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## *Articles*

**J. LYN ENTRIKIN, LUCY JEWEL, SUSIE SALMON, CRAIG T. SMITH,  
KRISTEN K. TISCIONE, AND MELISSA H. WERESH\***

### Treating Professionals Professionally: Requiring Security of Position for All Skills-Focused Faculty Under ABA Accreditation Standard 405(c) and Eliminating 405(d)

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\* Members of the Professional Status Committee of the Legal Writing Institute: J. Lyn Entrikin, Charles Baum Distinguished Professor of Law, William H. Bowen School of Law, University of Arkansas; Lucy Jewel, Professor of Law, The University of Tennessee College of Law; Susie Salmon, Director of Legal Writing and Clinical Professor of Law at University of Arizona, James E. Rogers College of Law (ex officio); Craig T. Smith, Assistant Dean for the Writing and Learning Resources Center and Clinical Professor of Law, University of North Carolina School of Law; Kristen K. Tiscione, Professor of Law, Legal Practice, and President of the Legal Writing Institute, Georgetown University Law Center; and Melissa H. Weresh, Dwight D. Opperman Distinguished Professor of Law, Drake University Law School.

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The Professional Status Committee of the Legal Writing Institute (LWI) was formed in 2015 to gather information about status issues and challenges facing its members at their respective institutions. In that year, LWI adopted a *Full Citizenship Statement* arguing that no justification exists for treating law faculty differently based on the subject matter they teach. The Association of Legal Writing Directors (ALWD) and the Society for American Law Teachers (SALT) also adopted the statement. To date, more than 570 law faculty and deans have signed it. See *The Professional Status Committee and Status-Related Advocacy*, LEGAL WRITING INST., <https://www.lwionline.org/resources/status-related-advocacy> [https://perma.cc/VW5Z-T7E7] (last visited Sept. 2, 2019). The Committee also thanks Mary Bowman, Clinical Professor of Law, Arizona State University, Sandra Day O’Connor College of Law, for her invaluable assistance with this project.

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## INTRODUCTION

In 2014, the American Bar Association (ABA) decided to retain Accreditation Standard 405 in its current form to preserve tenure for law faculty as well as the status, security of position, governance rights, and academic freedom that tenure provides.<sup>1</sup> In doing so, the ABA also preserved the long-standing hierarchy that elevates doctrine-focused faculty over skills-focused faculty. That hierarchy discriminates

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<sup>1</sup> SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018–2019 Standard 405 (2018), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/2018-2019-aba-standards-rules-approval-law-schools-final.pdf) [https://perma.cc/3MDJ-ML9A] [hereinafter 2018 STANDARDS AND RULES].

against skills-focused faculty, particularly those who specialize in legal writing—most of whom are women.

Standard 405, in four subsections, sets minimum requirements for a law school's "professional environment."<sup>2</sup> First, Standard 405 requires every accredited law school to "establish and maintain conditions adequate to attract and retain a competent faculty."<sup>3</sup> Second, it requires specific conditions—chiefly "a tenure policy"—for faculty.<sup>4</sup> Third, it begins whittling away those conditions by requiring only "reasonably similar" conditions for clinical faculty.<sup>5</sup> Finally, 405(d) requires only that legal writing teachers be afforded 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.<sup>6</sup> For faculty who teach legal writing, therefore, neither tenure nor any specific conditions are required; sufficient is instead whatever a school thinks "may" yield well-qualified teachers with some undefined academic freedom.<sup>7</sup>

At the same time the ABA declined to address the disparities in Standard 405, it increased the number of "experiential" credits that law students must complete—credits in courses like clinics and legal writing—from one to six.<sup>8</sup> The net effect increases teaching demands on skills-focused faculty to meet ABA accreditation requirements, while continuing to endorse institutional discrimination that undervalues them and disadvantages students.<sup>9</sup> The overwhelming majority of this large cohort of faculty is women. Women represent 65% of clinical faculty (an increase from 56% in 2008)<sup>10</sup> and 72% of

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* Standard 405(a).

<sup>4</sup> *Id.* Standard 405(b).

<sup>5</sup> *Id.* Standard 405(c).

<sup>6</sup> *Id.* Standard 405(d).

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

<sup>8</sup> *Id.* Standard 303(a)(3).

<sup>9</sup> See *infra* Section II.C, Part III, and Section IV.B.

<sup>10</sup> ROBERT R. KUEHN ET AL., CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION, THE 2016–17 SURVEY OF APPLIED LEGAL EDUCATION 40 (2017), [http://www.csale.org/files/Report\\_on\\_2016-17\\_CSALE\\_Survey.pdf](http://www.csale.org/files/Report_on_2016-17_CSALE_Survey.pdf) [<https://perma.cc/X9QR-EVCH>] [hereinafter 2017 CSALE SURVEY]; DAVID A. SANTACROCE & ROBERT R. KUEHN, CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION, REPORT ON THE 2007–2008 SURVEY 28 (2008), <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf> [<https://perma.cc/6GPK-SRDB>] [hereinafter 2008 CSALE SURVEY].

legal writing faculty (a percentage that has held steady for more than twenty years).<sup>11</sup>

The resulting irony is that faculty who teach writing and experiential courses—two out of the three major curricular requirements for accreditation<sup>12</sup>—receive substantially less protection under Standard 405 than faculty who qualify for the protections required for tenured and tenure-track faculty. In a nutshell, Standard 405 requires extensive rights for “faculty” but fails to require even “reasonably similar” rights for faculty who specialize in legal writing.

This paper calls on the ABA to address this discrimination against skills-focused faculty and the negative effects it has on schools, faculty, and students. As demonstrated below, many schools recognize the inherent limitations and unfairness of the status hierarchy that Standard 405 condones and, accordingly, provide skills-focused faculty security of position over and above what the ABA requires. We urge the ABA to follow their lead by eliminating Standard 405(d) and requiring that all law schools afford their clinical and legal writing faculty, at minimum and without exception, security of position under Standard 405(c).

Part I of this paper provides an overview of Standard 405. Part II then summarizes the history and evolution of Standard 405(d) since its first iteration in 1996. Part III explains the status hierarchy that Standard 405 creates and explains why any protection Standard 405(d) purports to provide legal writing faculty is illusory. Part IV discusses the disenfranchisement of skills-focused faculty with status equivalent to 405(d) and explains how this subordination is both gendered, triggering potential Title IX violations, and racialized, in that some minority professors report having been counseled to avoid teaching legal writing and skills courses because of the second-class status

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<sup>11</sup> ASS’N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY question 71(b) at 69 (2015), [https://www.alwd.org/images/resources/2015%20Survey%20Report%20\(AY%202014-2015\).pdf](https://www.alwd.org/images/resources/2015%20Survey%20Report%20(AY%202014-2015).pdf) [https://perma.cc/FYP4-YGNU] [hereinafter 2015 ALWD/LWI SURVEY].

<sup>12</sup> Law schools must provide “one writing experience in the first year and at least one additional writing experience after the first year,” as well as “one or more experiential course(s) totaling at least six credit hours.” An experiential course is a simulation course, a law clinic, or a field placement as defined in Standard 304. 2018 STANDARDS AND RULES, *supra* note 1, Standard 303(a)(2)–(3).

405(d) affords.<sup>13</sup> Part V explains that all clinical and legal writing faculty should at least be entitled to protection under Standard 405(c) because Standard 405(d) is inconsistent with other ABA regulations and undermines the ABA's efforts to increase and improve experiential legal education. Finally, Part VI explains why law schools have no justifiable reason for refusing to guarantee all clinical and legal writing faculty security of position under Standard 405(c).

## I

### OVERVIEW OF STANDARD 405

Standard 405 purports to require a “professional environment” to ensure that an accredited law school has a competent faculty. Titled Professional Environment, Standard 405 reads as follows:

- (a) A law school shall establish and maintain conditions adequate to attract and retain a competent faculty.
- (b) A law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix 1 herein is an example but is not obligatory.
- (c) A law school shall afford to 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. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.
- (d) A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 303(a)(2), and (2) safeguard academic freedom.<sup>14</sup>

Unfortunately, the rights guaranteed by Standard 405 are vague and ill-defined.<sup>15</sup> First, 405(a) requires “conditions adequate to attract and

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<sup>13</sup> See, e.g., Teri A. McMurtry-Chubb, *Writing at the Master's Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 DREXEL L. REV. 41, 45 (2009).

<sup>14</sup> 2018 STANDARDS AND RULES, *supra* note 1, Standard 405.

<sup>15</sup> 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, 643 (2017) (“Standard 405 is not a clear, unambiguous statement of accreditation policy” and

retain a competent faculty,” but the standards do not define “adequate conditions.” Next, 405(b) requires “an established and announced policy with respect to academic freedom and tenure” and provides an example in Appendix 1. But 405(b) does not specify what content the policy must have, what baseline protections would satisfy the standards, or what specifically the policy must accomplish. It also fails to define “tenure” and “academic freedom.”<sup>16</sup> Nor does 405(b) explicitly require that some—much less all—full-time faculty have the opportunity for tenure.<sup>17</sup>

And both 405(a) and 405(b) are clearer than 405’s remaining two subsections, which diminish or subtract rights that 405(a) and (b) purport to require for all faculty. First, for clinical faculty, 405(c) requires only security of position “reasonably similar to tenure.”<sup>18</sup> Then, for legal writing faculty only, 405(d) eliminates any reference to tenure or “non-compensatory perquisites.” Thus, 405(d) allows law schools to extend to legal writing professors any kind of job security that “may” suffice, no matter how weak.

Consequently, any conditions that 405(d) may require for “legal writing teachers” are best understood by what they are *not*: not tenure, not security “reasonably similar to tenure,” not “non-compensatory perquisites reasonably similar” to what other full-time faculty receive.<sup>19</sup> All that remains of the conditions required for other faculty is a weak possibility: whatever “may be necessary” to “attract and retain” well-qualified teachers and to provide “academic freedom” in some undefined way.

## II

### THE HISTORY AND EVOLUTION OF STANDARD 405(d)

Standard 405(d), the standard that explicitly relates to legal writing faculty, first appeared in 1996. The standard has been revised once, in

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uses “sometimes unclear and gap-riddled language”; Standard 405(b)’s language about tenure is “not masterful drafting for several reasons.”).

<sup>16</sup> Appendix 1 sets forth an example of an acceptable tenure policy, which “follows the ‘1940 Statement of Principles on Academic Freedom and Tenure’ of the American Association of University Professors,” 2018 STANDARDS AND RULES, *supra* note 1, app. 1 at 45, but 405(b) makes clear that the example is “not obligatory”; *id.* Standard 405(b).

<sup>17</sup> Polden & Tomain, *supra* note 15, at 643 (noting that the Council had accredited at least one school that provided only renewable-term employment contracts for faculty).

<sup>18</sup> 2018 STANDARDS AND RULES, *supra* note 1, Standard 405(c).

<sup>19</sup> *See id.* Standard 405(d).

2001, to refer explicitly to security of position, and to require that such security of position be adequate to attract and retain qualified legal writing faculty and to ensure their academic freedom.<sup>20</sup> The standard came under review once again during the 2008–14 ABA comprehensive standards review process.<sup>21</sup> Although the language was not changed during that process, arguments made at that time in numerous public comments submitted for the record highlighted the serious deficiencies of 405(d).<sup>22</sup>

#### *A. 1996 Adoption: Initial Protections for Legal Writing Faculty*

The 1996 iteration of 405(d) provided that “law schools employing full-time legal writing instructors or directors shall provide conditions sufficient to attract well-qualified legal writing instructors or directors.”<sup>23</sup> The precise rationale for the initial version<sup>24</sup> is difficult to determine, but its adoption should be considered in the context of certain other events in legal education accreditation at the time. The ABA Council’s consideration of the importance of skills training in legal education,<sup>25</sup> the 1996 consent decree between the Department of Justice (DOJ) and the ABA,<sup>26</sup> related advances emphasizing clinical

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<sup>20</sup> See *id.* Standard 405(c)–(d).

<sup>21</sup> Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass’n, *Council Acts on ABA Law School Approval Standards at March 2014 Meeting* (2014), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/march2014councilmeeting/2014\\_march\\_council\\_announcement\\_re\\_comprehensive\\_review.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/march2014councilmeeting/2014_march_council_announcement_re_comprehensive_review.pdf) [<https://perma.cc/S95W-2YNK>] [hereinafter *Council Acts*].

<sup>22</sup> See *infra* Section II.C.

<sup>23</sup> SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Standard 405(d) (1996) [hereinafter 1996 ANNUAL REPORT], [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/1996\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1996_standards.pdf) [<https://perma.cc/S3PU-ES36>].

<sup>24</sup> The commentary associated with the standards revision process is no longer available on the ABA website. A request for documents related to the 1996 revision cycle did not include information related to the 405(d) revision.

<sup>25</sup> See SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT], [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_macerate\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_macerate_report.authcheckdam.pdf) [<https://perma.cc/XKQ7-7LFU>].

<sup>26</sup> *United States v. Am. Bar Ass’n*, 934 F. Supp. 435 (D.C. Cir. 1996), *modified*, 135 F. Supp. 2d 28 (D.C. Cir. 2001), *final judgment as modified*, No. CIV. A. 95–1211, 2001 WL 514376 (D.C. Cir. Feb. 16, 2001). The consent decree expired on June 25, 2006. *Am. Bar Ass’n*, 934 F. Supp. at 439.

education and improving the status of clinical faculty,<sup>27</sup> and a growing awareness of gender disparities in legal education.<sup>28</sup>

Leading up to the adoption of the new standard, there was a growing emphasis on skills training in legal education. The 1992 publication of *Legal Education and Professional Development – An Educational Continuum*,<sup>29</sup> better known as the MacCrate Report,<sup>30</sup> was commissioned by the ABA Section of Legal Education and Admissions to the Bar. The report was designed to study the skills and values necessary for law practice and was widely regarded as a significant catalyst for improved skills instruction in legal education.<sup>31</sup> Soon after the MacCrate Report was published, the ABA began a formal revision of its accreditation standards for law schools. As part of that effort, in 1994, the ABA appointed a commission, led by Justice Rosalie E. Wahl, to study the substance of the ABA's accreditation standards and the revision process (the Wahl Commission).<sup>32</sup> Also during this time period, the Massachusetts School of Law filed a 1993 federal antitrust lawsuit<sup>33</sup> challenging the denial of its provisional accreditation, which

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<sup>27</sup> See generally Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008).

<sup>28</sup> See COMMISSION ON WOMEN IN THE PROFESSION, AM. BAR ASS'N, *ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION* (1996) [hereinafter *ELUSIVE EQUALITY*].

<sup>29</sup> See generally MACCRATE REPORT, *supra* note 25. The MacCrate Report, commissioned and published by the ABA, reexamined law school curricula and identified ten fundamental lawyering skills and four fundamental values of the legal profession. See Thomas M. Steele, *The MacCrate Report: Its Impact on Education in Law Firm Management*, 23 PACE L. REV. 613, 617 (2003).

<sup>30</sup> Steele, *supra* note 29, at 617 (noting Robert MacCrate was the chairperson of the task force that drafted the report).

<sup>31</sup> MACCRATE REPORT, *supra* note 25 (reporting the work of the task force); see also Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics That Train Social Change Advocates*, 17 CLINICAL L. REV. 563, 564 (2011) (“There have been some significant catalysts and changes in clinical legal education in that time—the legacy of the MacCrate Report . . .”).

<sup>32</sup> 2018 STANDARDS AND RULES, *supra* note 1, at vi.

<sup>33</sup> *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997), *aff'g* 846 F. Supp. 374 (E.D. Pa. 1994), *aff'g* 853 F. Supp. 837 (E.D. Pa. 1994), *aff'g* 857 F. Supp. 455 (E.D. Pa. 1994), *aff'g* 872 F. Supp. 1346 (E.D. Pa. 1994), *aff'g* 937 F. Supp. 435 (E.D. Pa. 1996). A related lawsuit filed in 1997 raised a number of other legal issues that were ultimately resolved in the ABA's favor. See *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 142 F.3d 26 (1st Cir. 1998), *aff'g* 914 F. Supp. 688 (D. Mass. 1996); *aff'g* 952 F. Supp. 884 (D. Mass. 1997), *aff'g* 959 F. Supp. 36 (D. Mass. 1997); *aff'g* No. 95-12320-MEL, 1997 WL 136240 (D. Mass. Mar. 10, 1997); *aff'g* No. 95-CV-12320-MEL, 1997 WL 263732 (May 8, 1997).

also compelled the ABA to reconsider its accreditation standards.<sup>34</sup> The lawsuit prompted an investigation by the Antitrust Division of the Department of Justice (DOJ).<sup>35</sup> The mandate for the Wahl Commission was enlarged to include an investigation of these antitrust concerns.<sup>36</sup> The investigation was completed in 1995, and at that time, the ABA Board of Governors, in consultation with the DOJ and the ABA Section of Legal Education and Admissions to the Bar, negotiated a consent decree to address specific accreditation criteria that could have anticompetitive effects.<sup>37</sup> The 1996 consent decree thus prompted a recodification of the accreditation standards, including those related to conditions of employment.<sup>38</sup>

One other report that provides context for the 1996 passage of 405(d) was the 1995 study titled *Elusive Equality: The Experiences of Women in Legal Education*, published by the ABA Commission on Women in the Profession.<sup>39</sup> In that report, the ABA Commission on Women in the Profession recognized that gender disparity—indeed, gender discrimination—existed within the ranks of the legal academy, and the greatest impact of this discrimination fell on legal writing professionals.<sup>40</sup> The report noted that legal writing was openly known as the “pink ghetto.”<sup>41</sup>

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<sup>34</sup> Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass’n, *Informational Report from the ABA Board of Governors to the House of Delegates*, 27 SYLLABUS, No. 2, Spring 1996, at 1, 4, [https://www.americanbar.org/content/dam/aba/publications/syllabus/1996\\_vol27\\_no2\\_syllabus.pdf](https://www.americanbar.org/content/dam/aba/publications/syllabus/1996_vol27_no2_syllabus.pdf) [<https://perma.cc/L7RW-G4U5>] [hereinafter SYLLABUS].

<sup>35</sup> *Id.*

<sup>36</sup> 2018 STANDARDS AND RULES, *supra* note 1, at vi.

<sup>37</sup> SYLLABUS, *supra* note 34, at 4.

<sup>38</sup> Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass’n, *Recodification of Standards Nears Completion*, 27 SYLLABUS, No. 1, Winter 1996, at 1, 14, [https://www.americanbar.org/content/dam/aba/publications/syllabus/1996\\_vol27\\_no1\\_syllabus.pdf](https://www.americanbar.org/content/dam/aba/publications/syllabus/1996_vol27_no1_syllabus.pdf) [<https://perma.cc/B4M4-K2UL>].

<sup>39</sup> ELUSIVE EQUALITY, *supra* note 28.

<sup>40</sup> *Id.* The report observed, “The Commission heard that skills training professors, including clinicians and writing instructors, are overwhelmingly female, and not proportionately tenured or even on tenure track. Yet the majority of legal research and writing directors are male and a number of them do not even teach research and writing.” *Id.* at 33.

<sup>41</sup> *Id.* at 32; see Susan Ayres, *Pink Ghetto*, 11 YALE J.L. & FEMINISM 1 (1999); Jenny B. Davis, *Writing Wrongs: Teachers of Legal Prose Struggle for Higher Status, Equal Treatment*, 87 A.B.A. J. 24 (Aug. 2001); Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000); Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 358 (1996) (“Legal education is partly responsible for producing . . . gendered expectations of professional competence. . . . [W]omen have been marginalized to the

Notwithstanding this widespread recognition of gender discrimination in legal writing positions, Standard 405(d) was not initially part of the ABA's 1996 proposed recodification.<sup>42</sup> The omission may have occurred because the focus, at least for Standard 405, was on enhancing security of position for clinical faculty members.<sup>43</sup> In 1996, Standard 405(c) was enhanced to require, rather than suggest, that clinical faculty be afforded security of position reasonably similar to tenure.<sup>44</sup> The 1996 change to Standard 405(c) reflected the clinical faculty's desire for not only better job security but also for peer review in light of the onerous time constraints imposed on faculty members engaged in the practice of law.<sup>45</sup> Legal writing teachers were distinguished from clinical faculty and covered by a new section, Standard 405(d), which gave them some protection but much less than that given to clinical faculty members.<sup>46</sup>

A transcript of the August 1996 House of Delegates meeting documents that the House was considering a significant recodification of the standards, prompted by the consent decree and recommendations of the Wahl Commission.<sup>47</sup> Specific commentary at the meeting appeared to be limited to the proposed amendments, including the new legal writing standard.<sup>48</sup> That material was presented to the House by Professor Susan Lynn Brody, then a delegate from the Illinois State Bar

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domestic sphere of the law school. . . . [especially] [i]n the Legal Research and Writing field, where women are over-represented . . . .").

<sup>42</sup> 1996 ANNUAL REPORT, *supra* note 23.

<sup>43</sup> Prior to the 1996 recodification, clinical faculty had been engaged in a lengthy process to change the standard applicable to clinical faculty to make security of position mandatory. *See* Joy & Kuehn, *supra* note 27, at 212. The authors explained,

At its meeting in June 1996, the Council voted to amend Standard 405(c) by replacing the words "professional skills" with "clinical" and changing the word "should" to "shall," and the ABA House of Delegates adopted these changes at its Annual Meeting in August 1996. The ABA explained "that full-time clinical faculty members must be afforded a form of security of position reasonably similar to tenure, and noncompensatory perquisites reasonably similar to other full-time faculty members."

*Id.* (quoting Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, *Recodification of Standards Nears Completion*, 27 SYLLABUS, No. 1, Winter 1996, at 1, 14).

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See id.*

<sup>47</sup> Am. Bar Ass'n, *Report No. 1 of the Section of Legal Education and Admissions to the Bar*, 121 ANN. REP. 267, 349-92 (1996).

<sup>48</sup> *See id.*

Association and Associate Dean of John Marshall Law School.<sup>49</sup> Brody put forth the amendment to the standards, explaining that the amendment was designed to require “schools to provide terms of employment and working conditions sufficient to attract well-qualified teachers.”<sup>50</sup> The transcript from the House of Delegates meeting indicates that proponents of the amendment waived their time, and the amendment passed, giving legal writing faculty their first explicit protection under the ABA standards.<sup>51</sup>

Prior to the 1996 revisions, clinical and legal writing faculty were categorized together as “full-time faculty members whose primary responsibilities are in its professional skills program.”<sup>52</sup> The 1996 revisions instead carved out two distinct categories of full-time professional skills faculty: Standard 405(c) for “clinical faculty” and Standard 405(d) for other skills-focused faculty, newly classified as “legal writing instructors or directors” to distinguish them from their clinical faculty counterparts.<sup>53</sup> The unfortunate legacy, therefore, is that most clinicians and legal writing faculty<sup>54</sup> make up the “middle” and “lower castes,” respectively, of the legal academy, forced at times to compete against one another for the recognition, security of position, and governance rights that all faculty should enjoy.<sup>55</sup> The resulting hierarchy imposes artificial barriers against integrating law faculty in a way that would emphasize the importance of all facets of legal

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<sup>49</sup> Am. Bar Ass’n, *Proceedings for the Annual Meeting of the House of Delegates*, 121 ANN. REP. 1, 24–25 (1996).

<sup>50</sup> *Id.* at 25. Brody emphasized that the proposed standard “stresses the importance of a curriculum that develops competency in skills of legal writing, legal reasoning, legal analysis, research and oral communication, and creates working conditions conducive to employing professional legal writing [faculty].” *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS Standard 405(c) (1995), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/1995\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1995_standards.pdf) [<https://perma.cc/KF8J-8286>].

<sup>53</sup> 1996 ANNUAL REPORT, *supra* note 23, at Standard 405(c), (d).

<sup>54</sup> Note that Standard 405 sets forth the minimum protections for these categories of faculty. Some law schools elect to provide clinical and legal writing faculty better protections, including tenure. See generally 2015 ALWD/LWI SURVEY, *supra* note 11, at question 65.

<sup>55</sup> See Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS’N LEGAL WRITING DIRECTORS 12, 14 (2002) (“Some clinicians also manifest a palpable defensiveness against upstart lower castes; a fear that hard-won gains will be watered down if teaching methods are spread too thinly over, for example, legal writing faculty and others.”).

education—as urged by experts<sup>56</sup> and accepted as the best practices for legal education.<sup>57</sup>

*B. 2001 Revision: Modest Improvement to Security of Position*

The next change to 405(d) occurred in 2001, when the standard was revised to refer explicitly to security of position for legal writing faculty. The new standard is still in effect. It renamed “legal writing instructors or directors” as “legal writing teachers” and provided that law schools “afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 302(a)(2), and (2) safeguard academic freedom.”<sup>58</sup> As with the 1996 adoption, the precise rationale for the 2001 change is difficult to discern, but the context of other changes proposed at the time sheds some light on this positive development.

Leading up to the 2001 revision, the ABA had begun to consider major changes to Standard 405, prompted in part by the American Law Deans Association’s (ALDA) assertion that the standards should not (or did not) require a system of tenure.<sup>59</sup> During this time, many

<sup>56</sup> See, e.g., SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS (Chicago, 1979); MACCRATE REPORT, *supra* note 25; WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (Carnegie Found. for the Advancement of Teaching ed., 2007) [hereinafter CARNEGIE REPORT].

<sup>57</sup> See, e.g., BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD (Deborah Maranville, Lisa Radtke Bliss, Carolyn Wilkes Kaas, & Antoinette Sedillo Lopez eds., 2015); ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (Clinical Legal Educ. Ass’n ed., 2007).

<sup>58</sup> SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS, 2001–2002 Standard 405(d) (2001), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/2001\\_2002\\_standards.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/2001_2002_standards.pdf) [https://perma.cc/W53A-7KYZ]; see also *supra* text accompanying note 14 (quoting current version of Standard 405(d)).

<sup>59</sup> Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass’n, Commentary, *Final Commentary on Changes in Chapters Three and Four of the Standards for Approval of Law Schools, 1998-1999*, 30 SYLLABUS, No. 3, Summer 1999, at 8, 10, 15.

In response to ALDA’s observation that Standard 405(c)’s requirement of “a form of security of position reasonably similar to tenure” was inconsistent with the Standards’ eschewal of any requirement that a law school have a tenure system at all, the Committee recommended restructuring all of Standard 405 to move away from the concept of tenure and to focus instead on the programmatic objectives

constituencies weighed in on proposed revisions, with the bulk of commentary focused on 405(d).<sup>60</sup> Much of the commentary at that time focused on “whether a law school’s use of short-term or non-renewable contracts prevents a law school from offering a sound legal writing program.”<sup>61</sup> The Association of Legal Writing Directors (ALWD), together with the Legal Writing Institute (LWI), submitted comments in connection with the standards revision process.<sup>62</sup> Asserting that “Standard 405’s current provisions on legal writing are a disservice to students, the legal profession, and the public,” ALWD and LWI argued that 405(d) was “the lowest form of protection given to any subject matter in the law school curriculum, even though Legal Writing is a required course at virtually every law school.”<sup>63</sup> Those constituents added that the inadequate protections in 405(d) “harm[] the[] teaching [of legal writing], and given the central role of writing in modern law practice, [they are] also a disservice to law students, the bench, the bar, and the public.”<sup>64</sup>

Stressing the importance of legal writing education, ALWD and LWI emphasized that a “legal writing program is effective only if directors and teachers are provided with adequate job security. A school cannot provide quality or success in any instructional activity unless it guarantees continuity, professionalism, and resources for

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that “security of position and other rights and privileges of faculty membership” are designed to achieve . . .

[https://www.americanbar.org/content/dam/aba/publications/syllabus/1999\\_vol30\\_no3\\_syllabus.pdf](https://www.americanbar.org/content/dam/aba/publications/syllabus/1999_vol30_no3_syllabus.pdf) [<https://perma.cc/3XC3-FWGZ>].

<sup>60</sup> Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass’n, *Commentary on the Changes to the Standards for the Approval of Law Schools and Rules of Procedure and the Work of the Standards Review Committee 2000–2001*, at 4 (Oct. 2001) (unpublished report) (on file with authors) [hereinafter 2001 Commentary]. The report notes, “The matter of security of position for legal writing program directors and instructors has been discussed for the last several academic years by both the Council and the Committee . . . [And] [t]his matter received the bulk of both the written and oral review and comment received by the Committee.” *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> See ASS’N OF LEGAL WRITING DIRECTORS & THE LEGAL WRITING INST., QUALITY LEGAL WRITING INSTRUCTION AND ABA ACCREDITATION STANDARD 405: REPORT AND RECOMMENDATIONS TO THE ABA STANDARDS REVIEW COMMITTEE AND THE COUNCIL OF THE ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR 2 (2000), [https://www.alwd.org/images/resources/Standard%20405%20-%20ALWD%20\\_%20LWI%20Report%20\\_%20Recommendations%20-%20January%202000.pdf](https://www.alwd.org/images/resources/Standard%20405%20-%20ALWD%20_%20LWI%20Report%20_%20Recommendations%20-%20January%202000.pdf) [<https://perma.cc/DT92-V7TK>] [hereinafter 2000 ALWD REPORT TO THE ABA].

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

<sup>64</sup> *Id.*

those who administer and teach.”<sup>65</sup> The ALWD/LWI report also highlighted the troubling discriminatory impact the standard has on women in legal education. The report offers startling statistical evidence that male members of the legal academy tend to enjoy the superior security of position and working conditions codified in 405(b), while female members are disproportionately burdened by the inferior status codified in 405(d).<sup>66</sup>

The emphasis on employment conditions adequate to retain competent faculty may have prompted the 2001 revisions to 405(d) referring specifically to security of position and academic freedom. In the commentary, the Section of Legal Education and Admissions to the Bar explained, “The new Standard and new Interpretation 405-9 are designed to focus attention on whether a law school is able to attract and retain a legal writing faculty that is capable of providing the quality of legal writing program required by the Standards.”<sup>67</sup> Describing the 2001 change as a compromise, one author noted that the change “strengthened 405(d) by adding language to emphasize retention and academic freedom.”<sup>68</sup>

### *C. 2008–14 Standards Review: Hierarchy Maintained*

Standard 405(d) has not been modified since 2001, but the tenure protections in Standard 405(b) came under assault once again in the most recent comprehensive standards review process—an elongated process that began in 2008 and did not end until 2014.<sup>69</sup> The lengthy process was due in part to a protracted debate over whether the accreditation standards require (or should require) that schools have a tenure system for any category of faculty.<sup>70</sup>

During the 2008–14 comprehensive review process, ALWD submitted a host of public comments and testimony on behalf of all

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<sup>65</sup> *Id.* at 7 (“In the legal writing field, it is not uncommon for teachers to be forced to leave just as they are beginning to acquire the skills that would make them valuable to their schools and to the legal profession.”).

<sup>66</sup> *Id.* at 10. This situation continues to persist. *See infra* Section III.C.

<sup>67</sup> 2001 Commentary, *supra* note 60.

<sup>68</sup> Davis, *supra* note 41, at 25 (explaining that the “changes reflect two years of testimony and debate, including proposals to bring legal writing instructors into Standard 405(c), putting them on par with clinicians[;] . . . [T]he council’s actions . . . reflect a compromise between this and an array of other opinions”).

<sup>69</sup> *Council Acts*, *supra* note 21.

<sup>70</sup> *Id.*

legal writing professionals.<sup>71</sup> ALWD's position statements primarily focused on the negative consequences of 405(d) on the quality of legal education and the value of security of position for all full-time faculty.<sup>72</sup> In its written comments and public testimony, ALWD carefully documented the gender and racial disparities among legal writing faculty that were attributable to the hierarchies embodied in Standard 405.<sup>73</sup>

After several years of work on the standards, the ABA Section of Legal Education and Admissions to the Bar ultimately put forth two alternative proposals to modify 405.<sup>74</sup> Alternative 1 would have removed the term "tenure" from Standard 405(b) and instead would have required schools provide full-time faculty members with a form of security of position sufficient to ensure academic freedom and to attract and retain a competent full-time faculty—language very similar to that used in 405(d).<sup>75</sup> Alternative 2 would not have included any provision regarding security of position or tenure and given schools even more flexibility and faculty even less protection.<sup>76</sup>

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<sup>71</sup> See generally *ALWD Comments on ABA Standards*, <https://www.alwd.org/aba-engagement/alwd-comments-on-aba-standards> [<https://perma.cc/Z3X7-DQGW>] (including links to public comments submitted by ALWD between 2000 and 2017) (last visited Aug. 19, 2019).

<sup>72</sup> See, e.g., Letter from Mary Garvey Algero & J. Lyn Entriikin Goering to Hulet H. (Bucky) Askew & Dean Don Polden (Mar. 31, 2011), <https://www.alwd.org/images/resources/Comprehensive%20Standards%20Review%20-%20ALWD%20Comments%20-%20March%202011.pdf> [<https://perma.cc/A27R-DN9N>].

For far too long, legal writing faculty have had significantly less voice in curriculum development and other governance issues than any other segment of the law faculty. Unfortunately, the ABA Standards have persistently failed to erase the chronic disparities among legal writing, clinical, and non-skills faculty with respect to security of position, faculty status, and governance rights. Until the standards fully acknowledge and remedy the longstanding disparate treatment of legal writing and other skills faculty, even the most well-intentioned efforts by the [ABA] Council to encourage outcomes-focused law teaching will undoubtedly founder—at the same time accredited law schools are encouraged to adopt student learning outcomes as a primary measure of the quality of legal education.

*Id.* at 7.

<sup>73</sup> See *id.* at 10–12.

<sup>74</sup> Memorandum from the Hon. Solomon Oliver, Jr., Council Chairperson of Am. Bar Ass'n, Section of Legal Educ. & Admissions to the Bar, and Barry A. Currier, Managing Dir. of Accreditation and Legal Educ., to Interested Persons and Entities (Sept. 6, 2013), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20130906\\_notice\\_comment\\_chs\\_1\\_3\\_4\\_s203b\\_s603d.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20130906_notice_comment_chs_1_3_4_s203b_s603d.pdf) [<https://perma.cc/J8N8-U4DS>].

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

The response to both proposals was overwhelmingly negative from law faculty who were either tenured or on the tenure track.<sup>77</sup> The response to Alternative 1 (with its nebulous language akin to that of 405(d)), underscored the deficiencies of 405(d) itself.<sup>78</sup> Speaking on behalf of the Society of American Law Teachers (SALT), Carol Chomsky noted,

The difficulty we see is that those guarantees are hollow without the security of position that is written out of these two proposals. Alternative 2 clearly has no requirement of any security of position. It simply states that there will be academic freedom and meaningful participation in governance. Alternative 1 on its face looks like it has a requirement of security of position, security of position sufficient to ensure academic freedom and attraction and retention of a competent, full time faculty, but experience shows us that *that language carries no punch. That's exactly what legal writing [faculty] are guaranteed now and at many institutions they have no security of position.*<sup>79</sup>

She emphasized, “Having the security of position of tenure is the best way and maybe the only way to really ensure that academic freedom truly exists.”<sup>80</sup> Focusing on the hierarchies embodied in Standard 405

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<sup>77</sup> Mark Hansen, *Legal Ed Section Takes a Pass on Changing Tenure Provision in Accreditation Standards*, A.B.A. J. (June 1, 2014), [http://www.abajournal.com/magazine/article/legal\\_ed\\_section\\_takes\\_a\\_pass\\_on\\_changing\\_tenure\\_provision\\_in\\_accreditation](http://www.abajournal.com/magazine/article/legal_ed_section_takes_a_pass_on_changing_tenure_provision_in_accreditation) [<https://perma.cc/QZ3E-6BMV>] (“[S]upporters of the existing standard, including nearly 650 professors who signed a letter earlier this year stating opposition to changes being considered by the section, say the elimination of tenure would jeopardize academic freedom, stifle dissenting points of view, and hamper efforts to recruit and retain minority professors.”).

<sup>78</sup> SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, TRANSCRIPT OF PUBLIC HEARING—AMENDMENTS TO STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 10–11 (Feb. 5, 2014) [hereinafter 2014 ABA HEARING TRANSCRIPT] (on file with authors).

<sup>79</sup> *Id.* (emphasis added). Chomsky further revealed:

And [legal writing faculty] will tell you that that means that they have, in actuality, often have no real voice in governance and no real academic freedom. They tell us that when—and this is true both for those as legal writing instructors who have no security of position, but also true of untenured faculty before they get past that hurdle. And others who may have different status at their law school, they come to tenured faculty and sometimes tenured track faculty and ask us to speak for them, to say things that they are concerned about saying, that they are afraid to say, whether it’s in a faculty meeting. Not doing their research for them, but mostly in governance issues.

*Id.* at 11.

<sup>80</sup> *Id.* at 12. Chomsky underscored the particular appeal of tenure in the legal academy, noting that

and their impact on legal writing faculty, Chomsky stated that “at the very least, full-time legal writing faculty who have not been embraced and granted any security of position should be brought up to where—in that sense, with security of position—to where clinical faculty are.”<sup>81</sup>

Ultimately, the arguments in favor of preserving tenure as the best mechanism to protect academic freedom prevailed, and the ABA maintained Standard 405 in its current form, which in turn perpetuates the hierarchy under 405(c) and (d).<sup>82</sup> The irony is that faculty who opposed Alternative 1 did so on the grounds that the language “sufficient to ensure academic freedom and to attract and retain” was insufficient to protect them, even in light of numerous public comments and testimony that it is not adequate to protect legal writing faculty. The resulting language of Standard 405 still in place today acknowledges the open secret that 405(d) provides no real protection for legal writing faculty at all.

### III

#### THOUGH STANDARD 405 PURPORTS TO MANDATE A PROFESSIONAL ENVIRONMENT FOR ALL LAW FACULTY, IT LABELS LEGAL WRITING PROFESSORS “TEACHERS” RATHER THAN FACULTY AND OFFERS THEM ONLY ILLUSORY PROTECTION

As explained above, Standard 405 purports to mandate a “professional environment” for law faculty to ensure competence, but then excludes certain faculty from that mandate.<sup>83</sup> To attain the minimum professional environment acceptable for accreditation, Standard 405(a) requires that law schools provide “conditions adequate to attract and retain a competent faculty.”<sup>84</sup> Those conditions must

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though we are not unique in the academy in needing academic freedom, the kinds of activity that law faculty more regularly engage in—clinical work on behalf of underserved and low-income communities, criticizing government officials and official policy, teaching about controversial political issues, put them at more risk than is largely true in other disciplines.

*Id.* at 17–18.

<sup>81</sup> *Id.* at 16. Asked for clarification, Chomsky noted that her position was partly to clarify that tenure should be “the standard, the norm, the starting place” and partly to assert that modification should “strengthen[] the protections for those who have not had really any security of position,” referring to legal writing faculty. *Id.* at 17.

<sup>82</sup> *Council Acts*, *supra* note 21 (“Because no proposal for change garnered a majority of the Council, current Standard 405 remains in place.”).

<sup>83</sup> *See supra* Part I.

<sup>84</sup> 2018 STANDARDS AND RULES, *supra* note 1, Standard 405(a).

appear, 405(b) states, in a “policy with respect to academic freedom and tenure.”<sup>85</sup> Thus Standard 405 initially makes minimum faculty competence depend on both academic freedom and tenure.

Standard 405(c) diminishes that protection for clinical faculty. They must be afforded a security of position “reasonably similar” to tenure and non-compensatory perquisites “reasonably similar” to those enjoyed by tenured and tenure-track faculty members.<sup>86</sup>

Then Standard 405(d) carves out a complete exception for an underclass of faculty whom the standard does not even designate as “faculty”: “legal writing teachers.” Thus 405(d) permits—and implicitly encourages—schools to treat these professors differently and far less favorably than their colleagues: they need only such security of position and other rights and privileges “as may be necessary” to attract and retain “well qualified” faculty and “safeguard academic freedom.”<sup>87</sup> Gone from 405(d) are any mentions of tenure, governance, or reasonably similar rights. In sum, 405(d) simply discards the rights that 405(a) and (b) purport to give other faculty and even the “reasonably similar” rights that 405(c) extends to clinical faculty. For legal writing faculty alone, whatever “may be necessary”—mere possibility—is enough.

Standard 405 thus reflects, creates, and enforces hierarchy among law faculty.<sup>88</sup> Both 405(c) and 405(d) have been assailed by clinical and legal writing faculty and law library directors as “perpetuating a caste-like system where tenured and tenure-earning faculty dr[i]ve governance and policymaking.”<sup>89</sup> Tenured and tenure-eligible faculty—those with the greatest voice and control over limited resources—receive the most protection, while legal writing faculty receive the least.<sup>90</sup> Standard 405 thus cements the status quo in legal

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<sup>85</sup> *Id.* Standard 405(b).

<sup>86</sup> *Id.* Standard 405(c).

<sup>87</sup> *Id.* Standard 405(d).

<sup>88</sup> *See, e.g.,* Linda L. Berger, *Rhetoric and Reality in the ABA Standards*, 66 J. LEGAL EDUC. 553, 553 (2017) (“[I]t’s clear that the Standards reflect and create hierarchy.”); Ann C. McGinley, *Employment Law Considerations for Law Schools Hiring Legal Writing Professors*, 66 J. LEGAL EDUC. 585, 586 (2017) (observing that Standard 405 reinforces a “three-tier” hierarchy with tenured and tenure-track faculty at the top, clinical faculty in the middle, and legal writing faculty at the bottom).

<sup>89</sup> Polden & Tomain, *supra* note 15, at 642; *see also* Syverud, *supra* note 55, at 13–16 (describing seven castes in legal education, including the “lower caste,” legal writing faculty).

<sup>90</sup> Polden & Tomain, *supra* note 15, at 643.

education, along with the longstanding disparities among full-time faculty based solely on the subject matter they teach.

In 2002, then Dean Kent Syverud, currently serving as Chancellor and President of Syracuse University,<sup>91</sup> explained the consequences of Standard 405(d) in graphic terms:

Legal Writing Faculty are lower caste. They teach courses that relatively few tenured faculty want to teach, although many tenured faculty once did so. Few are on a tenure track, and even tenure-track [legal writing] directors experience some caste discrimination at tenure-time. . . .The terms and conditions of employment reflect the status, with caps on terms of employment, low salaries, and other restrictions—including resistance at many schools even to the use of a Professor or Faculty title. All of these conditions vary widely by school. At the same time, the legal writing, lawyering, advocacy and research courses have evolved dramatically almost everywhere, particularly in the last ten years.<sup>92</sup>

Dean Syverud spoke from personal experience. His first teaching job was serving as a part-time legal writing instructor teaching twenty-five first-year law students in a legal writing course.<sup>93</sup> His dean had assured him that the teaching work could be done on the side while Syverud worked on his Ph.D. dissertation in economics.<sup>94</sup> The rest is history, as he later explained:

I never worked harder in my life, and I never finished my dissertation. I returned to teaching five years later on the tenure track, and regularly ever since have taught both traditional doctrinal and rules-based litigation courses and skills courses in negotiation and drafting.<sup>95</sup>

Standard 405(d)'s hierarchy devalues legal writing professors and the subject they teach. As one legal writing scholar has noted, the hierarchy is “[b]ased on largely hidden and therefore unexamined assumptions”—namely, that legal writing professors are less worthy

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<sup>91</sup> Syverud, then Dean of Vanderbilt Law School, went on to serve as Dean of Washington University School of Law for several years. He served on the ABA Council of Legal Education and Admissions to the Bar for several years and chaired the Council in 2012–13. He is currently Chancellor and President of Syracuse University, where he has served since January 2014. *Chancellor Kent Syverud*, SYRACUSE UNIV., <https://www.syracuse.edu/about/leadership/chancellor-syverud/> [<https://perma.cc/HZF9-WMSA>] (last visited Aug. 18, 2019).

<sup>92</sup> Syverud, *supra* note 55, at 14–15.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

and deserve lower status, protection, and presumably, compensation.<sup>96</sup> The use of modifiers (clinical and legal writing) in 405(c) and (d) suggests the same; 405(b) faculty are simply “faculty.” By imposing one standard of rights and privileges for “competent faculty” and a far less generous standard for “faculty well qualified to provide legal writing instruction,” Standard 405 communicates a judgment that, regardless of their qualifications, legal writing faculty are somehow inferior to “faculty.” Such discrimination on the basis of a faculty member’s primary subject matter would be unthinkable for doctrine-focused courses. Imagine a standard, for example, giving constitutional law professors many employment rights while giving few to torts professors.

With ABA backing, Section 405’s hierarchy—and, by extension, the assumptions about faculty worthiness that the hierarchy embodies—has proved virtually impossible to dismantle. By elevating doctrine over skills as a matter of faculty status, the standard favors certain types of law practice—generally those serving the wealthiest, most powerful interests—over others.<sup>97</sup> The assumption is that students headed for elite law firms, academia, or some kinds of government service either do not need practice skills or will learn them on the job.<sup>98</sup> This value system explicitly devalues the categories of lawyers who have always needed sharp practice skills upon graduation but who enjoy less mentoring or support: lawyers at smaller firms or in smaller communities, solo practitioners, lawyers in smaller or more resource-strapped government offices, and legal-aid lawyers—the lawyers who serve the most vulnerable populations.

Standard 405(d) undervalues the teaching of legal writing and underestimates the skill and burden of effectively doing so. As legal writing faculty well know, teaching a first-year legal research and writing course can be a thankless task. The amount of time spent reading and commenting on student papers, meeting with students, and

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<sup>96</sup> Berger, *supra* note 88, at 554; *see also* Kristen Konrad Robbins (Tiscione), *Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty*, 3 J. ASS’N LEGAL WRITING DIRECTORS 108, 111 (2006) (characterizing discrimination against legal writing professors as “discrimination on the basis of perceived intellect”; legal writing professors are perceived by other faculty as “women who aren’t that smart teaching a course that’s not that hard.”).

<sup>97</sup> *See* Lucille A. Jewel, *Oil and Water: How Legal Education’s Doctrine and Skills Divide Reproduces Toxic Hierarchies*, 31 COLUM. J. GENDER & L. 111, 127–32 (2015).

<sup>98</sup> *See id.* at 130.

designing problems year after year is exhausting. Institutional acknowledgments for excellence are often few and far between. Faculty with 405(d) status often have no ability to participate in faculty governance, and they earn considerably less in terms of compensation and other monetary perquisites.<sup>99</sup> Virtually invisible, this large cohort of faculty can go unnoticed and unknown by their colleagues for years. Given the limited protections 405(d) affords legal writing faculty, there is a high rate of uncertainty, disillusionment, and burnout.<sup>100</sup> Although Standard 405(d) can be rationalized as giving law schools much-needed flexibility to respond to changing conditions, it unjustifiably and inequitably inflicts real harm on just one essential category of full-time law faculty: those who teach legal writing.

#### IV

##### STANDARD 405(d) FORMALLY DISENFRANCHISES SKILLS-FOCUSED FACULTY

###### *A. Clinical and Legal Writing Faculty with 405(d) Status or Its Equivalent Represent 29% of Law Faculty Governed by Standard 405*

The most current data published by the ABA, reproduced in Figure 1, indicate that in 2013, full-time clinical, writing, and other skills or unspecified faculty represented roughly 29% of all full-time faculty.<sup>101</sup> Given the ABA's 2014 adoption of a six-credit experiential education requirement,<sup>102</sup> the current percentage is likely higher.

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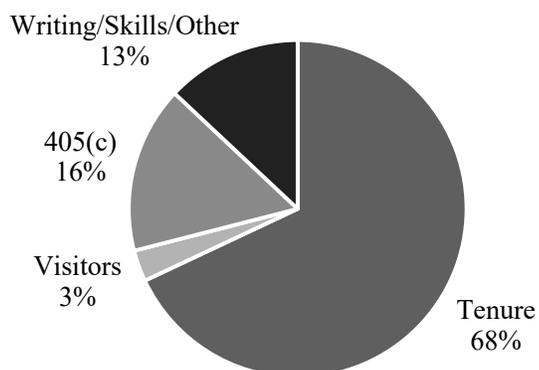
<sup>99</sup> See *infra* Part IV.

<sup>100</sup> See, e.g., Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117 (1997); Lorraine K. Bannai, *Challenged X 3: The Stories of Women of Color Who Teach Legal Writing*, 29 BERKELEY J. GENDER L. & JUST. 275 (2014); Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000); Jewel, *supra* note 97.

<sup>101</sup> See AM. BAR ASS'N, LAW SCHOOL FACULTY AND STAFF BY ETHNICITY AND GENDER (FALL 2013) [hereinafter 2013 ABA FACULTY REPORT], [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2013\\_law\\_school\\_staff\\_gender\\_ethnicity.xlsx](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_law_school_staff_gender_ethnicity.xlsx) [https://perma.cc/7SQR-U784]. The data include the following as teaching resources: tenured, tenure-track, 405(c), visitors, writing, skills, and other unspecified faculty. The total number in 2013 was 10,190, excluding part-time faculty. Of that number, 1669 were 405(c) faculty, and 1342 were writing, skills, or other faculty. See *id.*

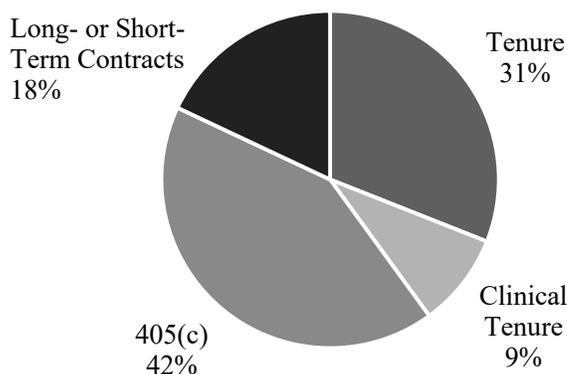
<sup>102</sup> 2018 STANDARDS AND RULES, *supra* note 1, Standard 303(a)(3) (providing that law school curricula must require each student to earn at least six credit hours in experiential courses); Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 576 (2018) (explaining the history of the experiential learning standard adopted in 2014).

Figure 1. *Percentage of Faculty by Status.*



In terms of their status, 40% of all clinical faculty have some form of tenure or are on a tenure track,<sup>103</sup> as shown in Figure 2. Forty-two percent have 405(c) status, and the remaining 18% have short-term, nonrenewable contracts ranging from one to five years, equivalent to 405(d) status.<sup>104</sup>

Figure 2. *Clinical Faculty by Status.*

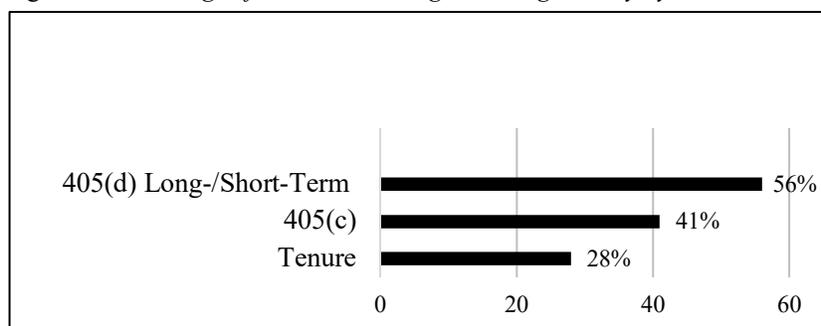


<sup>103</sup> 2017 CSALE SURVEY, *supra* note 10 (indicating that 31% of clinical faculty have traditional tenure or are on the tenure track and 9% have clinical tenure or are on the clinical tenure track).

<sup>104</sup> *See id.* (indicating that 70% of the 60% not on a tenure track have long-term presumptively renewable contracts under 405(c) of five or more years).

No directly comparable data is available on the percentage of individual legal writing faculty by status, but roughly 28% of law schools make some or all of their legal writing faculty (other than directors) eligible for some form of tenure, whether traditional or programmatic.<sup>105</sup> Forty-one percent of schools report having some or all legal writing faculty with 405(c) status,<sup>106</sup> 16% report having some or all with long-term, non-presumptively renewable contracts,<sup>107</sup> and 40% report having some or all with short-term contracts.<sup>108</sup> These last two groups—perhaps as many as 56% of legal writing faculty, or 100 law schools—have the equivalent of 405(d) status, as shown in Figure 3.

Figure 3. *Percentage of Schools with Legal Writing Faculty by Status.*



This large cohort of 405(d) faculty is sorely in need of better protection. Although 405(c) too has its drawbacks,<sup>109</sup> it is the most acceptable first step in the direction of equality.

<sup>105</sup> See ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., ALWD/LWI ANNUAL LEGAL WRITING SURVEY: REPORT OF THE 2017–2018 INSTITUTIONAL SURVEY questions 8.2 & 8.5 at 58–59 (2018) [hereinafter 2018 ALWD/LWI INSTITUTIONAL SURVEY] (indicating that 54 out of 182 reporting schools have legal writing faculty with traditional or programmatic tenure (or on track for tenure) who are not solely directors), <https://www.alwd.org/images/resources/ALWD-LWI-2017-18-Institutional-Survey-Report.pdf> [<https://perma.cc/DS5P-GBDC>].

<sup>106</sup> See *id.* (indicating that 74 out of 182 reporting schools have legal writing faculty with 405(c) contracts (or on track for 405(c) contracts) who are not solely directors).

<sup>107</sup> See *id.* (indicating that 29 out of 182 reporting schools have legal writing faculty with long-term, non-presumptively renewable contracts who are not solely directors).

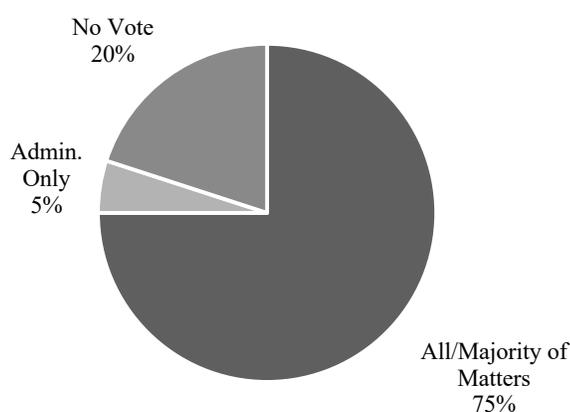
<sup>108</sup> See *id.* (indicating that 72 out of 182 reporting schools have legal writing faculty with short-term contracts who are not solely directors).

<sup>109</sup> See generally, e.g., Berger, *supra* note 88; Kathryn Stanchi, *The Problem with ABA Standard 405(c)*, 66 J. LEG. EDUC. 558 (2017).

*B. A Significant Percentage of Faculty with 405(d) Status or Its Equivalent Have No Voting Rights but Are Still Required or Expected to Serve on Committees, yet Earn Significantly Less Salary*

A disturbing percentage of clinical and legal writing faculty with 405(d) status or the equivalent have no voting rights. Twenty percent of all clinical faculty have no voting rights, and 5% can vote only on administrative matters,<sup>110</sup> as shown in Figure 4.

Figure 4. *Percentage of Clinical Faculty with Voting Rights by Type.*



Forty-five percent of schools with legal writing faculty on long-term contracts deny them any voting rights.<sup>111</sup> Similarly, 45% of schools with legal writing faculty on short-term contracts do not permit them to vote,<sup>112</sup> as shown in Figures 5 and 6.

Without voting rights, these faculty are largely invisible, unable to provide meaningful input on curricular or other matters that directly affect their responsibility for students and unable to voice their concerns on hiring or other employment matters. As the ABA has acknowledged, academic freedom and economic security are “indispensable to the success of an institution in fulfilling its

<sup>110</sup> 2017 CSALE SURVEY, *supra* note 10, at 45.

<sup>111</sup> 2018 ALWD/LWI INSTITUTIONAL SURVEY, *supra* note 105, questions 8.2 & 10.2 at 58, 79 (indicating that faculty on long-term contracts have no voting rights at fifteen out of thirty-three schools).

<sup>112</sup> *See id.* (indicating that faculty on short-term contracts have no voting rights at thirty-four out of seventy-five schools).

obligations to its students and to society,”<sup>113</sup> yet 405(d) guarantees legal writing faculty neither.

Figure 5. *Long-Term Contract Legal Writing Faculty: Percentage of Schools by Type of Voting Rights.*

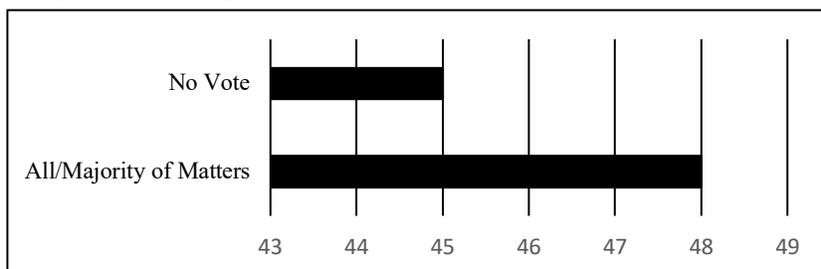
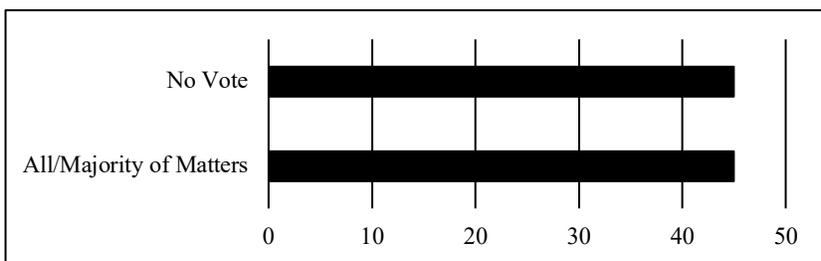


Figure 6. *Short-Term Contract Legal Writing Faculty: Percentage of Schools by Type of Voting Rights.*



Although 45% of legal writing faculty on long-term contracts are not entitled to a faculty vote, 73% are required or expected to serve on committees.<sup>114</sup> Similarly, although 45% of legal writing faculty on short-term contracts are not entitled to vote, 64% are required or expected to serve on committees.<sup>115</sup>

Directly related to status are salary and other forms of compensation. Although salary data for clinical faculty are not publicly available, the 2017–18 ALWD/LWI Survey indicates that the average starting salaries for entry-level legal writing faculty on long-term and short-term contracts appear to be \$72,350 and \$69,083 respectively, compared to \$106,151 for doctrine-focused tenure-track faculty and

<sup>113</sup> 2018 STANDARDS AND RULES, *supra* note 1, app. 1.

<sup>114</sup> 2018 ALWD/LWI INSTITUTIONAL SURVEY, *supra* note 105, question 10.8 at 82 (indicating that faculty on long-term contracts are required or expected to serve on committees at twenty-four out of thirty-three schools).

<sup>115</sup> *See id.* (indicating legal writing faculty with short-term contracts are required or expected to serve on committees at forty-eight out of seventy-five schools).

\$83,755 for clinical faculty hired on a 405(c) track.<sup>116</sup> The most recent SALT Equalizer indicates that the average salary of a tenured faculty member is now roughly \$146,666.<sup>117</sup> The actual average is known to be much higher, however, because only eighty-one law schools responded to the SALT survey, and none of the highest-ranked private schools ever respond.<sup>118</sup>

*C. Standard 405(d) Discriminatorily Affects Women and Minorities*

Standard 405(d) has a discriminatory impact on women and minority faculty whose teaching expertise and interests are devoted to legal writing. Women are overrepresented in legal writing faculty, representing 72% of all full-time legal writing faculty, a statistic that has remained stubbornly static for more than two decades. Although more than two-thirds of full-time legal writing faculty members are women, fewer than 10% represent racial minorities.<sup>119</sup> Minorities are underrepresented among full-time legal writing faculty as a direct result of the “lower caste” stigmatizing effect of Standard 405(d).

With respect to legal writing faculty positions, people of color are actively *discouraged* from applying for legal writing positions because they lack the potential for tenure and because of the stigmatizing effect of holding nontenured positions with unequal security of position, research support, salary, and governance rights.<sup>120</sup> Because Standard 405 allows law schools to treat full-time legal writing faculty as second-class citizens, minority law teachers may avoid teaching legal writing to avoid the one-two punch of experiencing double, sometimes triple, discrimination. These longstanding *de jure* classifications permitted by Standard 405 among legal writing, clinical, and traditional tenure-track doctrinal faculty have had a concomitant discriminatory

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<sup>116</sup> See *id.* questions 12.3 & 12.5 at 138, 142.

<sup>117</sup> See *Society of American Law Teachers (SALT)*, SALT EQUALIZER 1–4 (2018), <https://www.saltlaw.org/wp-content/uploads/2018/11/SALT-salary-survey-2018-final.pdf> [<https://perma.cc/AZZ5-7TUP>].

<sup>118</sup> See *id.* at 1.

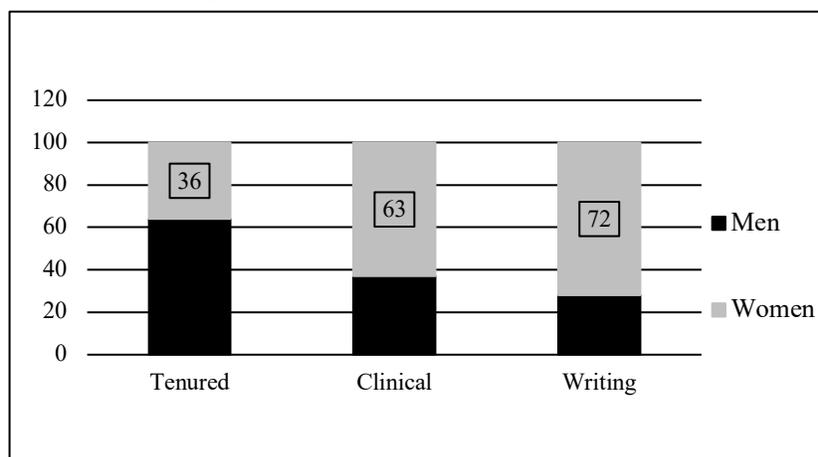
<sup>119</sup> See Letter from J. Lyn Entrikin, ALWD President, Ass’n of Legal Writing Dirs., to Professor Jeffrey E. Lewis, Chair, Standards Review Comm., ABA Section of Legal Educ. and Admissions to the Bar and Hulett H. Askew, Consultant, Office of the Consultant on Legal Education, ABA Section of Legal Educ. & Admissions to the Bar 19–21 (Dec. 16, 2011), [https://www.alwd.org/images/resources/Standard\\_405\\_-\\_ALWD\\_Comments\\_-\\_December\\_2011.pdf](https://www.alwd.org/images/resources/Standard_405_-_ALWD_Comments_-_December_2011.pdf) [<https://perma.cc/Z7A8-S5Q6>].

<sup>120</sup> McMurtry-Chubb, *supra* note 13, at 45.

effect on full-time legal writing and clinical faculty in ABA-accredited law schools.

As faculty status decreases generally, the percentage of women increases. While 36% of tenured or tenure-track faculty in 2013–14 were women (a troubling statistic in its own right), women represented 63% of clinical faculty and 72% of legal writing faculty.<sup>121</sup> The most recent study by the Center for Applied Legal Education indicates that 65% of all faculty with clinical status are women.<sup>122</sup> The most recent annual survey by the Association of Legal Writing Directors (ALWD) and Legal Writing Institute (LWI) indicates that 72% of legal writing faculty are still women,<sup>123</sup> as shown in Figure 7.

Figure 7. *Percentage of Faculty by Status and Gender.*



The artificial hierarchy imposed by Standard 405, as well as its discriminatory impact on women and minority representatives, directly conflicts with the mandate of ABA Standard 205(b) that law schools *foster and maintain* equality of opportunity not only for students but also faculty and staff: “A law school shall foster and maintain equality of opportunity for students, *faculty*, and staff, *without discrimination or segregation* on the basis of race, color, religion, national origin,

<sup>121</sup> See 2013 ABA FACULTY REPORT, *supra* note 101; CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., 2013–14 SURVEY OF APPLIED LEGAL EDUCATION 39 (2015), <http://www.csale.org/results.html> [<https://perma.cc/WCT9-Q97P>]; ASS’N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY, question 71(b) at 68 (2014), <https://www.lwionline.org/sites/default/files/2014-Survey-Report-Final.pdf> [<https://perma.cc/VF2B-X3RZ>].

<sup>122</sup> 2017 CSALE SURVEY, *supra* note 10, at 40.

<sup>123</sup> 2015 ALWD/LWI SURVEY, *supra* note 11, question 71(b) at 69.

gender, sexual orientation, age, or disability.”<sup>124</sup> Similarly, ABA Standard 206(b) requires law schools to *demonstrate by concrete action* their commitment to diversity and inclusion by ensuring that students study in a diverse faculty and staff environment: “Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a *faculty* and staff that are *diverse with respect to gender, race, and ethnicity*.”<sup>125</sup>

Standard 405(d) impedes the goals of both Standards 205(b) and 206(b) by turning a blind eye to the real effects of the faculty caste system it imposes. A disproportionate number of women are represented among full-time legal writing faculty, while a disproportionate number of men (some 65%) are represented among faculty who enjoy the security of position, academic freedom, and governance rights conferred by Standard 405(b). Not surprisingly, full-time faculty who have Standard 405(c) status, which is halfway between the higher caste and lower caste, are about evenly divided among men and women.

In 2011, the Association of Legal Writing Directors, in written testimony submitted to the ABA Standards Review Committee, documented the existing gender and racial disparities among faculty who teach legal writing and clinical courses.<sup>126</sup> These disparities clearly violate the stated goals of diversity, inclusion, and equal opportunity enumerated in Chapter 2 of the Standards. Yet those disparities are expressly *permitted* by Standards 405(b), (c), and (d), which together allow accredited law schools to openly discriminate among full-time faculty members based solely on the subject that they teach. These strikingly disproportionate statistics have been well documented over the years in other written testimony submitted to the ABA Standards Review Committee.<sup>127</sup> Yet nothing has been done to

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<sup>124</sup> 2018 STANDARDS AND RULES, *supra* note 1, Standard 205(b) (emphasis added).

<sup>125</sup> *Id.* Standard 206(b)(emphasis added).

<sup>126</sup> Letter from J. Lyn Entrikin to Jeffrey E. Lewis and Hulett H. Askew, *supra* note 119, at 5.

<sup>127</sup> See, e.g., 2000 ALWD REPORT TO THE ABA, *supra* note 62; Letter from Anthony Niedwiecki, ALWD President, Ass’n of Legal Writing Dirs., to Professor Jeffrey E. Lewis, Chair, Standards Review Comm., ABA Section of Legal Educ. & Admissions to the Bar and Barry Currier, Office of the Consultant on Legal Education, ABA Section of Legal Educ. & Admissions to the Bar 1 (Jan. 15, 2013), <https://www.alwd.org/images/resources/Standard%20405%20-%20ALWD%20Comments%20-%20January%202013.pdf> [https://perma.cc/N2SC-WE5W].

address these disparities by erasing the lines among full-time law faculty created by Standard 405 and its three subdivisions.

Standard 405(d) has created and fostered retention of academic hierarchies that are inconsistent with the goals of gender and racial equality long championed by the ABA. Standard 405 has created disparities in diversity and equality of opportunity. If those disparities remain without action to remedy the problem, then Standards 205(b) and 206(b) are at best empty promises and at worst disingenuous.

*D. Because of Its Disparate Impact, Standard 405(d) Likely Violates Title IX of the Federal Higher Education Act*

By segregating full-time faculty based on teaching assignments in a manner that has a discriminatory effect on women, Standard 405(d) directly conflicts with federal regulations implementing Title IX of the Education Amendments Act of 1972, one of the federal laws the ABA must enforce as the law school accrediting body designated by the Department of Education.<sup>128</sup>

Any law school whose students use federal loan or grant funds to pay law school tuition must comply with Title IX of the Education Amendments Act of 1972.<sup>129</sup> If a recipient of federal funds fails to comply with Title IX and its implementing regulations, the law provides for administrative enforcement by two primary mechanisms: (1) loss of federal financial assistance,<sup>130</sup> or (2) any other means authorized by law.<sup>131</sup> The statutory and regulatory framework is designed to seek voluntary compliance in the first instance.<sup>132</sup> But once

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<sup>128</sup> *Accreditation in the United States: Programmatic Accrediting Agencies*, U.S. DEP'T OF EDUC., [https://www2.ed.gov/admins/finaid/accred/accreditation\\_pg7.html](https://www2.ed.gov/admins/finaid/accred/accreditation_pg7.html) [<https://perma.cc/DF26-6PFN>] (last modified July 19, 2019) (listing ABA Council of the Section of Legal Education and Admissions to the Bar as the accrediting agency for legal education and describing its scope of recognition).

<sup>129</sup> 20 U.S.C. §§ 1681–87 (2012). Under Title IX, federal financial assistance is expressly defined to include federal grant and loan funds provided to law school students. *Id.* § 1682; 34 C.F.R. § 106.2(g)(1)(ii) (2018); see *Grove City Coll. v. Bell*, 465 U.S. 555, 569–70 (1984) (“Title IX coverage is not foreclosed because federal funds are granted to Grove City’s students rather than directly to one of the College’s educational programs.”).

<sup>130</sup> 20 U.S.C. § 1681(a).

<sup>131</sup> *Id.* § 1682.

<sup>132</sup> See *id.* Regulations require each recipient of federal financial assistance to designate a Title IX Coordinator. 34 C.F.R. § 106.8(a). The Coordinator’s responsibilities include investigating any complaint alleging noncompliance with the Department of Education’s regulations or alleging any prohibited conduct. *Id.* Recipients must also adopt grievance procedures that provide for “prompt and equitable resolution of . . . employee complaints” alleging discrimination on the basis of gender. *Id.* § 106.8(b).

the federal agency has advised the appropriate person of the entity's failure to comply and determines that compliance cannot be secured by voluntary means, the Department of Education is authorized to take enforcement action.<sup>133</sup>

Title IX's prohibition against discrimination on the basis of gender extends to a wide range of discriminatory actions, including employment discrimination. Specifically, the United States Supreme Court has held that Title IX authorizes administrative regulations prohibiting federal fund recipients from engaging in gender discrimination in employment.<sup>134</sup> The Supreme Court has given Title IX a broad sweep, specifically upholding agency regulations that interpret its prohibitions to include employment discrimination based on gender.<sup>135</sup>

Since its original enactment in 1972, Congress has amended Title IX to overrule judicial interpretations that would have narrowed its scope.<sup>136</sup> But Congress has never amended Title IX to overrule the Supreme Court's interpretation that it prohibits gender discrimination in employment, as well as in admissions and athletic programs.<sup>137</sup>

Similarly, the Supreme Court has held that all available remedies can be used to enforce Title IX's guarantees, including a private right of action in some instances.<sup>138</sup> And a majority of federal circuits that

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<sup>133</sup> 20 U.S.C. § 1682. Federal statutes expressly prohibit any educational institution that receives federal financial assistance from discriminating against any person on the basis of sex. *Id.* § 1681(a). "Educational institution" includes any public or private institution of professional education, which includes law schools accredited by the ABA. *Id.* § 1681(c). The Department of Education has defined "recipient" to include any entity that (1) receives federal financial assistance, either directly or indirectly, and (2) operates an education program or activity that receives such assistance. 34 C.F.R. § 106.2(i).

<sup>134</sup> See *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982) ("[E]mployment discrimination comes within the prohibition of Title IX.").

<sup>135</sup> *Id.* at 521 ("There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'") (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

<sup>136</sup> *E.g.*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (superseding *Grove City Coll. v. Bell*, 465 U.S. 555 (1984)).

<sup>137</sup> U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL 14 (2001), <http://www.justice.gov/crt/about/cor/coord/ixlegal.pdf> [<https://perma.cc/RA2P-NEU2>].

<sup>138</sup> See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 69 (1992) ("[T]he existence of a statutory right implies the existence of all necessary and appropriate remedies.") (quoting *Carey v. Phipus*, 435 U.S. 247, 255 (1978)); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) ("Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination.") (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690-93 (1979)).

have addressed the issue have concluded that Title IX private remedies are available to redress employment discrimination whether or not Title VII remedies also apply.<sup>139</sup>

The Department of Justice enforcement guidelines explain that both Title IX and the Civil Rights Restoration Act of 1987 were enacted “to eradicate sex-based discrimination in education programs operated by recipients of federal financial assistance, and all determinations as to the scope of coverage under these statutes must be made in a manner consistent with this important congressional mandate.”<sup>140</sup> The guidelines also explain that “Title IX . . . recognizes three general types of prohibited discrimination: (1) disparate treatment, (2) disparate impact, and (3) retaliation. Any effective and meaningful administrative enforcement program under Title IX must be prepared to address all three.”<sup>141</sup>

The Department of Education’s Office of Civil Rights is the primary enforcement agency for Title IX compliance. Regulations issued by the Department broadly define employment discrimination. For example, the regulations impose an affirmative duty on recipients of federal financial assistance to make employment decisions in a nondiscriminatory manner.<sup>142</sup> More specifically, “[a] recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and *shall not limit, segregate, or classify . . . employees in any way which could adversely affect any . . . employee’s employment opportunities or status because of sex.*”<sup>143</sup> This obligation applies to all terms, conditions, or privileges of employment.<sup>144</sup> Further, specific regulations preclude

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<sup>139</sup> Fox v. Pittsburg State Univ., 257 F. Supp. 3d 1112, 1122 (D. Kan. 2017) (upholding jury verdict in favor of female custodial employee on both Title VII and Title IX employment discrimination claims); see, e.g., Doe v. Mercy Catholic Med. Ctr., 850 F.3d 545, 563 (3d Cir. 2017) (reversing dismissal of female medical resident’s Title IX claim for sex discrimination).

<sup>140</sup> U.S. DEP’T OF JUSTICE, *supra* note 137, at 55.

<sup>141</sup> *Id.* at 57.

<sup>142</sup> 34 C.F.R. § 106.51(a)(2) (2018).

<sup>143</sup> *Id.* (emphasis added).

<sup>144</sup> *Id.*

Terms, conditions, and privileges of employment include, among other things, the process of application for employment; . . . consideration for and award of tenure, . . . layoff, termination, . . . right of return from layoff, and rehiring; . . . [r]ates of pay or any other form of compensation, and changes in compensation; . . . [j]ob assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists; . . . [f]ringe benefits available by virtue of employment . . . ; [s]election and financial support for training, including . . . professional meetings, conferences, and other related activities, . . .

discrimination on the basis of gender in compensation,<sup>145</sup> job classification and structure,<sup>146</sup> and fringe benefits.<sup>147</sup>

ABA Standard 405 sets up a classification system based on the teaching specialty of full-time faculty members. Those classified under Standard 405(d) are afforded substantially less protection against pay disparities, security of position, and other “term[s], condition[s], or privilege[s] of employment.”<sup>148</sup> It has been well documented that a significantly large and disproportionate number of faculty members

selection for sabbaticals and leaves of absence to pursue training; . . . and . . . [a]ny other term, condition, or privilege of employment.

*Id.* § 106.51(b)(1)–(10).

<sup>145</sup> 34 C.F.R. § 106.54 provides,

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

- (a) Makes distinctions in rates of pay or other compensation;
- (b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

*Id.*

<sup>146</sup> 34 C.F.R. § 106.55 provides,

A recipient shall not:

- (a) Classify a job as being for males or for females;
- (b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or
- (c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question . . . .

*Id.*

<sup>147</sup> 34 C.F.R. § 106.56 provides, in relevant part,

(b) *Prohibitions.* A recipient shall not:

- (1) Discriminate on the basis of sex with regard to making fringe benefits available to employees . . . ;
- (2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or
- (3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

*Id.*

<sup>148</sup> 34 C.F.R. § 106.51(b)(10) expressly provides that the nondiscrimination regulations apply to “[a]ny other term, condition, or privilege of employment.” *Id.*

who are assigned to the legal writing employment classification under Standard 405(d) are women.<sup>149</sup> Because ABA Standard 405(d) has a disparate impact on women, it allows law schools to violate Title IX and its implementing regulations.<sup>150</sup>

Ironically, one of the original purposes of the legislation later enacted as Title IX was to “promote the representation of women in academia.”<sup>151</sup> Standard 405(d) has persistently and demonstrably undermined that purpose.

## V

### ALL CLINICAL AND LEGAL WRITING FACULTY SHOULD BE ENTITLED TO PROTECTION UNDER STANDARD 405(c)

#### *A. The Only Way to Rectify the Wrongs of Standard 405(d) Is to Eliminate It*

There is no way to modify Standard 405(d) to give meaning to the “Professional Environment” it purports to require for all law faculty.<sup>152</sup> In 2010, when the ABA first proposed eliminating the tenure requirement under 405(b), tenured faculty fought hard to preserve it.<sup>153</sup> Several organizations, including AALS (Association of American Law Schools), AAUP (Association of American University Professors), SALT (Society of American Law Teachers), CLEA (Clinical Legal Education Association), ALWD (Association of Legal Writing Directors), and an informal group of past AALS presidents filed

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<sup>149</sup> See *supra* Part III.

<sup>150</sup> See generally David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51, 138 (2011) (“Despite major advances in sex equality law and norms, sex segregation is not a thing of the past in this country. . . . [S]ex segregation should once again be at the forefront of a feminist agenda for equality.”); David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 283 (2005) (making the case that Title IX “has emerged as a superior source for educational equality” by providing “greater protection against discrimination, as well as an affirmative avenue for reform, than the [Equal Protection Clause of the] Constitution”).

<sup>151</sup> Daniel J. Emam, Note, *Manufacturing Equality: Title IX, Proportionality, & Natural Demand*, 105 GEO. L.J. 1107, 1142 (2017) (addressing the disproportionately low number of women represented in tenure or tenure-track faculty positions in the U.S.); *id.* at 1117 n.49 (quoting 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh) (“[O]ne of the great failings of the American educational system is the continuation of corrosive and unjustified discrimination against women. It is clear to me that sex discrimination reaches into all facets of education—[including] faculty hiring and promotion, professional staffing, and pay scales.”)).

<sup>152</sup> See *supra* Part III.

<sup>153</sup> See *supra* Section II.C.

comments with the ABA in opposition to the proposed changes.<sup>154</sup> In March 2011, American University, Washington College of Law faculty adopted a resolution opposing the proposed changes, which endorsed and adopted the official comments of these faculty organizations.<sup>155</sup>

Shortly thereafter, at least fourteen law school faculties adopted the same or a similar resolution.<sup>156</sup> These resolutions rejected language that would guarantee conditions only sufficient to ensure academic freedom and to attract and retain a competent full-time faculty on the grounds that these changes would lead to the following negative results:

- (1) undermine the quality of legal education;
- (2) undermine academic freedom in the legal academy;
- (3) undermine faculty governance in the legal academy; and
- (4) undermine the movement, long endorsed by [the named institution], to bring clinical law professors, legal writing professors, and library directors into full membership in the academy.<sup>157</sup>

Had clinicians, legal writing professors, and library directors not been specifically named as deserving full membership in the academy, we suspect the number of schools adopting the resolution may have been much higher.

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<sup>154</sup> See Notice and Comment Archive of 2013 Comments on Proposed Changes to Chapter 4 of THE STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/resources/notice\\_and\\_comment/notice\\_comment\\_archive/](https://www.americanbar.org/groups/legal_education/resources/notice_and_comment/notice_comment_archive/) [<https://perma.cc/8TXR-NJHC>] (last visited Sept. 7, 2019).

<sup>155</sup> See *Resolution of Faculty of Georgetown Law University School of Law Regarding Proposed Changes to Existing ABA Standards Regarding Security of Position, Academic Freedom, and Attraction and Retention of Faculty*, ALBANY LAW SCHOOL (Mar. 2, 2011), [https://www.albanylaw.edu/media/user/celt/outcomes\\_page/law\\_school\\_resolutions\\_-\\_as\\_of\\_apr52011.pdf](https://www.albanylaw.edu/media/user/celt/outcomes_page/law_school_resolutions_-_as_of_apr52011.pdf) [<https://perma.cc/ZR36-PVCP>].

<sup>156</sup> These schools include Boyd School of Law; University of Nevada, Las Vegas; Cleveland-Marshall College of Law; Duquesne University School of Law; Howard University School of Law; Loyola University New Orleans College of Law; Seattle University School of Law; Suffolk University Law School; Touro College, Jacob D. Fuchsberg Law Center; University of Baltimore School of Law; University of Oregon School of Law; Vermont Law School; West Virginia University College of Law; and William Mitchell College of Law. *See id.*

<sup>157</sup> *Id.*

The proposed change to eliminate tenure under Standard 405 used the same language that purports now to protect legal writing faculty under 405(d). However, as acknowledged several years later by Carol Chomsky at a 2014 hearing before the ABA Section of Legal Education and Admissions to the Bar, this language “carries no punch.”<sup>158</sup> Dean Anthony Niedwiecki, then teaching at The John Marshall Law School, observed at the 2014 hearing that

three-quarters of legal writing professors are women who have substantially less academic freedom, security of position, and governance rights than anybody else. . . . Standard 405 has built in a caste system [that] has a negative impact on women and runs counter to the ultimate goals of equality and diversity as articulated in Standards 211 and 212.<sup>159</sup>

*B. Standard 405(d) Undermines the ABA’s Efforts to Increase and Improve Experiential Learning and Student Learning Outcomes*

The ABA’s increasing focus on experiential course offerings is hampered by the hierarchy imposed by Standard 405. The current emphasis on practice-ready law graduates and experiential learning both demand greater vertical integration of skills throughout the law school curriculum. Yet the entrenched faculty hierarchies created by Standard 405 have erected invisible but no-less-real barriers to needed reforms in legal education. Moreover, the silos erected by Standard 405 create other conflicts—not only internal conflicts with other ABA accreditation standards but also external conflicts with the federal laws and regulations the Department of Education has designated the ABA Council to enforce with respect to legal education.<sup>160</sup>

Although the ABA has revamped the accreditation standards to focus on student learning outcomes, core curriculum requirements (sometimes known as “inputs”) remain an essential component of an approved curriculum. For example, every accredited law school must *require* students to complete three essential curriculum components: (1) a two-credit course in professional responsibility, (2) two faculty-supervised writing experiences, one in the first year and a second after the first year, and (3) six credits in experiential courses, such as simulation courses, law clinics, or field placements.<sup>161</sup> Until the six

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<sup>158</sup> See 2014 ABA HEARING TRANSCRIPT, *supra* note 78, at 10–11, and accompanying text.

<sup>159</sup> *Id.* at 62.

<sup>160</sup> See *supra* Section IV.D.

<sup>161</sup> 2018 STANDARDS AND RULES, *supra* note 1, Standard 303(a).

experiential course credits were added in 2014, the two faculty-supervised “writing experiences” were the only mandatory courses in the law school curriculum other than one professional responsibility course.<sup>162</sup>

Furthermore, as the standards requiring experiential courses have evolved, law schools need not offer clinical courses at all; they may instead offer field placements.<sup>163</sup> Students may complete the six required experiential course credits in “simulation” courses, which are defined in Standard 304(b). As the standards define simulation courses, many basic and upper-level legal writing courses would satisfy that requirement. Indeed, the Interpretations acknowledge that a single course may satisfy more than one Standard 303 requirement, although a single course cannot count toward more than one requirement.<sup>164</sup>

ABA Standard 303 requires all accredited law schools to provide at least two faculty-supervised writing experiences.<sup>165</sup> The same standard requires students to complete at least six credit hours in experiential courses (which often include a practical writing component).<sup>166</sup> But the ABA Standards do *not* require students to complete any live-client clinical course. Other than one professional responsibility course, the standards do not impose any specific curriculum requirements for nonprofessional skills courses.

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<sup>162</sup> See SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2013–2014 Standard 302 (2013), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2013\\_2014\\_final\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_body.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.pdf) [<https://perma.cc/9J2E-36LM>]. In 2013, Standard 302(a)(3) required “at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year.” SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, 2014–2015 Standard 303 (2014), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_and\\_rules\\_of\\_procedure\\_for\\_approval\\_of\\_law\\_schools\\_bookmarked.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_bookmarked.pdf) [<https://perma.cc/VKZ6-QUHQ>]. In 2014, Standard 302 became Standard 303, which continued to require two writing experiences and six credit hours of experiential learning. *See id.*

<sup>163</sup> 2018 STANDARDS AND RULES, *supra* note 1, Standard 303(b) (“A law school shall provide substantial opportunities to students for: (1) law clinics *or* field placement(s) . . .” (emphasis added)).

<sup>164</sup> *Id.* Interpretation 303-1.

<sup>165</sup> *Id.* Standard 303(a)(2).

<sup>166</sup> *Id.* Standard 303(a)(3).

By requiring two faculty-supervised legal writing experiences, the ABA Standards emphasize the value of high-quality legal writing instruction. The ABA Council has devoted many years to revamping its accreditation standards to encourage law schools to reform their curricula to better prepare law graduates for practice. Ironically, Standard 405(d) undermines one of the primary objectives of Standard 303 by allowing accredited law schools to devalue full-time faculty members who teach legal writing courses. Yet neither the Council nor the Standards Review Committee has ever explained or attempted to remedy this anomaly.

*C. The Percentage of Skills-Focused Faculty Is Increasing, and Many Schools Afford Them Protection Beyond What the ABA Requires*

Since 2008, the percentage of clinical faculty with some form of tenure has barely increased, from 34% to 35%.<sup>167</sup> The percentage of clinical faculty with 405(c) status has increased a bit more from 26% to 32%.<sup>168</sup>

The percentage of law schools employing exclusively full-time legal writing faculty to teach the required first-year course has increased from 54% to 69%,<sup>169</sup> and the percentage of schools employing exclusively adjunct faculty has decreased from 9% to 3%.<sup>170</sup> An additional 18% of law schools use a hybrid staffing model<sup>171</sup> that includes full-time faculty.<sup>172</sup> In total, 87% of law schools surveyed employ all or some full-time faculty to teach the first-year course.<sup>173</sup>

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<sup>167</sup> 2008 CSALE SURVEY, *supra* note 10, at 29.

<sup>168</sup> 2017 CSALE SURVEY, *supra* note 10, at 41.

<sup>169</sup> See 2018 ALWD/LWI INSTITUTIONAL SURVEY, *supra* note 105, question 4.4 at 9 (indicating that 100 out of 144 schools employed full-time faculty to teach legal writing); ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY question 10 at 6 (2008) [hereinafter 2008 ALWD/LWI SURVEY] (indicating that 98 out of 181 responding schools employed exclusively full-time faculty to teach legal writing).

<sup>170</sup> 2018 ALWD/LWI INSTITUTIONAL SURVEY, *supra* note 105, question 4.10 at 10 (indicating that 5 out of 144 schools used adjuncts to teach first-year legal writing); 2008 ALWD/LWI SURVEY, *supra* note 169, question 10 at 6 (indicating that 17 out of 165 schools used adjuncts to teach first-year legal writing).

<sup>171</sup> A hybrid staffing model is one that usually employs a combination of full-time, part-time, and adjunct faculty or hires faculty on short-term contracts that convert to long-term contracts or tenure.

<sup>172</sup> 2018 ALWD/LWI INSTITUTIONAL SURVEY, *supra* note 105, question 4.10 at 10 (indicating that thirty-two out of thirty-three schools with hybrid programs employed at least some full-time faculty in the first year).

<sup>173</sup> Roughly 93% of law schools with a combined first-year and upper-level program use full-time faculty. See *id.* questions 4.4 & 4.10 at 9–10 (indicating that 57% of schools with

Inherent in this shift is the recognition that full-time faculty are in the best position to have expertise in the discipline and teach legal writing at the level of rigor required by Standards 302(b)<sup>174</sup> and 303(a)(2).<sup>175</sup>

As the percentage of full-time legal writing faculty has increased, so has their status, but only for a few faculty and at a seemingly glacial pace. As indicated above, legal writing faculty are now eligible for some form of tenure at roughly 28% of U.S. law schools.<sup>176</sup> Historically, there has been great institutional and faculty resistance to unitary tenure for skills-focused faculty, particularly at the most elite schools.<sup>177</sup> The percentage of schools with legal writing faculty on 405(c) contracts is now roughly 43%, representing an increase from fifty-three to seventy-nine schools.<sup>178</sup> More than 70% of law schools thus afford some or all legal writing faculty some degree of security of position under 405(b), 405(c), or its equivalent.

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a combined program use exclusively full-time faculty, and fourteen out of fifteen schools with combined programs use some full-time faculty).

<sup>174</sup> Standard 302 requires schools to establish learning outcomes that, “at a minimum, include competency in . . . (b) [l]egal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context.” 2018 STANDARDS AND RULES, *supra* note 1, Standard 302.

<sup>175</sup> Standard 303 requires that law students complete “one writing experience in the first year and at least one additional writing experience after the first year, both of which are faculty supervised.” 2018 STANDARDS AND RULES, *supra* note 1, Standard 303.

<sup>176</sup> See *supra* Section IV.A.

<sup>177</sup> See, e.g., Mitchell Nathanson, *Dismantling the “Other”: Understanding the Nature and Malleability of Groups in the Legal Writing Professorate’s Quest for Equality*, 13 J. LEGAL WRITING 79 (2007); 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, 57–59 (2015); cf. Melissa Weresh, *Stars upon Thars: Evaluating the Discriminatory Impact of ABA Standard 405(c) “Tenure-Like” Security of Position*, 34 LAW & INEQ. 137, 146–49 (2016).

<sup>178</sup> 2018 ALWD/LWI INSTITUTIONAL SURVEY, *supra* note 105, question 8.3 at 58; 2008 ALWD/LWI SURVEY, *supra* note 169, question 65 at 50.

## VI

NO JUSTIFIABLE REASON EXISTS FOR REFUSING TO AFFORD ALL  
CLINICAL AND LEGAL WRITING FACULTY SECURITY OF POSITION  
UNDER STANDARD 405(c)*A. Better Status for Skills-Focused Faculty Is Better for  
Legal Education*

Schools that provide legal writing faculty protection over and above what Standard 405(d) requires have done so for a variety of beneficial reasons. First, these schools recognize the significant value that clinical and legal writing faculty bring to legal education in terms of teaching, scholarship, and service, and the concomitant need to improve their standing in the legal academy. They also recognize that the best way to cultivate teachers and scholars is to give them time to develop their expertise. Full-time faculty on long-term or tenure-track appointments have the time and space to think about teaching creatively, spending the time to research and to try out novel teaching methods in the classroom. Thus, Standard 403 requires that “substantially all” of first-year courses be taught by full-time faculty.<sup>179</sup>

The definition of a “full-time” faculty member indicates that a full time faculty member should engage in the activities listed in Standard 404(a), which include teaching, engaging in scholarship, and participating in faculty governance.<sup>180</sup> Because Standard 405(d) makes no reference to “full-time faculty,” the inference is that legal writing teachers need not be full-time faculty who engage in any or all of the professional activities listed in Standard 403(a). Nonetheless, despite the disparate treatment authorized by 405(d), legal writing faculty, as a whole, have been on the vanguard of bringing novel teaching ideas and trends into legal education. It does not make sense to exclude legal writing faculty from the status and protections the standards afford all other full-time faculty.

Exclusion of legal writing faculty from legal education’s shared governance model is a tremendous drawback of the 405(d) model. Faculty hired under the 405(d) framework often do not have the ability to participate in faculty governance of the law school.<sup>181</sup> Excluded faculty thus have no vote on hiring new teachers, curricular reform,

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<sup>179</sup> 2018 STANDARDS AND RULES, *supra* note 1, Standard 403(a)(1), (3), (4).

<sup>180</sup> *Id.* at ix (defining “Full-time faculty member”); *id.* Standard 403(a).

<sup>181</sup> *See supra* Part III.

academic standards, and assessment methods—matters for which this cohort of faculty has special experience and knowledge.<sup>182</sup>

The antidemocratic effect of depriving legal writing of a meaningful voice is harmful to the law school. Because a significant portion of the law school's professional community is not able to express any voice on important academic issues, the law school receives less input on these issues. Because decision-making is limited to a group that does not fully represent the entire academic community, denying governance rights to legal writing faculty enables poor decisions infected by bias, groupthink, or a failure to understand the knowledge that comes from teaching legal writing and legal skills. Standard 405(a)'s caption referring to the faculty's "professional environment" reflects the fact that shared governance is a hallmark of higher education in the United States. All faculty should be included in this venerated tradition.

Security of position equates to better status and higher salary.<sup>183</sup> Feeling valued as a part of the academic community encourages all faculty to remain and thrive in their jobs. All too often, low-status positions create a stepping-stone mentality, where the legal writing professor is in the job for just a little while, until a better position comes along. The hierarchical message that the Standard 405 framework sends is that skills-focused faculty are on the lowest rung of the ladder, and that one must keep climbing that ladder to move up. The precarious nature of the position promotes instructional instability and makes it difficult, if not impossible, to retain legal writing faculty who are fully invested in teaching the subject well into the future.

Many of 405(d)'s effects are detrimental to law students. Legal skills teachers with minimal job security, depressed pay, and no professional development support may not fully invest in the job on a long-term basis. There is a high degree of burnout in 405(d) positions. Negative morale, low job satisfaction, and a disincentive to work toward the future creates an impoverished academic environment in which law students lose.

Although 405(d)'s Standard might be sufficient to attract good legal writing faculty, the Standard should be sufficient to attract *excellent* legal writing faculty. Excellence in legal education is what law students

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<sup>182</sup> See *supra* Part III.

<sup>183</sup> See *supra* Section IV.B.

deserve. Good is not good enough. Second, 405(d) sends the message to students that legal writing is not a “serious” class when, ironically, it is repeatedly listed as the most important class in law school and among the most important components of law practice.<sup>184</sup> Finally, as mentioned above, the exclusion of legal writing faculty from shared governance instantiates a decision-making model that excludes the opinions, knowledge, and teaching experience of a significant cohort of faculty. These deficiencies set the stage for curricular and academic missteps that could be harmful for law students.

On the other hand, skills-focused faculty with rank and security of position comparable to the rest of the faculty benefit students. Students benefit when teachers are incentivized to pursue long-term programmatic goals with respect to teaching and assessment. Legal skills faculty who have access to faculty development funds and opportunities can grow their craft and build knowledge from colleagues through conferences, workshops, and other professional opportunities. Denying legal skills faculty these opportunities not only stunts their professional development and growth but also harms the law school learning environment.

In addition, given the typically small sizes of legal skills classes and the amount of personal interaction with students, legal skills faculty are often uniquely suited to provide students with clerkship and other employment references during law school and beyond. Legal skills faculty with rank and position equivalent to the rest of the school’s faculty can thus put students in a better competitive position. When students seek references from faculty who know the students best but have noticeably lower rank and position, they are at an unfair disadvantage.

Finally, schools with integrated, unitary tenure-track faculties recognize that lesser forms of security for legal writing faculty are inconsistent with notions of equality and justice, the cornerstones of the legal profession. Skills-focused faculty, often with the same credentials as tenured, doctrine-focused faculty,<sup>185</sup> teach the same

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<sup>184</sup> See, e.g., Tiscione & Vorenberg, *supra* note 177, at 58 (explaining that legal writing is often under-credited, particularly at higher-ranked schools; its faculty usually have lesser titles, such as professor of legal writing, lecturer, or instructor; and the lesser status of legal writing faculty harms students when they seek internships, externships, clerkships, and permanent employment because it affects students’ willingness to seek recommendations from them as well as the weight of those opinions outside the academy).

<sup>185</sup> See, e.g., Susan P. Liemer & Hollee S. Temple, *Did Your Legal Writing Professor Go to Harvard?: The Credentials of Legal Writing Faculty at Hiring Time*, 46 U. LOUISVILLE L. REV. 383 (2008); Weresh, *supra* note 177, at 143 (“Many, if not most, legal

students. The idea that they should be treated the same as other faculty simply makes sense. The fact that these faculty are overwhelmingly female also sends a troubling message to students about the value schools place on female faculty and about gendered roles in society.

The 405(d) framework is not justified by purported differences between skills faculty and traditional law faculty. Differences in credentials between skills-focused and traditional faculty have sometimes been raised to support differences in job security. Yet legal skills and traditional faculty share similar credentials in terms of education, years of law practice, and clerkship experience.<sup>186</sup> There are, however, some distinctions between legal writing faculty and traditional faculty in terms of the rank of the law school alma mater.<sup>187</sup> One study indicates that more traditional faculty graduate from top-twenty schools than legal writing faculty.<sup>188</sup> Although this factor could be viewed as a reason to maintain the existing disparity in security of position, it is not a good reason. Used in this way, law school rankings maintain inequality within the legal academy; known as status or social closure, this use of the rankings permits powerful groups to create and maintain arbitrary barriers that keep out-group members from entering the group.<sup>189</sup> Due to the salary differences between traditional tenure and legal writing faculty,<sup>190</sup> it may even discourage graduates from top schools from pursuing teaching legal writing as a career goal.

*B. Skills-Focused Faculty Are Entitled to Better Protection Based on  
Their Longstanding Contributions to Legal Education*

There is no marked difference between the types of work performed by full-time traditional, clinical, and legal writing faculty within law schools. Of the three traditional elements of academic labor—teaching, service, and scholarship—legal writing faculty excel in all three.

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writing faculty members produce scholarship and perform service. Further, legal writing faculty members often have academic credentials equal to their tenure-line peers.”).

<sup>186</sup> Liemer & Temple, *supra* note 185, at 418–25.

<sup>187</sup> *Id.* at 418–20.

<sup>188</sup> *Id.*

<sup>189</sup> See PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE 133 (Richard Nice trans., Harvard Univ. Press 1984); see also William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 L. & SOC. INQUIRY 547, 548–49 (2004) (describing Bourdieu as a social closure theorist).

<sup>190</sup> See *supra* Section IV.B.

### *1. Skills-Focused Faculty Are Master Teachers on a Wide Range of Law Topics*

As illustrated below, skills-focused teachers excel at teaching in a tremendous range of topics—research, analysis, litigation, alternate dispute resolution, legal document genres, real-world practice, and transactional skills. In all these realms, skills-focused teachers have longstanding experience as thoughtful teachers, employing frequent feedback, delivering meaningful but intensive assessment, and engaging students with collaborative and interactive teaching methods.<sup>191</sup> Skills-focused teachers have been at the forefront of pedagogical innovations, leading the charge to infuse legal education with skills-based learning so that students “integrate analytical thinking into practical models,” giving students the tools to “blend the analytical and practical habits of mind that professional practice demands.”<sup>192</sup>

For more than two decades, two professional organizations devoted to the discipline of legal writing—the Legal Writing Institute and the Association of Legal Writing Directors—have sponsored biennial academic conferences, teaching workshops, scholarly journals, and other professional development initiatives.<sup>193</sup> The Legal Writing Institute, with more than 1000 members, dates from 1985.<sup>194</sup> The Association of Legal Writing Directors, with more than 300 members, dates from 1996. Together, these two organizations have produced an impressive body of scholarship and wisdom for law teaching as well as related doctrinal subject matter.

Further, legal writing and skills-focused faculty have authored countless articles on teaching techniques and theories, formulating a robust canon for the best practices in the field.<sup>195</sup> Skills-focused teachers have been heavily involved in the Institute for Law Teaching and Learning, which, since 2009, has sponsored yearly conferences on

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<sup>191</sup> See Anne E. Mullins, *The Flipped Classroom: Fad or Innovation?*, 92 OR. L. REV. ONLINE 27, 27 (2014) (“Within the legal writing community . . . student-centered, active learning has been a centerpiece of our classrooms for years.”).

<sup>192</sup> CARNEGIE REPORT, *supra* note 56, at 97.

<sup>193</sup> See *Events*, ASS’N OF LEGAL WRITING DIRS., <https://www.alwd.org/events> [<https://perma.cc/DQN5-T2Q4>] (last visited Sept. 7, 2019); *Conferences*, LEGAL WRITING INST., <https://www.lwionline.org/conferences> [<https://perma.cc/H7U7-DGMZ>] (last visited Sept. 7, 2019).

<sup>194</sup> *About LWI*, LEGAL WRITING INST., <https://www.lwionline.org/index.php/about> [<https://perma.cc/NKC8-URUR>] (last visited Sept. 7, 2019). AALS is the largest organization of legal academics.

<sup>195</sup> See, e.g., *infra* Appendix A.

teaching methods.<sup>196</sup> Skills-focused faculty have taken major leadership roles in the AALS section on teaching methods. The AALS-sponsored list for “Teacher of the Year” award reveals a sizeable number of skills-focused legal writing faculty who receive honors for their teaching.<sup>197</sup> The Burton Award for Outstanding Contributions to Legal Writing Education is a national award recognizing excellence for teaching legal writing. The fifteen past award winners collectively demonstrate the sterling quality of the teaching in the legal writing field.<sup>198</sup>

## *2. Skills-Focused Faculty Intensely Serve Their Law Schools and Their Communities*

There is no difference between the service of legal writing faculty and traditional faculty. Today’s legal education landscape heavily focuses on curricular reform, assessment plans, learning outcomes, and academic support. Often, legal writing faculty teachers who do not receive the benefit of 405(c) status are nevertheless required to serve on faculty committees.<sup>199</sup> Thus, although these teachers serve on the committees charged with operating the program of legal education, they sometimes do not have a formal voice (i.e., a vote) in the decisions

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<sup>196</sup> *Conferences*, INST. FOR LAW TEACHING AND LEARNING, <http://lawteaching.org/conferences/> [<https://perma.cc/2NVC-45TV>] (last visited Sept. 7, 2019).

<sup>197</sup> For instance, the 2017 AALS list of Teacher of the Year awards included nine legal writing professors—J. Lyn Entrikin (Arkansas Little Rock); Karen Sneddon (Mercer); Anne Mullins (North Dakota); Margaret Hahn-Dupont (Northeastern); Barbara McFarland (Northern Kentucky); Olympia Duhart (Nova Southeastern); Kirsten Davis (Stetson); Michael Higdon (Tennessee); and Joseph Mastro Simone (Washburn). *See 2017 Law School Teachers of the Year*, ASS’N AM. LAW SCHS., <https://www.aals.org/home/faculty-highlights/2017-law-school-teachers-of-the-year/> [<https://perma.cc/DSU7-UB2A>] (last visited Oct. 4, 2019).

<sup>198</sup> The fifteen past winners of the Burton Award For Outstanding Contributions to Legal Writing include: Kent D. Syverud (2004), Darby Dickerson (2005), Ralph Brill (2006), Laurel Oates (2007), Mary Beth Beazley (2008), Richard K. Neumann Jr. (2009), Helene S. Shapo (2010), Marjorie Dick Rombauer (2011), Tina L. Stark (2012), Mary Lawrence (2013), Anne M. Enquist (2014), Marilyn Walter (2015), Louis J. Sirico (2016), Linda Edwards (2017), and Mark Wojcik (2018). Full information about the award can be found here at THE BURTON AWARDS, <https://www.burtonawards.com/winners/outstanding-contributions-to-legal-writing-education-award/> [<https://perma.cc/8QLY-D2KM>] (last visited Sept. 15, 2019).

<sup>199</sup> *See* 2018 ALWD/LWI INSTITUTIONAL SURVEY, *supra* note 105, question 10.8 at 82 (indicating that legal writing faculty with short-term and long-term contracts are required or expected to serve on committees at forty-eight and twenty-four schools, respectively).

that are made.<sup>200</sup> Many clinical faculty are similarly expected to serve on law school committees without having full voting rights.<sup>201</sup> Beyond service that contributes to a law school's academic policies and practices, skills-focused faculty engage in extensive community service by authoring bar journal articles, teaching CLE presentations, serving on bar association committees—generally serving as a bridge between the law school and the local bench and bar. Equal professional contributions in the service realm such as those provided by other faculty members should lead to equal treatment in security of position.

### *3. Skills-Focused Faculty Research, Write, and Publish Meaningful Scholarship on Law, Practice, and Theory That Aids the Bench, Bar, Legal Education, and the Public*

With respect to scholarship, legal writing professors publish articles that further the purpose of legal scholarship by developing knowledge and understanding of legal issues in a way that aids the bench, bar, and academy. A 2005 bibliography of scholarship related to legal writing included more than 300 authors; 350 books, book chapters, and supplements; and more than 600 articles published in traditional, student-edited law reviews.<sup>202</sup> More than a decade later, the body of scholarship related to legal writing continues to expand. In 2007, legal writing and clinical scholars founded the Applied Legal Storytelling conference, which focuses on the connections between narrative, rhetoric, and persuasion to practical legal advocacy. Since the project's founding, seven biennial international Applied Legal Storytelling conferences have been held. And legal writing and clinical scholars have authored and published more than one hundred papers on Applied Legal Storytelling topics.<sup>203</sup>

Many legal writing faculty do not receive support for writing scholarship.<sup>204</sup> Yet, as a whole, legal writing faculty produce high-quality scholarly work that is useful to the bench, bar, and academy; their scholarship is cited by courts, including the United States

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<sup>200</sup> See *supra* Section IV.B.

<sup>201</sup> See 2017 CSALE SURVEY, *supra* note 10, at 44–45.

<sup>202</sup> Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 LEGAL WRITING: J. LEGAL WRITING INST. 3 (2005).

<sup>203</sup> See J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC JALWD 247 (2015).

<sup>204</sup> See, e.g., 2018 ALWD/LWI INSTITUTIONAL SURVEY, *supra* note 105, question 10.12 at 84–85 (indicating that fewer legal writing faculty are entitled to paid sabbaticals, research stipends, and professional funding).

Supreme Court, federal circuit courts, and state appellate courts.<sup>205</sup> Legal writing faculty routinely win awards for their scholarship on the national level as well.<sup>206</sup> The assumption that legal writing faculty do not need scholarship support because “they do no scholarship” is false.<sup>207</sup>

Because teaching and scholarship exist in a synergistic relationship, encouraging legal writing faculty to engage in scholarship will inure to the overall benefit of the law school and produce more valuable knowledge: “if writing is important for the development of faculty members who teach subjects *other than* writing, it is doubly important for the development of those whose primary teaching area is the writing process itself.”<sup>208</sup> A purported difference in scholarship production, especially when those differentials are often driven by inequities in financial support for faculty scholarship, is not a good reason to maintain the 405(d) hierarchy.

#### CONCLUSION

Standard 405 is imperfect at best. In theory, it began as a way to ensure competent law faculties by affording security of position and academic freedom. But its later permutations, Standards 405(c) and (d), create and perpetuate a hierarchy that favors mostly male, doctrine-focused faculty and discriminates against mostly female, skills-focused faculty, even though both groups teach the same students.

All law faculty should be eligible for tenure and the protections it affords. At this juncture, we recognize that advocating for tenure opportunities for all faculty likely represents too large a leap. Thus, this paper calls on the ABA to both (1) require that all professional skills-focused faculty—both clinical and legal writing faculty—be afforded protection under Standard 405(c) at minimum, and (2) eliminate Standard 405(d).

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<sup>205</sup> See, e.g., *infra* Appendix B.

<sup>206</sup> See, e.g., Linda H. Edwards, *Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation*, 29 *YALE J.L. & FEMINISM* 29 (2017) (winner of the 2018 Teresa Godwin Phelps Award for Scholarship in Legal Communication); Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 *SANTA CLARA L. REV.* 457 (2016) (winner of the 2016 Penny Pether Award for Law and Language Scholarship).

<sup>207</sup> See *supra* notes 205–06.

<sup>208</sup> Pollman & Edwards, *supra* note 202, at 5.

Only long-term, presumptively renewable contracts, which afford security of position “reasonably similar to tenure” as well as significant governance rights, come close to recognizing the vital contribution that skills-focused faculty bring to legal education. Eliminating 405(d) and extending 405(c) to all professional skills faculty are both necessary for law schools to comport with traditional notions of fairness and equal treatment. No justifiable reason exists for discriminating against faculty on the basis of subject matter, particularly when legal writing courses are both required by the ABA accreditation standards and increasingly valued in a legal profession that demands law graduates who understand both legal theory and law practice.

#### APPENDIX A

Articles collected in the LWI Monograph series, The New Teacher's Deskbook, <https://www.lwionline.org/index.php/publications/monograph-series/volume-two> [<https://perma.cc/3NTA-G5P8>]. The range of relevant articles includes: Lorraine Bannai et al., *Sailing Through Designing Memo Assignments*, 5 LEGAL WRITING: J. LEGAL WRITING INST. 193 (1999); Camille Lamar Campbell, *How to Use a Tube Top and a Dress Code to Demystify the Predictive Writing Process and Build a Framework of Hope During the First Weeks of Class*, 48 DUQ. L. REV. 273 (2010); Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 DUQ. L. REV. 489 (2002); Anne M. Enquist, *Unlocking the Secrets of Highly Successful Legal Writing Students*, 82 ST. JOHN'S L. REV. 609 (2008); Elizabeth Fajans & Mary R. Falk, *Comments Worth Making: Supervising Scholarly Writing in Law School*, 46 J. LEGAL EDUC. 342 (1996); Brian J. Foley & Ruth Anne Robbins, *Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections*, 32 RUTGERS L.J. 459 (2001); Ian Gallacher, *The Hitchhiker's Guide to Teaching Legal Research to the Google Generation*, 39 AKRON L. REV. 151 (2006); M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student*, 25 SEATTLE U. L. REV. 139 (2001); Steven J. Johansen, "What Were You Thinking?": *Using Annotated Portfolios to Improve Student Assessment*, 4 LEGAL WRITING: J. LEGAL WRITING INST. 123 (1998); Aliza B. Kaplan & Kathleen Darvil, *Think [and Practice] Like a Lawyer: Legal Research for the New Millennials*, 8 LEGAL COMM. & RHETORIC: JALWD 153 (2011); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997); Suzanne E. Rowe, *Legal Research, Legal Writing, and Legal Analysis: Putting Law Schools into Practice*, 29 STETSON L. REV. 1193 (2000); Sophie M. Sparrow, *Describing the Ball: Improve Teaching By Using Rubrics—Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1 (2004); Kent D. Syverud, *Taking Students Seriously: A Guide for New Law Teachers*, 43 J. LEGAL EDUC. 247 (1993); Kristen K. Robbins (Tiscione), *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483 (2003); Grace Tonner & Diana Pratt, *Selecting and Designing Effective Legal Writing Problems*, 3 LEGAL WRITING: J. LEGAL WRITING INST. 163 (1997); Robin S. Wellford-

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#### APPENDIX B

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