

# INTEGRATED LEARNING, INTEGRATED FACULTY

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## ABSTRACT

*A fundamental obstacle to the success of legal education’s practice-readiness movement is the “bifurcated faculty.” Most law schools continue to operate a two-tiered system in which a group of elite-credentialed “doctrinal” faculty enjoy the generous compensation, security, and privileges associated with tenure, while an underclass of contract faculty teach work-intensive “skills” courses for lower pay and lesser status. This Essay analyzes the bifurcated faculty as a personnel practice, leveraging insights from management theory and employment discrimination scholarship to evaluate law schools as employers. It considers, first, the rise of new economy management practices that eschew static job classifications in favor of greater flexibility and integration and, second, the role of structural discrimination in stymying institutional efforts to eliminate workplace disparities tied to race, gender, and other protected characteristics. These bodies of research suggest that law schools aspiring to graduate practice-ready lawyers must not only integrate their curricula but also their faculty. Doing so means eliminating structural obstacles that isolate skills faculty from doctrinal faculty and dislodging embedded assumptions about their relative worth. Law schools that are seriously committed to graduating practice-ready lawyers should adopt a unified tenure system that hires, evaluates, and promotes all faculty based on the quality of their teaching and scholarship regardless of the subject of their courses or their area of research.*

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#### INTRODUCTION

Legal education is no stranger to hierarchy. The history of the modern law school lies in the stratification of the legal profession during the nineteenth century. Prominent lawyers grew concerned about the quality of apprenticeships offered by a set of upwardly mobile practitioners in the United States' emerging middle class.<sup>1</sup> These elites feared that young entrants would receive only a narrow, technical indoctrination in the field.<sup>2</sup> Consequently, they sought to formalize legal education in a way that would ensure a broad exposure to legal principles and standardize access to the profession.<sup>3</sup> Their efforts resulted in the first university-based law schools and the gradual waning of the apprenticeship model of professional training: the academic model of legal education was born.<sup>4</sup>

The historical dichotomy between legal training in the field and legal learning in the academy endures today in the structure of the modern law school curriculum and in the composition of its faculty. Most schools, particularly those in the top tier, continue to draw a sharp divide between “doctrinal” and “skills” courses and those who teach them.<sup>5</sup> A privileged group of elite-credentialed faculty cover the doctrinal courses, while enjoying the generous compensation and job security associated with tenure. Meanwhile an underclass of contract faculty shoulder the more labor-intensive skills curriculum, enduring lower pay and lesser status.<sup>6</sup> These contract faculty (and their courses) are

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1. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 22–24 (1983); A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1963 (2012). These sources provide a detailed history of the development of legal education. For a primary account of the legal academy's view of the relative importance of apprenticeship and higher learning as of the turn of the century, see *Is Apprenticeship in a Law Office Desirable While Pursuing a Course of Study in a Law School?*, reprinted in 2 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 880, 880–81 (Steve Sheppard ed., 1999).

2. STEVENS, *supra* note 1, 21–22; Spencer, *supra* note 1, at 1962–63.

3. STEVENS, *supra* note 1, at 25–26; Spencer, *supra* note 1, at 1962–64.

4. See generally STEVENS, *supra* note 1, at 7–8, 21–26 (tracing the institutionalization of legal education over the course of the nineteenth century).

5. The terms “doctrine” and “skills” are highly problematic. As this Essay describes, they assume a pedagogical distinction that is fundamentally untenable and embed values that subordinate some faculty based on the superficial classification of the courses they teach. See LINDA H. EDWARDS, *THE DOCTRINE-SKILLS DIVIDE: LEGAL EDUCATION'S SELF-INFLICTED WOUND* 6 (2017) (asserting that the project of improving student training “should begin by dismantling the assumption that these two categories [‘doctrine’ and ‘skills’] are objectively ‘true’ reflections of the natural world . . . [and r]ecognizing the artificiality of the divide”); Duncan Kennedy, *Introduction*, 73 UMKC L. REV. 231, 234 (2004) (“The problem . . . has to do with the initial set up of job categories—that is, with the existence of ‘doctrinal’ and LRW faculty as distinct job categories . . .”). This Essay reluctantly adopts these terms when referring to the status quo curriculum and categorization of faculty because they so clearly evoke the divide this Essay contests. Moreover, there is no ready alternative. It is doubtlessly a reflection of the depth of the problem with these terms that one is at a loss for words to replace them.

6. There are many indicia of this lesser status, see Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73

siloed within the institution. They operate as a discrete, isolated subunit governed by different rules and subjected to different expectations than the larger professorate.<sup>7</sup>

This organizational structure—what this Essay terms the “bifurcated faculty”—has been widely criticized from an equity perspective and on pedagogical grounds.<sup>8</sup> This Essay does not revisit that literature but draws from it in offering a different critique: it considers the bifurcated faculty from the perspective of the institution as an employer, leveraging insights from management theory and employment discrimination scholarship to evaluate the bifurcated faculty as a personnel practice.<sup>9</sup> It proceeds from the premises that the legal academy is committed to producing more practice-ready graduates and that a more comprehensive and integrated curriculum is essential to that

UMKC L. REV. 253, 255–71 (2004), but the critical distinction is tenure. Only a minority of skills faculty have access to this form of job security and its attendant prestige. See ASS’N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., ALWD/LWI ANNUAL LEGAL WRITING SURVEY: REPORT OF THE 2017–2018 INSTITUTIONAL SURVEY 58 (2018) [hereinafter 2017–2018 ALWD/LWI SURVEY], <http://www.alwd.org/images/resources/ALWD-LWI-2017-18-Institutional-Survey-Report.pdf> [<https://perma.cc/YZP4-DAVN>] (finding that twenty-eight percent of legal writing professors were in traditional tenure-line positions in the 2017–18 school year); ROBERT R. KUEHN ET AL., CTR. FOR STUDY ON APPLIED LEGAL EDUC., THE 2016–17 SURVEY OF APPLIED LEGAL EDUCATION 42 (2017), <http://www.cleaweb.org/resources/Documents/CSALE%20Report%202016-17.pdf> [<https://perma.cc/4PL6-NT76>] (finding that thirty-four percent of instructors of clinical courses were in tenure-line positions in the 2016–2017 school year); *infra* Section II.

7. For instance, among schools with written standards for the promotion, tenure, or retention of clinical faculty, seventy-two percent have standards that differ from those for doctrinal faculty. KUEHN ET AL., *supra* note 6, at 17.

8. The literature on this subject is too vast to fully capture here. For a sampling, see EDWARDS, *supra* note 5; Renee Nicole Allen et al., *The “Pink Ghetto” Pipeline: Challenges and Opportunities for Women in Legal Education*, 96 U. DET. MERCY L. REV. 525, 526–27 (2019); Mary Beth Beazley, *Finishing the Job of Legal Education Reform*, 51 WAKE FOREST L. REV. 275, 309–10 (2016); Catherine Martin Christopher, *Putting Legal Writing on the Tenure Track: One School’s Perspective*, 31 COLUM. J. GENDER & L. 65, 65 (2015); Kirsten A. Dauphinais, *Sea Change: The Seismic Shift in the Legal Profession and How Legal Writing Professors Will Keep Legal Education Afloat in its Wake*, 10 SEATTLE J. FOR SOC. JUST. 49, 71 (2011); Durako, *supra* note 6; Lucille A. Jewel, *Oil and Water: How Legal Education’s Doctrine and Skills Divide Reproduces Toxic Hierarchies*, 31 COLUM. J. GENDER & L. 111, 115 (2015); Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 116–17; Mitchell Nathanson, *Dismantling the “Other”: Understanding the Nature and Malleability of Groups in the Legal Writing Professorate’s Quest for Equality*, 13 LEGAL WRITING 79, 80 (2007); Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 467–68 (2004); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 3, 4 (2001); Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS’N LEGAL WRITING DIRECTORS 12, 14 (2002). This Essay’s critique aligns most closely with the works of Professor Linda Edwards and Professor Mary Beth Beazley, who have judged the bifurcated curriculum and resulting classification of faculty to be pedagogically suspect. See generally EDWARDS, *supra* note 5; Beazley, *supra*.

9. As Professor Nantiya Ruan observes, law schools are not only educational institutions but also employers, though they are only rarely viewed as such in scholarly discourse. Nantiya Ruan, *Papercuts: Hierarchical Microaggressions in Law Schools*, 31 HASTINGS WOMEN’S L.J. 3, 7 (2020) [hereinafter Ruan, *Papercuts*]. To the extent they are, it is generally in the context of assessing their compliance with antidiscrimination mandates. See, e.g., Ann C. McGinley, *Discrimination in Our Midst: Law Schools’ Potential Liability for Employment Practices*, 14 UCLA WOMEN’S L.J. 1 (2005); Melissa Hart, *Missing the Forest for the Trees: Gender Pay Discrimination in Academia*, 91 DENV. U. L. REV. 873 (2014). In contrast, this Essay views the law school employer not as a potential defendant but as a strategic actor. It asks how employment law discourse informs our understanding of law schools’ management practices in relation to their institutional goals. Cf. Durako, *supra* note 6, at 272 (looking to equal protection law “not as legal precedent but as educational wisdom”).

mission.<sup>10</sup> The bifurcated faculty is in tension with these institutional values, operating as a chronic headwind against efforts to implement them.<sup>11</sup>

Two insights inform this assertion. First, contemporary workplace management practices emphasize the value of increased worker integration and work role fluidity in responding to changing market demands.<sup>12</sup> The bifurcated faculty, viewed as a management practice, is at odds with this trend. It imposes a strict job classification system that impedes faculty development of the cross competencies needed to deliver an integrated curriculum. Second, there is increased awareness of the roles subconscious bias and structural discrimination play in hampering efforts to achieve greater racial and gender diversity in the workplace.<sup>13</sup> By analogy, the bifurcated faculty reaffirms stereotypes about the comparative worthiness of doctrinal and skills faculty, operating as a structural barrier to faculty integration and the delivery of a curriculum that equally prioritizes all aspects of professional development.

A few disclaimers are in order: First, this Essay presumes the legal academy's commitment to graduating practice-ready lawyers. Certainly some law schools and faculty question or even reject this goal.<sup>14</sup> This Essay addresses those who genuinely embrace reform. Second, this Essay acknowledges but does not consider other compelling reasons why law schools should reject the bifurcated faculty. There is, for instance, a strong normative argument that law schools, particularly those that market their commitment to practice readiness, should commit to equal and fair treatment of doctrinal and skills faculty.<sup>15</sup> Rather this Essay makes a pragmatic claim, appealing to law schools' professed self-interests. Third, and last, this Essay does not wade into the debate about the value of tenure. Despite chronic expressions of antitenure sentiment and a retreat from tenure on the part of some universities, tenure remains the gold standard

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10. See generally ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007) [hereinafter BEST PRACTICES]; WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter THE CARNEGIE REPORT]. The content of these reports and the practice-readiness movement more broadly have been discussed extensively elsewhere. See, e.g., Rachel S. Arnov-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 453–55 (2009); Beazley, *supra* note 8, at 306–08; Todd A. Berger, *Three Generations and Two Tiers: How Participation in Law School Clinics and the Demand for "Practice-Ready" Graduates Will Impact the Faculty Status of Clinical Law Professors*, 43 WASH. U. J.L. & POL'Y 129, 152–53 (2013); Susannah Furnish, *The Progression of Legal Education Models: Everything Old Is New Again . . .*, 6 NE. U. L.J. 7, 13–15 (2013); William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 501–02 (2013); Jewel, *supra* note 8, at 127–33; Jerome M. Organ, *Legal Education and the Legal Profession: Convergence or Divergence?*, 38 OHIO N.U. L. REV. 885, 889–91 (2012); Nantiya Ruan, *Student, Esquire?: The Practice of Law in the Collaborative Classroom*, 20 CLINICAL L. REV. 429, 435–37 (2014) [hereinafter Ruan, *Student, Esquire*].

11. Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (holding that an employer's use of facially neutral job requirements that operate as "built-in headwinds" for minority employees is actionable discrimination under federal law).

12. See *infra* Part II.A.

13. See *infra* Part II.B.

14. See, e.g., Henderson, *supra* note 10, at 501–03. Others may view practice readiness as a phase or commit to it halfheartedly. See *id.*

15. See, e.g., *id.* at 506; Jewel, *supra* note 8, at 128–33. For more articles that discuss the argument that law schools should commit to equal and fair treatment of doctrinal and skills faculty, see *supra* note 8.

in defining full-fledged faculty status within law schools.<sup>16</sup> So long as that is the case, this Essay contends that tenure should be available on an equal basis to all faculty who meet its standards.<sup>17</sup>

The remainder of this Essay proceeds as follows: Section I discusses the rise of the practice-readiness movement in legal education and the challenges it poses. Rather than seek holistic reforms, law schools have long relied on isolated programs staffed by lower-status, contract faculty to provide practical training. Section II considers the result of this practice—the bifurcated faculty—as a managerial choice and a structural feature of work. It argues that faculty bifurcation undermines institutional efforts to integrate the curriculum and reifies the historical devaluation of skills education, precluding transformative change. Finally, Section III calls on the legal academy to align their workplace practices with their professed goals by adopting a uniform system of tenure-line employment. True curricular integration can be best achieved where the contributions of all faculty, to both innovative teaching and impactful scholarship, are equally encouraged and rewarded.

## I. THE INTEGRATION MANDATE

Criticism of legal education is as old as legal education itself. A common theme is the need to enhance law graduates' practice readiness. Assessments of institutional performance generally praise law schools' ability to train students to "think like a lawyer."<sup>18</sup> However, law schools receive poor marks when it comes to inculcating the practical, ethical, and professional dimensions of lawyering.<sup>19</sup> In effect, students graduate knowing a great deal about the law but very little about what to do with it.<sup>20</sup>

The most recent assessments of legal education add a particular pedagogical proscriptio to this critique. In 2007, the Carnegie Foundation and the Clinical Legal Education Association published reports that called on law schools to deliver integrated

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16. See Stanchi, *supra* note 8, at 485 (labeling tenure "the quintessential social reward of the academy"). Ambivalence about tenure in law school is illustrated most starkly in the American Bar Association's recent about-face on the continued necessity of tenure for accreditation. See Karen Sloan, *ABA Council Abandons Bid to Drop Tenure Requirement*, NAT'L L.J. (Mar. 17, 2014), <http://ncforaj.org/wp-content/uploads/2014/03/NLJ-3-18-14-ABA-Council-Abandons-Bid-to-Drop-Tenure-Requirement.pdf> [https://perma.cc/VFN5-U99R].

17. See Beazley, *supra* note 8, at 278 (asserting that "[a]ll full-time faculty deserve the protections of tenure regardless of their method of teaching or the subject area of their courses").

18. *E.g.*, THE CARNEGIE REPORT, *supra* note 10, at 185–86. *But see* Kristen Holmquist, *Challenging Carnegie*, 61 J. LEGAL EDUC. 353, 357 (2012) (questioning whether law schools truly excel in developing cognitive skills and suggesting that the traditional "case method" style of teaching diminishes student opportunity "to engage in sophisticated higher-order thinking about law and policy, problems, and goals, and about potential paths, obstructions, and solutions").

19. See THE CARNEGIE REPORT, *supra* note 10, at 187–88; AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 4–6 (1992), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_maccrate\\_report\).pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).pdf) [https://perma.cc/8JKW-7JR2].

20. See *id.* at 187 (noting that the case method style presents a "deliberate simplification" and leaves students unprepared to deal with the "complexity of actual situations that involve full-dimensional people").

learning experiences.<sup>21</sup> Law schools must create contexts that place students in the role of the lawyer, forcing them to bring to bear multiple competencies in a single learning environment. This integration should encapsulate what the Carnegie Report calls “the cognitive, practical, and ethical-social” apprenticeships that together compose professional mastery.<sup>22</sup> In other words, students must learn “experientially” in situations that simulate or expose them to actual practice, providing the opportunity not only to think like a lawyer but to behave like one.<sup>23</sup>

This focus on experiential learning poses a direct challenge to the organizing framework that defines contemporary legal education. Over the course of the twentieth century, law schools developed courses and programs to deliver the practical training and professional exposure that had long been lacking in the standard curriculum.<sup>24</sup> Today, virtually all law schools house sophisticated legal writing programs, in-house clinics, and externship programs that offer rich opportunities for experiential learning.<sup>25</sup> Yet as a matter of both history and design, these educational opportunities exist outside the mainstream curriculum in which cognitive learning still predominates. As a consequence, the courses at the core of the law school experience inculcate only a handful of the professional competencies educators and practitioners have identified as essential to success in practice.<sup>26</sup> Meanwhile the balance of students’ professional training occurs in programmatic silos on the “fringes” of the curriculum.<sup>27</sup>

Adding to this division is the distinctly lower status afforded to faculty who teach in these programs. Despite some movement in recent years, the vast majority of skills faculty serve in short- or long-term contract positions. A recent survey of clinicians reveals that only thirty-four percent of full-time clinical faculty hold tenure-line positions: twenty-seven percent in traditional tenure systems and twelve percent in clinic-specific systems.<sup>28</sup> The majority hold contract positions of between one and five years.<sup>29</sup> A recent survey of legal writing programs reveals that only twenty-eight percent

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21. BEST PRACTICES, *supra* note 10, at 6; THE CARNEGIE REPORT, *supra* note 10, at 185.

22. THE CARNEGIE REPORT, *supra* note 10, at 191–92.

23. David I. C. Thomson, *Defining Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 1, 20 (2014) (describing experiential learning as “methods of instruction that regularly or primarily place students in the role of attorneys”).

24. THE CARNEGIE REPORT, *supra* note 10, at 189–91 (describing this approach to institutional reform).

25. See Thomson, *supra* note 23, at 3, 20 (citing simulations, clinics, and externships as key examples of experiential learning). For some especially rich examples of experiential learning that combine classroom instruction, advocacy, drafting and public service, see Nantiya Ruan, *Experiential Learning in the First-Year Curriculum: The Public Interest Partnership*, 8 LEGAL COMM. & RHETORIC 191, 204–08 (2011); Ruan, *Student, Esquire*, *supra* note 10, at 442–47.

26. See Neil Hamilton, *Law Firm Competency Models & Student Professional Success: Building on a Foundation of Professional Formation/Professionalism*, 11 U. ST. THOMAS L.J. 6, 7–9 (2013) (reporting on competency rubrics that law firms have developed for associate hiring and performance); Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 L. & SOC. INQUIRY 620, 620 (2011) (considering measures of competency in the context of law school admissions).

27. Ruan, *Papercuts*, *supra* note 9, at 15; see also THE CARNEGIE REPORT, *supra* note 10, at 191 (criticizing law schools for taking an “additive” rather than “integrative” approach to delivering professional skills and values training).

28. KUEHN ET AL., *supra* note 6, at 25.

29. *Id.*

of law schools employ any legal research and writing (LRW) faculty in traditional tenure-line positions, while eight percent employ at least one LRW faculty member in a program-specific tenure-line position.<sup>30</sup> The remaining schools employed LRW faculty exclusively in short- or long-term contract positions.<sup>31</sup> Faculty serving in contract positions generally are not expected to contribute to the legal academy's scholarly mission and lack access to the privileges and security associated with tenure.<sup>32</sup>

These stark differences in status have been institutionalized in the American Bar Association (ABA) accreditation standards. ABA Standard 405(b) requires each law school to have an "announced policy" regarding academic freedom and tenure.<sup>33</sup> Law schools generally interpret this to mean that full-time faculty must be tenure eligible unless they fall outside of Standard 405(b). Indeed, the ABA Standards explicitly carve out two categories of professors that need not have access to tenure status: clinical and legal writing faculty.<sup>34</sup> ABA Standard 405(c) allows law schools to provide clinicians a status "reasonably similar to tenure," defined as a series of long-term contracts of five or more years that are "presumptively renewable" or a similar process "sufficient to ensure academic freedom."<sup>35</sup> Legal writing faculty command even less protection. Standard 405(d) requires only that law schools provide legal writing professors "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>36</sup>

The formalization and sanctioning of these status differences ironically occur in tandem with a renewed interest in legal education reform and an express commitment to experiential learning. In 2014, the ABA revised its standards for law school accreditation to improve and measure schools' success in graduating practice-ready lawyers.<sup>37</sup> ABA

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30. 2017–2018 ALWD/LWI SURVEY, *supra* note 6, at 58. These numbers are somewhat misleading in that they capture any school that employs at least one LRW faculty member in a tenure-line position. Thirty-two percent of responding schools with traditional tenure and twenty-seven percent of responding schools with programmatic tenure indicated that the *only* LRW faculty members within their institutions who held those positions were LRW program directors. *Id.* at 59.

31. *Id.* at 58 (reporting that forty-three percent of responding schools employed faculty in long-term 405(c) contracts, eighteen percent in long-term contracts without 405(c) status, and forty-one percent in short-term contracts).

32. See KUEHN ET AL., *supra* note 6, at 47 (reporting that only thirty-seven percent of full-time clinical faculty were required to produce scholarship as part of their job and less than forty percent were entitled to sabbaticals or research leave).

33. AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019–2020, at 27 (2019), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf) [https://perma.cc/G833-V7US].

34. *Id.*

35. *Id.* at 27–28.

36. *Id.* at 27. Professor Beazley describes Standard 405(d) as the ultimate "catch-22": legal writing faculty "must either leave their jobs (to show that the job conditions were not sufficient to 'retain' them), or argue that they themselves are not 'well qualified' in legal writing instruction." Beazley, *supra* note 8, at 287.

37. See Standards Review Comm., Am. Bar Ass'n, *Overview of Changes to the Standard for Approval of Law Schools*, A.B.A., [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/overview\\_of\\_changes.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/overview_of_changes.pdf) [https://perma.cc/5S3K-XNWN] (last visited May 1, 2020).

Standard 301 mandates that law schools establish learning outcomes designed to prepare students “for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”<sup>38</sup> The new standards specifically require that law students receive six credit hours of experiential education.<sup>39</sup> Thus, law schools and their accreditors are embracing the importance of experiential education and an integrated curriculum while simultaneously condoning the lesser treatment of faculty essential to fulfilling that mission.<sup>40</sup>

## II. INSTITUTIONAL CHOICES AT ODDS WITH INSTITUTIONAL GOALS

The previous Section discussed the increasing importance of experiential learning in the legal academy and the differential status of faculty engaged in this pedagogy. This Section considers that contradiction from the perspective of the law school as employer. It argues that the bifurcated faculty is a managerial failure that jeopardizes institutional goals. The bifurcated faculty impedes managerial flexibility, limiting law schools’ ability to adjust their curricula in the face of changing market demands.<sup>41</sup> At the same time, it undermines the purported equality of doctrinal learning and skills training by reifying stereotypes about the value and competence of skills faculty.<sup>42</sup> In these ways, the bifurcated faculty precludes the development of the type of fully integrated experiential curriculum that the practice-readiness movement envisions.

### A. Silos and Flexibility

In the broader labor market, workplace silos are the antithesis of flexibility. Contemporary employers, seeking to remain competitive in an increasingly globalized economy, prize the ability to deploy and adjust their workforces quickly and nimbly.<sup>43</sup> From this perspective, law schools’ adherence to the bifurcated faculty is a throwback to a time when the academy could count on steady demand for its product. In a world in which expectations about the content and value of a legal education are in flux, law schools need to leverage faculty resources dynamically.

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38. AM. BAR ASS’N, *supra* note 33, at 15. ABA Standard 302 provides specifics on “minimum” outcomes that law schools “shall establish.” *Id.*

39. *Id.* at 16. ABA Standard 303(a)(3) provides that “[a] law school shall offer a curriculum that requires each student to satisfactorily complete at least . . . one or more experiential course(s) totaling at least six credit hours.” *Id.*

40. See Beazley, *supra* note 8, at 285–86 (observing that while “the ABA [standards] say[] that teaching legal writing is important. . . [T]he people who teach it are apparently far less important”); Ruan, *Papercuts*, *supra* note 9, at 15 (noting that while “law schools are strongly encouraged to provide more experiential learning opportunities . . . , [they] systemically marginalize the very faculty [who] teach[] those skills”).

41. See *infra* Part II.A.

42. See *infra* Part II.B.

43. See KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 67–72, 92–94 (2004) [hereinafter STONE, WIDGETS TO DIGITS] (describing the evolution of flexibility-focused management practices in the late twentieth century and the concomitant rise of the “boundaryless” career). Professor Katherine Stone’s important monograph on the changing nature of employment relationships and her related articles incorporate the key business management and sociological literature on this shift. This Part draws heavily on her work.



This is borne out in the literature on changing employment practices, which depicts a move from rigidity to fluidity in workplace management strategies. Industrial management practices from the late nineteenth and early twentieth centuries emphasized clearly defined workplace roles.<sup>44</sup> This made sense given the strength and stability of large regional employers in a predominantly industrial economy.<sup>45</sup> For much of the twentieth century, an individual spent the bulk of his or her working life with a single company, at a single physical location, and advanced along a defined career path.<sup>46</sup> Early industrial engineer Frederick Taylor famously developed the theory of scientific management that systemized work routines and job tasks into a predesigned progression.<sup>47</sup> His approach divided production into discrete tasks and assigned them to workers in sharply differentiated job categories.<sup>48</sup> These workers relied on the discrete skill set associated with their job positions to advance along defined career ladders.<sup>49</sup> Pathways were fixed, and lateral movement was discouraged.<sup>50</sup>

The bifurcated faculty is reminiscent of this managerial model. The academy has divided the production of legal education into two constituent parts—the teaching of legal principles and the inculcation of lawyering skills—which are assigned to distinct classes of employees who operate in separate silos within an institution.<sup>51</sup> These employees are evaluated and rewarded differently and governed by different policies and procedures: Doctrinal faculty are judged principally on their scholarship and proceed through a faculty-governed tenure system that confers maximum security and independence.<sup>52</sup> Skills faculty are judged almost exclusively on their teaching and service and are typically eligible for a series of successive contractual appointments, usually at the dean's discretion.<sup>53</sup> There is minimal professional interaction between

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44. *See id.* at 31–37.

45. *See id.*

46. *See id.* at 37–38. For additional employment law scholarship describing the rise of the “career” model of employment and its implications for employee job security rights, see, for example, Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 *IND. L.J.* 1, 6 (2001); Matthew W. Finkin, *The Bureaucratization of Work: Employer Policies and Contract Law*, 1986 *WIS. L. REV.* 733, 740–43; Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 *MICH. L. REV.* 8, 14–15 (1993); and Katherine V. W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 *UCLA L. REV.* 519, 535–39 (2001) [hereinafter Stone, *Psychological Contract*].

47. *See* STONE, WIDGETS TO DIGITS, *supra* note 43, at 31–37; *see also* PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE 59–64 (1999).

48. *See* STONE, WIDGETS TO DIGITS, *supra* note 43, at 34–35.

49. *Id.* at 42–43.

50. *See id.*

51. Jessica Erickson, *Experiential Education in the Lecture Hall*, 6 *NE. U. L.J.* 87, 87 (2013); *see also* Jewel, *supra* note 8, at 112–14; Stanchi, *supra* note 8, at 487. For more articles that discuss how legal education is divided into separate silos, see *supra* note 8.

52. *See* Spencer, *supra* note 1, at 2048; Stanchi, *supra* note 8, at 479–85.

53. KUEHN ET AL., *supra* note 6, at 15 (finding thirty percent of full-time faculty teaching in a law clinic or field placement course are in presumptively renewable long-term contracts); Bryan L. Adamson et al., *Clinical Faculty in the Legal Academy: Hiring, Promotion and Retention*, 62 *J. LEGAL EDUC.* 115, 129 (2012) [hereinafter Adamson et al., *Clinical Faculty*] (finding seventy-four percent of clinical faculty on a clinical-faculty tenure track reported that their standards for promotion and retention place a greater emphasis on their teaching as compared to doctrinal faculty on a traditional tenure track).

these categories of faculty, whose responsibilities are considered independent of each other and who have almost no ability to leave one track in favor of the other.<sup>54</sup>

In the broader labor market, however, employers have moved away from strict job classifications with assigned roles in favor of more flexible management practices.<sup>55</sup> In the contemporary service- and information-driven economy,<sup>56</sup> work is less amenable to dissection and requires greater cross collaboration.<sup>57</sup> Adaptability is key. Global competition and the pace of change mean companies must react quickly to fluctuating market demands.<sup>58</sup> Some have responded to these dynamics by adopting new management strategies that increase teamwork and foster greater innovation.<sup>59</sup> This includes dismantling fixed hierarchies and career ladders in favor of work teams in which supervision is diffuse and employees can develop and deploy diverse skill sets.<sup>60</sup> These companies promote and prize so-called organizational citizenship behavior—the desire and capacity of employees to reach beyond their assigned roles, adding value to the company while evolving professionally.<sup>61</sup>

That is not to say that new economy management practices are necessarily a positive development. An attendant concern is the rise of independent contractor arrangements, which serve employers' interests in efficiently fulfilling short-term labor needs, but diminish workers' ability to access the already limited legal protections

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54. To be sure, faculty from time-to-time break out of their assigned silo to teach on the “other” side of the curriculum. But the way this occurs is telling. When strapped for coverage in doctrinal courses, institutions may tap skills faculty, who, owing to their lesser pay and lack of job security, may be willing to teach an overload for additional compensation or feel unable to decline (or both). On the other hand, if doctrinal faculty teach (or develop) a skills course, it is often the product of idiosyncratic interest—the faculty member’s pet project. In either case, the cross-over is treated as an exception and the preexisting role division remains intact. *See Stanchi, supra* note 8, at 473 (describing how in the case of legal writing faculty it is the professor’s “membership in a particular group, as opposed to merit-based factors . . . that dictates access to opportunities”). Situations in which faculty consistently teach on both sides of the curriculum or leave one silo permanently in favor of the other are exceedingly rare and, in the latter case, even notorious. *See Deborah Jones Merritt, Crossing the Divide, in THE DOCTRINE-SKILLS DIVIDE: LEGAL EDUCATION’S SELF-INFLICTED WOUND, supra* note 5, at 347, 347–58 (describing the author’s migration from podium teaching to clinical supervision).

55. *See* RICHARD SENNETT, *THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM* 51 (1998) (describing the modern approach of “flexible specialization” as “the antithesis of the system of production embodied in [early industrial management]”); STONE, *WIDGETS TO DIGITS, supra* note 43, at 92–94.

56. For an explanation of the movement from a manufacturing to a service-oriented economy, see STEPHEN A. HERZENBERG ET AL., *NEW RULES FOR A NEW ECONOMY: EMPLOYMENT AND OPPORTUNITY IN POSTINDUSTRIAL AMERICA* 1–3 (1998).

57. *See* CAPPELLI, *supra* note 47, at 146–47 (noting the shift in the late nineties from narrow job descriptions to autonomous teams and job rotation, resulting in an increase in cross-training).

58. *See id.* at 59 (attributing changes in employment practices to increasingly competitive product markets and pressures to exploit market niches); Stone, *Psychological Contract, supra* note 46, at 549 (noting pressures caused by international trade and global competition in explaining changing management trends).

59. CAPPELLI, *supra* note 47, at 146–48.

60. *See id.* (noting an increase in workers performing broader tasks and a decrease in supervisory positions in white-collar work environments).

61. *See* STONE, *WIDGETS TO DIGITS, supra* note 43, at 94–96 (defining “organizational citizenship behavior” as “discretionary behavior that goes beyond the requirements of specific role definitions and that is not rewarded through the formal reward structure of the firm”).

afforded to traditional employees.<sup>62</sup> Universities are arguably guilty of this practice with respect to their use of adjunct faculty, who perform essential teaching work but lack the benefits of employment status.<sup>63</sup> This Essay, however, addresses law schools' ability to develop and deploy their core faculty—individuals who serve full time and have full employment status but are treated unequally despite their equal role in the in the educational mission.

In other words, integrating skills faculty makes business sense. As recent events have shown, the demand for legal education is not static, and legal education cannot afford to be. In the wake of the Great Recession, law schools faced low enrollment and reduced demand for new lawyers.<sup>64</sup> Many law schools sought to distinguish themselves, claiming to provide a more practice-oriented learning experience that would enhance student marketability upon graduation.<sup>65</sup> While the peak of the 2010 enrollment crisis

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62. See Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 417 (2002); Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 158 (2003); V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 65 (2017); Laurie E. Leader, *Whose Time Is It Anyway?: Evolving Notions of Work in the 21st Century*, 6 BELMONT L. REV. 96, 99–100 (2019); Orla O'Callaghan, Comment, *Independent Contractor Injustice: The Case for Amending Discriminatory Discrimination Laws*, 55 HOUS. L. REV. 1187, 1188–91 (2018). Several recent state legislative initiatives have sought to address this problem, either by expanding the definition of employee or by extending some employment benefits to workers without formal employment status. See, e.g., Act of Sept. 18, 2019, ch. 296, 2019 Cal. Stat. 2888 (codifying the common law “ABC” test of employment status that limits employers’ abilities to classify workers as independent contractors); S. 67, 218th Leg., Reg. Sess. (N.J. 2018) (proposing the Portable Benefits Act for Independent Contractors, which creates a system of portable benefits for independent workers). For more information about such efforts, see Ekaterina (Kate) Napalkova & Katrine Magas, *Landmark Bill Passes: California Codifies “ABC” Test for Worker Classification*, NAT'L L. REV. (Sept. 16, 2019), <http://www.natlawreview.com/article/landmark-bill-passes-california-codifies-abc-test-worker-classification> [https://perma.cc/2CWZ-AVT2]; and *NJ Benefits Bill May Deter Business with Contractors*, LAW360 (Dec. 13, 2019, 5:18 PM), <http://www.law360.com/articles/1224065/nj-benefits-bill-may-deter-business-with-contractors> [https://perma.cc/3J66-MB7F]. In what might hopefully model a change for the future, Congress recently extended federal unemployment benefits to “gig” workers dislocated as a result of the COVID-19 pandemic. See Coronavirus Aid, Relief, and Economic Security Act (“CARES” Act), Pub. L. No. 116-136, § 2102 (2020); Heather Long, “Paid Sick Leave: Who Gets It During the Coronavirus Outbreak,” WASH. POST (Mar. 17, 2020, 11:18 AM), <http://www.washingtonpost.com/business/2020/03/16/paid-sick-leave-coronavirus-house-bill/> [https://perma.cc/3PX9-GW44].

63. This is a well-known problem at the college level. While law school adjuncts by and large are esteemed, well-established practitioners who teach by choice, college adjuncts often are recent PhDs without access to secure employment in fields where academic jobs are scarce and poorly paid. See, e.g., Kevin Birmingham, *The Great Shame of Our Profession: How the Humanities Survive on Exploitation*, CHRON. HIGHER EDUC. (Feb. 12, 2017), <http://www.chronicle.com/article/The-Great-Shame-of-Our-239148> [https://perma.cc/AJ2G-PVN5].

64. Jane Croft, *Law School Admissions Collapse Continues*, FIN. TIMES (Nov. 20, 2016), <http://www.ft.com/content/4ddb437e-9ace-11e6-8f9b-70e3cabccfae> [https://perma.cc/RAV2-EVVG]; see also Donald J. Polden, *Leading Institutional Change: Law Schools and Legal Education in a Time of Crisis*, 83 TENN. L. REV. 949, 949–50 (2016); Samantha Robbins, *From Big Law to Legal Education: The Trickle Down Effect of the Recession*, 27 GEO. J. LEGAL ETHICS 841, 841 (2014) (discussing the effects of the recession on the legal market and how law schools should adapt to survive).

65. See Margaret Loftus, *Law Schools Innovate with Hands-On Learning*, U.S. NEWS & WORLD REP. (Mar. 30, 2016), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2016-03-30/law-schools-innovate-with-hands-on-learning> [https://perma.cc/H2UE-9PP8]; see also Cynthia Batt, *A*

has passed,<sup>66</sup> the next downturn looms. As this Essay goes to press, law schools and the legal profession are reeling from the economic effects of the COVID-19 pandemic.<sup>67</sup> It is too soon to know the full impact on the legal market and law school enrollment, but it would be wise to anticipate reduced job opportunities for the immediate future.<sup>68</sup> Law schools that promise to provide a competitive edge will have to deliver.

Faculty silos are artifacts limiting the type of curricular innovation and faculty collaboration that law schools most need to provide a twenty-first-century education. Law schools should take a page from the contemporary business management playbook and seek ways to diversify skill sets, cross-train, and integrate faculty across formal lines. The most recent assessments of legal education critique not only the academy's weak commitment to skills training but specifically its disaggregation of the curriculum.<sup>69</sup> True preparation for practice requires students to master not only the core components of the profession individually but also the ability to bring them all to bear simultaneously in a realistic professional context.<sup>70</sup> Law schools cannot excel in delivering that type of integrated learning experience without integrated faculty.

### B. *Silos and Stereotypes*

The politics that underlie the bifurcated faculty add to the problem. The two silos—doctrine and skills—that make up this system are far from neutral. They embed deeply held assumptions about who and what are most valuable to the legal education enterprise—namely, the delivery of doctrinal content by tenure-line scholars teaching traditional courses primarily through Socratic pedagogy.<sup>71</sup> This belief system and its

*Practice Continuum: Integrating Experiential Education into the Curriculum*, 7 ELON L. REV. 119, 120–21 (2015).

66. See *New Data Confirm Boost in Law School Attendance*, A.B.A., <http://www.americanbar.org/news/abanews/aba-news-archives/2018/12/new-data-confirms-boost-law-school/> [<https://perma.cc/JPP8-WJRM>] (last visited May 1, 2020).

67. See, e.g., James Mackintosh, *Coronavirus Scars Might Weaken Economy for Years to Come*, WALL STREET J. (Apr. 12, 2020, 9:00 AM), <https://www.wsj.com/articles/coronavirus-scars-might-weaken-economy-for-years-to-come-11586696401> [<https://perma.cc/DL6S-6MMQ>].

68. See Casey Sullivan, *Law Firms Are Starting To Cancel Summer Associate Classes Entirely as They Scramble to Cut Costs. Here's What We Know So Far.*, BUS. INSIDER (Apr. 11, 2020, 10:13 AM), <http://www.businessinsider.com/two-big-law-firms-cancel-summer-associate-programs-2020-4> [<https://perma.cc/G5PL-ZY3T>]; Meghan Tribe et al., *The Pandemic Is Putting Law Students' Futures on Hold*, BLOOMBERG BUSINESSWEEK (Apr. 14, 2020, 5:00 AM), <http://www.bloomberg.com/news/articles/2020-04-14/coronavirus-pandemic-is-putting-law-students-futures-on-hold> [<https://perma.cc/85S7-VVHD>]. On the other hand, it is difficult to predict the effects on admissions. Despite fewer legal jobs, the down economy may create an incentive for college graduates to apply to law schools rather than navigate a weak job market. See Gabriel Kuris, *The Impact of the Coronavirus on Legal Education*, U.S. NEWS & WORLD REP. (Mar. 23, 2020), <http://www.usnews.com/education/blogs/law-admissions-lowdown/articles/the-impact-of-the-coronavirus-on-legal-education> [<https://perma.cc/X6NG-SCA5>].

69. See, e.g., THE CARNEGIE REPORT, *supra* note 10, at 58–59 (noting that because case-method instruction and clinical learning are not “explicitly connected . . . , few law schools achieve the full impact that an integrated ensemble [educational experience] could provide”).

70. See Arnov-Richman, *supra* note 10, at 455 (“A hallmark of the successful professional is the ability to integrate and bring to bear multiple competencies—expert knowledge, practical experience, and moral judgment—in circumstances of uncertainty and complexity.”).

71. Dean Kent Syverud cunningly describes these faculty as the “Brahmins” in the law school “caste system.” Syverud, *supra* note 8, at 14; see also Beazley, *supra* note 8, at 276; Stanichi, *supra* note 8, at 476 n.62.

interrelationship with the bifurcated faculty galvanize faculty and intensify barriers to integration.

The concept of “second generation” discrimination, which animates much of contemporary antidiscrimination literature, offers a useful analogy for understanding how embedded beliefs can perpetuate historical disadvantage and undermine progressive goals.<sup>72</sup> Second generation literature seeks to account for the persistence of inequality tied to race, gender, and other protected characteristics despite not only a decline in overt discrimination but also, in many organizations (including law schools), an expressed commitment to diversity.<sup>73</sup> One explanation is that subconscious stereotyping, occurring within and legitimized by established institutional structures, prevents diverse employees from achieving their full potential, which reinforces the underlying beliefs.<sup>74</sup> It is now widely accepted that implicit biases based on social stereotypes subconsciously affect how people perceive, assess, categorize, store, and ultimately retrieve information.<sup>75</sup> Put simply, our brains rely on heuristics to make sense of a complicated world, which predisposes us to interpret and implement information in ways that confirm preexisting expectations and experiences.<sup>76</sup> This, in turn, adversely affects how people view and treat

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72. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468–69 (2001). Professor Stephanie Bornstein describes “second generation” discrimination as discrimination [that] involves bias that is more subtle, suppressed, and implicit—as opposed to explicit or recognized by those who hold it . . . [It] may also be diffuse and structural, embedded in a variety of workplace practices . . . . Lastly, second generation discrimination may be relational, interactional, and contextual, meaning that it is fostered by workplace relationships and culture. See Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 930 (2016).

73. See, e.g., TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW 26 (2017) [hereinafter GREEN, LAUNDERING]; Laura T. Kessler, *Employment Discrimination and the Domino Effect*, 44 FLA. ST. U. L. REV. 1041, 1050 (2017) [hereinafter Kessler, *Domino Effect*]; Sturm, *supra* note 72, at 468–69.

74. See Kessler, *Domino Effect*, *supra* note 73, at 1089–91; Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1169–70 (1995). That is not to suggest that subconscious bias is the sole explanation for the limited success of diversity initiatives. Another strand of antidiscrimination scholarship suggests that even well-intentioned organizations tend to pursue mere symbolic compliance with antidiscrimination laws rather than disrupt the established organizational hierarchy. See, e.g., LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 3–18 (2016); Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 591–92 (2006).

75. Kreiger, *supra* note 74, at 1188. Professor Linda Hamilton Kreiger’s article is the seminal article incorporating the social science literature into the employment discrimination field, *see id.*, but numerous others have drawn on these ideas in developing a contemporary account of discriminatory bias in the workplace and the limits of existing law. See, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1 (2006); Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Kessler, *Domino Effect*, *supra* note 73. For an especially rich account of the cause and effects of subconscious racial bias looking beyond the context of employment, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005), which focuses on the role of news media and crime reporting.

76. As Professor Laura Kessler explains, “[I]mplicit’ bias refers to prejudiced judgments that may affect our understandings, actions, and decisions. It is a type of cognitive shortcut that occurs when our brains make

“out-group” members—those whose characteristics differ from theirs or others in the relevant dataset.<sup>77</sup> In this way, reflexive assumptions about who is and is not capable of success become self-fulfilling prophecies.

The bifurcated faculty is precisely such a bias-reinforcing structure. This does not mean that the bifurcated faculty discriminates based on gender or other protected characteristics, although the preponderance of women in contract positions is due in part to the dynamics described here.<sup>78</sup> Rather the bifurcated faculty is rooted in longstanding, deeply embedded stereotypes about the academic rigor of skills courses and the intellectual capacity of skills teachers.<sup>79</sup> The interaction between these ingrained beliefs and the personnel practices they have engendered ensures that skills education remains segregated and devalued along with those who teach it.<sup>80</sup>

Subsumed within the bifurcated faculty are three interrelated personnel practices that reflect and reaffirm the secondary status of skills faculty: (1) the *ex ante* division of faculty into doctrinal and skills professors, (2) the pairing of only doctrinal teaching with scholarship expectations, and (3) the prioritization of academic criteria in hiring doctrinal faculty. Together these practices embody a set of first principles about faculty hiring and the terms of their employment that seem both natural and necessary but in fact are institutional choices at odds with institutional goals.<sup>81</sup>

These three practices have historical roots. The first practice—the division of faculty into doctrinal and skills professors—flows from the division within the curriculum itself, a product of legal education’s peculiar evolution. As previously noted, the contemporary academic law school evolved in the late nineteenth century as a supplement to the contextual learning afforded through apprenticeship in the field.<sup>82</sup> The division of doctrine from skills was thus functional, not instrumental. Had history been

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quick judgments and assessments of people and situations, informed by our background, cultural environment, and personal experiences.” Kessler, *Domino Effect*, *supra* note 73, at 1056 (footnote omitted).

77. *See id.* at 1063 n.71.

78. Many scholars have critically engaged the gendered nature of skills positions, particularly in the area of legal writing, which has been labeled a “pink ghetto.” Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000); *see also* Allen et al., *supra* note 8, at 525; Beazley, *supra* note 8, at 290–92; McGinley, *supra* note 8, at 99; Stanchi & Levine, *supra* note 8, at 4, 8. While skills faculty are predominately female, they are also almost entirely white. The undervalued nature of skills positions poses a further distinct challenge to professors of color who risk a double stigma. *See* Beazley, *supra* note 8, at 292–94; Jewel, *supra* note 8, at 122.

79. For an especially painful illustration of this perception and its effects, see Linda L. Berger, *When Less Is More: An Ideological Rhetorical Analysis of Selected ABA Standards on Curricula and Faculty*, in THE DOCTRINE-SKILLS DIVIDE: LEGAL EDUCATION’S SELF-INFLICTED WOUND, *supra* note 5, at 209, 210 (describing the ABA’s rule that a non-tenure-line skills professor counted as seven-tenths of a tenure-line professor as “reminiscent of the Constitution’s equation for counting slaves”).

80. For a discussion of the roles that employer personnel practices and other organizational structures play in enabling the operation of subconscious bias, *see*, for example, Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 104–08, 145–48 (2003); and Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 650 (2005).

81. Professor Edwards neatly captured this irony by describing the curricular separation of skills and doctrine in the title of her book, *The Doctrine-Skills Divide: Legal Education’s Self-Inflicted Wound*. EDWARDS, *supra* note 5.

82. *See supra* note 1 and accompanying text.

different or the apprenticeship model less robust, law schools might have developed a more seamless curriculum or even one that prioritized context-based learning, augmented by courses in doctrine.<sup>83</sup>

As it was, however, law schools sought to add value beyond that offered by the apprenticeship and to establish their academic credibility within the broader university. Their contribution was instruction in foundational legal principles delivered through Harvard Law School Dean Christopher Columbus Langdell's pioneering "case method."<sup>84</sup> Harvard President Charles William Eliot, who appointed Langdell, famously described law as a science, one that was better learned in the library than in the courtroom.<sup>85</sup> This perspective, combined with the spread of the case method, ultimately gave rise to the idea of two types of legal competencies inculcated through distinct pedagogies—academic knowledge learned in law school and practical skills obtained in the field.<sup>86</sup>

The second practice—combining the expectation of scholarship solely with doctrinal teaching—followed logically from the first. The *sine qua non* of an academic discipline, the pursuit of scholarship corroborated the Langdellian view that the study of law was an intellectual, scientific endeavor and, of course, aligned the law school with the research goals of the broader university.<sup>87</sup> At the time of Harvard's ascendance, apprenticeships providing practical training were still commonplace, so the "research professor" model was necessarily exclusive to doctrinal faculty.<sup>88</sup> Unsurprisingly then, when practice-oriented law school courses emerged in the middle of the last century—legal research and writing in the 1940s and 1950s; clinics in the 1960s and 1970s—they were staffed by practitioners rather than research professors.<sup>89</sup> This reinforced the idea that skills teaching was unsophisticated and best suited to someone without scholarly proclivities or capacity.<sup>90</sup> The image of a skills professor as a nonscholar practitioner cemented.

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83. For instance, modern law schools might have resembled the Litchfield Law School, which evolved in the late eighteenth century outside the university systems. It provided courses in foundational doctrinal law, taught by practitioners, as a supplement to the apprentices' office experience. See Spencer, *supra* note 1, at 1966–68.

84. On the history of the case method and the role of Dean Langdell, see generally STEVENS, *supra* note 1, at 52–56; Spencer, *supra* note 1, at 1973–74.

85. 2 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 391–92 (1908).

86. See Spencer, *supra* note 1, at 1972. That is not to suggest that Langdell was hostile to the practice of law. His goal seemingly was to enhance knowledge and thereby elevate the profession. See Jeffrey D. Jackson & David R. Cleveland, *American Legal Education: A History of Integrated Instruction*, in THE DOCTRINE-SKILLS DIVIDE: LEGAL EDUCATION'S SELF-INFLICTED WOUND, *supra* note 6, at 277, 285–86.

87. See CHARLES W. ELIOT, LANGDELL AND THE LAW SCHOOL (1895), reprinted in 1 THE HISTORY OF THE LEGAL EDUCATION IN THE UNITED STATES 509, 510 (Steve Sheppard ed., 1999).

88. See Spencer, *supra* note 1, at 1975–77 ("With this vision, the career, legal professoriate was born, purely academic in character and divorced from the practicing bar.").

89. See Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181, 198 (2014) [hereinafter Edwards, *Categories*]; Spencer, *supra* note 1, at 2012–13; Melissa H. Weresh, *Form and Substance: Standards for Promotion and Retention of Legal Writing Faculty on Clinical Tenure Track*, 37 GOLDEN GATE U. L. REV. 281, 285 (2007).

90. Edwards, *Categories*, *supra* note 89, at 198–99.

The last practice—academically focused hiring criteria—is the legacy of the other two. One of Langdell’s first hires was James Barr Ames, a recent Harvard Law School graduate, just two years out of school, who had never practiced law.<sup>91</sup> His background and interests neatly aligned with the Langdellian idea of an academic law professor, and his vast achievements ultimately vindicated Langdell’s vision.<sup>92</sup> As a consequence, Ames became an ideal—a prototype—for candidates that law schools deem suitable to join the professorate.<sup>93</sup>

The employment discrimination literature that focused on the adverse effects of work/family conflict on women’s careers sheds light on this phenomenon. Scholars in this field use the term “ideal worker” to describe a set of employee expectations that derive from a male norm and disadvantage women who disproportionately bear the responsibilities of family life.<sup>94</sup> Ideal worker expectations ossify and become synonymous with the job itself. This prevents the employer from imagining other ways of defining the job or the qualifications necessary to hold it, even when doing so would meet the employer’s goals equally or better.<sup>95</sup> Thus, many employers maintain “full-time face-time” requirements for their most valued jobs and tend to resist long-term, part-time, and other flexible work arrangements that would better accommodate “non-ideal” female employees.<sup>96</sup>

With respect to faculty, law school hiring committees maintain an ideal worker image derived from James Barr Ames in seeking tenure-line candidates. Competition is such that law schools now seek not only scholarly potential but a record of existing scholarship, even for entry-level candidates.<sup>97</sup> Otherwise, however, the profile of the typical tenure-line hire is likely to look very much like Ames—a recent graduate from

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91. Spencer, *supra* note 1, at 1975–76. His prior professional experience was limited to teaching languages and medieval history at Harvard College. *Id.*

92. *See id.* at 1976.

93. *Id.*

94. *See* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 64–84, 113 (2000) (describing how market work is structured around an ideal worker who has no household or caregiving responsibilities and who receives a free flow of domestic work). The phrase is widely used throughout gender discrimination literature. *See, e.g.*, Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 37; Michele E. Gilman, *En-Gendering Economic Inequality*, 32 COLUM. J. GENDER & L. 1, 14 (2016); Kessler, *Domino Effect*, *supra* note 73, at 1077–78; Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 375 (2001); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 10 (2005); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822–23 (1989) [hereinafter Williams, *Deconstructing*]; Joan C. Williams, *Restructuring Work and Family Entitlements Around Family Values*, 19 HARV. J.L. & PUB. POL’Y 753, 753–55 (1996); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 80 (2003).

95. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1227 (1989); Travis, *supra* note 94, at 12; Williams, *Deconstructing*, *supra* note 94, at 822–23.

96. Travis, *supra* note 94, at 5–6 (describing a “full-time face-time norm” that requires “full-time positions, unlimited hours, rigid work schedules, an uninterrupted worklife, and performance of work at a central location”).

97. *See* Adamson et al., *Clinical Faculty*, *supra* note 53, at 137; Spencer, *supra* note 1, at 2049–51.



an elite school with little to no legal practice experience.<sup>98</sup> That model persists despite many law schools' explicit commitments to producing practice-ready graduates and critics' calls for greater prioritization and integration of skills training.<sup>99</sup>

Law schools espousing a practice-readiness mission ought to sensibly modify their hiring practices to meet these challenges and deliver on their commitments.<sup>100</sup> Yet they continue to devalue legal experience when filling tenure-line positions while also pursuing candidates with strong practice backgrounds for lower-status positions that are presumed to be incompatible with scholarship.<sup>101</sup> Hence, the most pernicious aspect of the bifurcated faculty is that, like the ideal worker norm and the problem of subconscious biases more generally, it reproduces itself.<sup>102</sup> Those who have the desire and ability to teach skills are ineligible for tenure and consequently are not incentivized to produce scholarship.<sup>103</sup> This perpetuates the idea that they lack that capacity and seemingly justifies bifurcation. Meanwhile tenure-line faculty, supported and rewarded for scholarly productivity, have no incentive to modernize their teaching methods or augment the skills content of their courses; they are free to prioritize writing and maintain their privileged status.<sup>104</sup>

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98. Studies of the law school hiring market bear this out. *See, e.g.*, Tracey E. George & Albert H. Yoon, *The Labor Market for New Law Professors*, 11 J. EMPIRICAL LEGAL STUD. 1, 37 (2014) (finding that “[g]raduating from a Tier 1 law school . . . dramatically improves a candidate’s chance of being offered a tenure-track job [as a law professor], holding other qualifications constant”); 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, 407 (20-08) (reviewing numerous studies of credentials of entering tenure-line faculty and concluding that “despite striking demographic changes in the law professorate [over the decades], the single most consistently expected credential of tenure-line hires has been a degree from one of the top law schools”). Recent research prepared for this symposium reveals that the bias for elite credentials extends beyond evaluation of new law professors’ law school degrees to their undergraduate institutions as well. *See* Milan Markovic, *The Law Professor Pipeline*, 92 TEMP. L. REV. 813, 822 (2020) (finding that forty percent of new law professors attended Ivy-Plus colleges and another thirty-three percent attended a non-Ivy elite private college).

99. *See* George & Yoon, *supra* note 98, at 37–38 (suggesting the “strong path dependence in law school hiring provides stability but possibly at the price of innovation and adaptation”).

100. *See id.* (questioning the “capacity of new hires to teach skills courses and to assist students making the transition to . . . real-world jobs” given their “lack of real-world experience”).

101. In a recent study of legal writing hires prepared for this symposium, Professor Cody Jacobs found that forty percent of legal writing programs reported that their most recent hire had in excess of ten years of practice experience. *See* Cody J. Jacobs, *The “Other” Market*, 92 TEMP. L. REV. 765, 774 (2020). Moreover, in sharp contrast to the hiring priorities for tenure-line doctrinal faculty, a full ninety percent of respondents said that practice experience was important or very important in their evaluation of candidates. *See id.*

102. *See* Kennedy, *supra* note 5, at 234 (describing the “self-perpetuating” system of the doctrine/skills “categories” whereby “working in one . . . disables you from working in the other”); Mary Beth Beazley, *“Riddikulus!”: Tenure-Track Legal-Writing Faculty and the Boggart in the Wardrobe*, 7 SCRIBES J. LEGAL WRITING 79, 84–85 (2000) (observing how the low status of legal writing positions disincentivizes the highest qualified candidates from pursuing a legal writing career, ostensibly justifying the lower status).

103. *See* Stanchi, *supra* note 8, at 483–84 (questioning why legal writing faculty would take on the work of scholarship when they are “categorically denied the primary incentive to publish: they are ineligible for tenure, no matter how much they write, and no matter what the quality”).

104. Beazley, *supra* note 8, at 299 (noting how “faculty who teach theoretical subjects . . . have ample time for scholarship if they implement the traditional teaching methods” that involve lecture and discussion with a single final examination); Stanchi, *supra* note 8, at 484–85 (describing how doctrinal faculty, who perform

### III. TOWARD AN INTEGRATED FACULTY

The solution to these problems is well within reach. Because the bifurcated faculty is in some respects a managerial choice, law schools can change their staffing practices and role expectations, just as new economy companies have done to enhance flexibility and nimbleness.<sup>105</sup> They can similarly redress the stereotypes embedded in the bifurcated faculty. Problems of discrimination and inclusion can seem intractable in the broader labor economy where disadvantages tied to race, gender, and other protected characteristics are not merely a matter of workplace structures but a part of social history. In the case of the bifurcated faculty, however, the problem is one of the academy's own making. Law schools created the workplace structures and inculcated the expectations that led to and continue to perpetuate differential treatment of skills faculty.<sup>106</sup> They are therefore able to—and should aspire to—dismantle the resulting hierarchy.<sup>107</sup>

Several law schools have already attempted to abolish the skills/doctrine divide and offer models for how best to achieve an integrated faculty as well as pitfalls to avoid.<sup>108</sup> One well-intentioned but ultimately flawed approach is to create so-called programmatic tenure that grants tenure to skills faculty within their specific areas.<sup>109</sup> While this approach equalizes working conditions of doctrinal and skills faculty in some respects, it does so only at the margins. Tenure-line skills faculty obtain equal job security, but they do not achieve equal voice or parity in pay or prestige.<sup>110</sup> Programmatic tenure standards often place less importance on scholarly productivity, reinforcing assumptions about the intellectual capabilities of skills faculty and the sophistication of skills teaching.<sup>111</sup> Worst of all, such systems reaffirm the subject matter divide between skills

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less onerous teaching than legal writing faculty, enjoy “additional free time, as well as intellectual and psychological free space, which they can then devote to the more highly valued pursuit of scholarship”).

105. See *supra* Part II.A.

106. See *supra* Part II.B.

107. A core concern of antidiscrimination scholarship is how and to what extent to hold employers accountable for enduring disparities tied to subconscious bias against women and minority workers. See generally Kessler, *Domino Effect*, *supra* note 73, at 1046 (describing the tension between “‘demand side’ and ‘supply side’ explanations of worker inequality” in theoretical accounts of employment discrimination liability). Pro-plaintiff scholars have made a compelling case that employers should be held liable where they disregard or fail to mitigate subconscious bias that is enabled by their own organizational choices. See generally GREEN, LAUNDERING, *supra* note 73; Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055 (2017). The argument is much stronger with the bifurcated faculty where the categories underlying subconscious bias are institutionally created. See *supra* Part II.B.

108. See, e.g., Christopher, *supra* note 8 (detailing transition from non-tenure-line legal writing program to tenure-line system at Texas Tech Law School). See generally Deborah A. Maranville et al., *Faculty Status and Institutional Effectiveness*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 432, 438–43 (Deborah Maranville et al. eds., 2015) (describing four possible pathways to equalizing the status of skills faculty).

109. See 2017–2018 ALWD/LWI SURVEY, *supra* note 6, at viii (defining programmatic tenure as “[t]enure that is achieved through a separate track/using different standards than traditional tenure awarded to doctrinal faculty”).

110. Bryan L. Adamson et al., *The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy*, 36 J. LEGAL PROF. 353, 392–93 (2012) [hereinafter Adamson et al., *Task Force Report*]; Maranville et al., *supra* note 108, at 441.

111. See Adamson et al., *Task Force Report*, *supra* note 110, at 393 (“[E]ach status model other than [traditional] tenure . . . institutionally preserves a lower status for clinical faculty.”); Maranville et al., *supra* note

and doctrine, precluding true curricular integration. Programmatic tenure is simply another silo.

True integration requires a single tenure track, one in which all faculty are subject to the same standards. Delineating the content and structure of such a system is an undertaking that goes beyond the scope of this Essay. The basic model, however, is simple: a system that evaluates all full-time faculty hires and candidates for promotion on the same three criteria for tenure—the potential for and achievement of excellence in scholarship, teaching, and service—regardless of their course package.<sup>112</sup> Those standards must be applied expansively and inclusively while upholding the institution's commitment to excellence. For instance, law schools currently prioritize the publication of full-length law review articles placed in elite journals when evaluating faculty scholarship.<sup>113</sup> The publication of such articles, however valuable, should not be the sole criterion by which law schools assess faculty contributions to academic discourse. Rather, scholarship should be evaluated for its quality, irrespective of its subject, format, or methodology.<sup>114</sup> All faculty should be encouraged to produce and rewarded for the production of pedagogical scholarship and shorter-length articles that meet standards of excellence.<sup>115</sup>

Similarly, schools must find meaningful and comprehensive ways to evaluate faculty teaching. Institutional assessment of teaching often lacks rigor, placing undue weight on student evaluations.<sup>116</sup> Schools must find ways to better peer assess teaching quality and student outcomes. Moreover, the evaluation of teaching should consider the degree to which faculty inculcate professional competencies other than just doctrinal learning.<sup>117</sup> Neither the burden of making students practice ready nor the expectation to innovate pedagogically should fall solely on the shoulders of skills faculty.<sup>118</sup> The

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108, at 441 (recognizing that at institutions that prize scholarship non-scholars will be seen as “lesser” regardless of the conferral of tenure).

112. Many scholars who have critiqued the bifurcated faculty have espoused such a solution. *See, e.g.*, Adamson et al., *Task Force Report*, *supra* note 110, at 389; Beazley, *supra* note 8, at 314–15; Merritt, *supra* note 54, at 416.

113. *See, e.g.*, W. Lawrence Church, *A Plea for Readable Law Review Articles*, 1989 WIS. L. REV. 739, 743.

114. *See* Maranville et al., *supra* note 108, at 439–40. This is of critical importance with respect to legal writing scholarship, which has long been discredited. *See* Beazley, *supra* note 8, at 296–98 (discussing roots of this historical bias).

115. There are other potential benefits to this. For instance, shorter works in mainstream publications are more accessible to jurists and practitioners, increasing the potential for faculty scholarship to impact law and policy. *See* Church, *supra* note 113, at 743.

116. Among other failures, it is widely agreed that student evaluations reflect race and gender bias. *See, e.g.*, Debra S. Austin, *Leadership Lapse: Laundering Systemic Bias Through Student Evaluations*, VILL. L. REV. (forthcoming 2020), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3550086](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3550086) [<https://perma.cc/U75J-G8WL>]; Meera E. Deo, *A Better Tenure Battle: Fighting Bias in Teaching Evaluations*, 31 COLUM. J. GENDER & L. 7, 10 (2015).

117. Erickson, *supra* note 51, at 88 (“Experiential learning is not just appropriate for the relatively few skills courses in law schools. It is the best way to teach all material in law schools . . . . Students learn by experiencing, and doctrine is no exception.” (footnote omitted)).

118. *See* Beazley, *supra* note 8, at 276 (warning that meaningful reform must “shift the behavior of the Brahmins” lest responsibility for enhanced education fall solely “onto the laps of the skills faculty who don’t have the job security to say no or the power to spread the reforms beyond their own classrooms”); Stanchi, *supra*

effective delivery of professional knowledge and the production of impactful scholarship are everyone's responsibility.

To be sure, these goals will not be achieved easily or painlessly. The unraveling of ingrained expectations and institutional practices that go back decades requires not only patience and tenacity but also the ability to engage in critical self-reflection.<sup>119</sup> Like any meaningful scholarly inquiry, however, it is a process worth undertaking.

#### CONCLUSION

This Essay called on law schools to reject the bifurcated faculty, a system that is grounded in assumptions that devalue skills faculty and that is out of step with contemporary reform efforts. Legal education critics have made a convincing case that cognitive knowledge and professional skills are of equal importance, if they are even distinguishable. Best practices demand they be taught as part of an integrated learning experience. Law schools could better position themselves to achieve this type of curriculum and meet their educational goals by rejecting the bifurcated faculty in favor of true integration. In the end, silos stymie educational reform and shortchange students. Schools that eradicate the bifurcated faculty can achieve a better educational product while realizing a more egalitarian workplace.

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note 8, at 484 (describing how in the bifurcated faculty “the fruits of the labor of legal writing professors are ultimately enjoyed by the higher ranked doctrinal professors . . . who are ‘exonerated’ from more intensive teaching and student advising roles because others are doing this devalued work”).

119. See Christopher, *supra* note 8, at 80 (offering a list of provocative “questions to consider” for tenure-line faculty “resistant to the idea” of tenure for legal writing faculty).