy Stanchi comments, however, while Standard 405(c) offers some respite from "job insecurity, intellectual disparagement, and pay inequity,"[5] it ultimately serves as an "institutionalized bar to professional advancement divorced from any reasonable measure of merit."[6] This essay takes Stanchi's framing of 405(c) as an irrational categorical exclusion of tenure despite meritorious performance, and extends her reasoning as further evidence of gender sidelining.

Well-established research, from both the ABA and legal scholars, demonstrates the longstanding marginalization and inequitable status of legal writing faculty within the academy. As evidence of this inequity, there has been a rise in conversion of legal writing programs to tenure-track positions.[7] And this rise toward parity is the only systemic gesture that can combat the gendered barrier of white males who dominate the legal academy.

It is no secret that women are overrepresented as legal writing faculty, with many still being untenured after years of experience. Still unique is the position

Langdell's traditional case method study as a strategic and sanitary response to an "Industrial America" that needed "legal protections [in order for capitalism] to survive," noting, "The most heavily weighted courses in Langdell's Gilded Age curriculum remain a fixture of the 1L legal curriculum to this day: Property, Equity (Equitable Remedies), Contracts, and Torts. These courses endure as a reflection of and tool to maintain the imperialist, capitalist, White supremacist patriarchy.").

3. The phrase was popularized in legal scholarship by Professor Jessica Fink (California Western School of Law), in Jessica Fink, *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 Stan. L. & Pol'y 57, 60 (2018), and was the subject of the 2018 Gender Sidelining Symposium hosted by California Western School of Law.

4. "Full time clinical faculty members must be afforded a form of security of position reasonably similar to tenure, and non-compensatory prerequisites reasonably similar to other full-time faculty members." While this provision applies to clinicians, "many law schools have chosen to place legal writing faculty on 405(c) status and have benefited from doing so." Melissa H. Weresh, *Best Practices for Protecting Security of Position for 405(c) Faculty*, 66 J. Legal Educ. 538, 538, 541 (2017) (discussing best practices in interpreting "reasonably similar to tenure" under 405(c) for purposes of aiding security of position for clinical and legal writing faculty).

5. Kathryn Stanchi, *The Problem with ABA Standard 405(c)*, 66 J. Legal Educ. 558, 558 (2017).

6. *Id.*

7. Since 2018, the following schools converted to tenure-track positions for legal writing professors: University of New Mexico School of Law, Southern University Law Center, Georgetown Law, and Suffolk University Law School. They join the now 46 tenure legal writing programs (including unitary, programmatic or special) in the country. *See* The Professional Status Committee and Status-Related Advocacy, Schools with Tenure Eligibility for LRW, Legal Writing Inst., https://www.lwionline.org/resources/status-related-advocacy (last visited April 27, 2020) (February 2020 List contains 46 schools) (on file with author)).

of women and men of color who chose to teach legal writing, as they are twice marginalized due to race and status. In short, if white males dominate the legal academy in the same way they dominate the legal profession,[8] then waving my accolades in front of my doctrinal colleagues as an act of visibility and credibility is futile, no matter how loud I shout.

The legal profession has been singing the tune of diversity and inclusion for decades. While there has been some movement for traditionally marginalized groups,[9] these have only been small victories in a sizable and very long war. Rarely (if ever) has a marginalized group in American history gained upward movement without some influence by the privileged dominant group.[10] To this point, Angela Onwuachi-Willig's recent essay highlights the frustration of women of color in the current #MeToo movement, which regained resurgence only after a white woman tweeted the now popular hashtag originally coined by a black woman a decade earlier.[11]

What a gender sidelining framework highlights is the unique challenge facing marginalized groups—being subject to subtle yet pernicious forms of unequal treatment[12]—that beckon systemic and institutional influence to

8. *See A Current Glance at Women in the Law* 2 (Apr. 2019) (noting that men make up sixty-two percent of the legal profession), https://www.americanbar.org/content/dam/aba/administrative/women/current_glance_2019.pdf; and *American Bar Association, ABA National Lawyer Population Survey 10-Year Trend in Lawyer Demographics (2019)*, https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf (noting that men make up sixty-four percent, and Caucasians eighty-five percent, of the legal profession) (last visited April 9, 2020).

9. The ABA provides a resource that offers recent statistics on its members with a special focus on persons with disabilities, minorities, and women. *Legal Profession Statistics*, https://www.americanbar.org/about_the_aba/profession_statistics/ (last visited April 27, 2019).

10. Both the LGBTQ and women's rights movements owe their advance, in part, to white gay men and white women, respectively. *See e.g.*, Neo Khuu, *Obergefell v. Hodges: Kinship Formation, Interest Convergence, and the Future of Lgbtq Rights*, 64 UCLA L. Rev. 184, 198 (2017) ("pluralist advocates expose how the flip from minority to majority support of marriage equality was a product of upper-class gay white men using their dominant position and money to mold the priorities of the LGBTQ movement."); Gemma Donofrio, *Exploring the Role of Lawyers in Supporting the Reproductive Justice Movement*, 42 N.Y.U. Rev. L. & Soc. Change 221, 221 (2018) ("At the same time, the reproductive rights movement largely prioritized the needs of middle- and upper-class white women, often excluding historically marginalized groups.").

11. *See* Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 Yale L. J. Forum 105, 106 (2018) ("On October 15, 2017, the #MeToo movement exploded onto the popular media stage after actress Alyssa Milano asked Twitter users to "write 'me too' as a reply to [her] tweet" if they had "been sexually harassed or assaulted. . . . Along with millions of affirming responses to Milano's tweet, there were also critiques of her request, namely from women of color who were upset that—yet again—a white woman was receiving credit for an idea originated by a woman of color. In their responses to Milano's call for "me too" tweets, these women highlighted not only that the phrase "me too" was originally coined by a black woman, Tarana Burke, more than ten years prior, but also that Burke had never received anywhere near the same level of support that white feminists like Milano received from the general public.").

12. I attribute this notion of describing discrimination as subtle and pernicious to Jessica Fink.

compel change. For example, due largely to Standard 405(c), many legal writing faculty (again, largely female) have meager voting rights, static course loads, little influence on institutional governance, and pay disparity.[13] Thus, not only are these faculty members without traditional discrimination recourses, but their unequal treatment may hinder their ability to advance and flourish in an academy dominated by white men. Needless to say, if white men were largely teaching legal writing, issues of status inequality would be tenuous.

I recognize that the inequality facing legal writing faculty is not novel. However, as this essay suggests, a gender sidelining framework demonstrates the need for a creative resolve that is bigger than any single community. To start, the legal writing community can take steps toward elevating our discipline by providing fundamental training for practitioners and adjuncts seeking to become full-time legal writing faculty.[14] For example, prospective faculty need training on how to effectively deliver job talks that both elevate the discipline of legal writing and inform the traditional podium faculty as to the pedagogy and the interdisciplinary and integral foundations of legal writing across other first-year courses. Further, junior faculty would benefit from education on the need for and the value of professional development by way of conference participation, scholarship, and organizational participation in the legal writing community and more.

Ultimately, however, the voice of the larger institution is paramount toward change for legal writing faculty. It is the *law school* members who must believe in the value of a strong legal writing program if the legal academy intends to prepare law students with practical skills for the legal profession. This necessitates doing away with inferior status of legal writing faculty and providing full parity with other professors of law. Anything less is insincere and demoralizing. It is the *law school* that must afford legal writing faculty with the same professional development and mentorship as entry-level doctrinal faculty. This fosters a value-driven collaboration that signals supportive vision toward professional growth. Finally, it is the *law school* that must resist using legal writing courses as a steppingstone into podium faculty positions. These positions traditionally

Jessica Fink, *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 Stan. L. & Pol'y Rev. 57, 80 (2018) ("One subtle yet pernicious obstacle encountered by female workers is a lack of access and opportunity that they receive in comparison to that provided to their male peers.").

13. It is important to note that even if schools adhere to Standard 405(c) for its legal writing or clinical faculty, legal writing faculty may fail to achieves parity with casebook faculty in other areas, such as faculty governance and course selection.

14. I have previously presented this idea as an adaption of the Culp Colloquium. A tentative title is Elevare Colloquium (Latin: Elevate), for those practitioners and adjuncts seeking to transition into the legal academy as legal writing professors and also for junior faculty currently in the profession who could benefit from a vision for their career. Their vision for professional growth, for scholarship, serves the entire community by elevating our status and raising the caliber of our discipline in the academy. The vision for this colloquium is to share best practices to elevate the discipline individually and collectively—through effective job talks/presentations, pedagogy development, conference attendance, collaborations, scholarship, etc.

employ white males and thus perpetuate the very patriarchy the discipline of legal writing is fighting against.

My name is Leslie . . . and I love teaching legal writing." And no matter how loud I shout, as a member of the marginalized group, my voice is only as significant as the institution's viewpoint on legal writing.