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SILENCING DISCIPLINE IN LEGAL EDUCATION

Lucille A. Jewel[*]

INTRODUCTION

THIS essay is about academic freedom in the context of two groups that are not often discussed together: critical outsider scholars[1] and legal writing teachers. Storytelling is the common thread that connects these two groups. Both outsider scholars and legal skills teachers have special knowledge that enables them to deploy storytelling in a way that moves the law forward in a progressive direction, in the greater law culture and through teaching new generations of lawyers. Both the voices of outsider scholars and legal skills teachers have been targets of *silencing discipline*.

I use the term "silencing discipline" to invoke a set of practices that tends to dis-incentivize the production of valuable legal meanings that can contribute to a shape-shifting of legal culture. As this essay will show, silencing discipline has evolved from the intra-academic critiques in the 1990s[2] to a different form, neoliberal rationality, which also tends to silence, but in a different way. In the 1990s, tenured or tenure-track outsider scholars were criticized based on their purported intellectual deficits.[3] There was the idea that outsider scholarship, on topics of race, feminism, and LGTBQ issues, was not rigorous enough to pass muster within the academy and was not appropriate for the award of tenure.[4] Despite undergoing this crucible, outsider scholars were protected by longstanding concepts of academic freedom (though fraught) and were taught on a tenure track. Many outsider scholars from this era are tenured, distinguished professors: elders in the field who mentor new generations of critical scholars.

In current times, the production of critical legal knowledge has become constrained by a neoliberal education mindset that emphasizes economic

[*] I want to thank the organizers of this wonderful symposium, particularly Symposium Editor Emina Causevic and Professors Nicole Porter and Shelley Cavalieri. I am also grateful to the other wonderful participants at this symposium: Lisa Pruitt, Kingsley Browne, Nancy Cantalupo, Blanche Cook, Rebecca Facey, Donald Kamm, Jessica Knouse, Saru Matambanadzo, Martha McCluskey, Marc Spindelman, and Jennifer Wriggins. This was a wonderful day of intellectual sustenance and nourishment, and I was honored to be a part of it.

1. I use the term critical outsider scholars to collectively refer to Critical Race Theorists, Feminist Theorists, LGBTQ theorists, and Latino/a theorists.

2. *See infra* notes 85-159 and accompanying text.

3. *See infra* notes 131-145 and accompanying text.

4. *See* Cynthia Lee, *(E)racing Travon Martin*, 12 OHIO ST. J. CRIM. L. 91, 91 (2014) (citing Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561 (1984)).

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performance and measured outcomes over critical thought.[5] Neoliberalism, in the context of education, strives to reduce labor costs as much as possible.[6] This means that tenure and tenure-track appointments are often put on the chopping block.[7] In the context of this article, the absence of tenure protection is a type of silencing discipline. Unfortunately, as per recent amendments to ABA rules regulating legal education, the erosion of tenure will likely become more prevalent in legal education.[8] The absence of tenure is the default for legal writing and legal skills teachers, who also suffer from high levels of gender segmentation.[9]

This essay fits within several interlocking categories and draws upon intellectual history, legal education reform, and critical theory. It not only explains why the intense legal academic debates of the 1990s lost steam, but also how other lines of reason emerged to function as silencing discipline. In this essay, I argue that academic freedom, in the sense of being free to speak, write, and teach critical knowledge, both in the intellectual sense and in the law practice sense, is being eroded. And, I urge my critically minded colleagues that are traditional law scholars (tenure-track or tenured) to consider the circumstances of law teachers who currently do not have the protections of tenure but who generate valuable knowledge, particularly in the realm of teaching critical common-law analysis and lawyering skills. Together, we should oppose further encroachments of neoliberal rationality into legal education. This is a matter of reform, but it is also a matter of protecting our voice.

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5. *See* WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 181 (2015).

6. *See* David Singh Grewal & Jedediah Purdy, *Introduction: Law & Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 21 (2014).

7. *See infra* note 189 and accompanying text.

8. Instead of replacing retired tenured professors, law schools are incentivized to use more visiting assistant professors and professors of the practice, non-tenure stream appointments, but with responsibilities for teaching traditional "substantive" courses. Moreover, in 2014, as part of its accreditation process, the ABA stopped inquiring into a law school's full-time tenure-track faculty/student ratio. In the earlier versions of the ABA regulations, the ABA considered this ratio. *See* SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2008-2009, at 32-33 (2008), https://www.americanbar.org/groups/legal_education/resources/standards/standards_archives.html (under "Standards and Rules," select the "2008-2009" hyperlink to download the pdf). To create a favorable ratio, schools were incentivized to have full-time tenure-track or equivalent teachers. If a law teacher did not have a tenure or tenure-like appointment, then that professor counted as .7 of a teacher in calculating the ratio. *See id.* Although, there is still the requirement that the full-time faculty teach "substantially all of the first one-third of each student's coursework," non-tenure-track legal writing teachers are now defined as members of the full-time faculty. *See* SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017-2018, at ix, 28 (2017), https://www.americanbar.org/groups/legal_education/resources/standards.html (select "Complete Bookmarked Publication) [hereinafter 2017-2018 ABA STANDARDS AND RULES] ("'Full-time faculty member' means an individual whose primary professional employment is with the law school, who is designated by the law school as a full-time faculty member, who devotes substantially all working time during the academic year to responsibilities described in Standard 404(a).").

9. *See infra* notes 164-166 and accompanying text.

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I. INSPIRED BY THE ENLIGHTENMENT: LEGAL FORMALISM

To begin, it would be helpful to describe the dominant culture within U.S. legal education, which emphasizes concepts of logocentric thinking: objective analysis, syllogistic frameworks, and rules.[10] Another aspect of this dominant culture is pedagogical, the idea that law teaching should advance legal formalism's precepts through the Socratic method and a rigid deductive logical structure (IRAC).[11] We start here because the two groups discussed in this paper, which seem unrelated at first glance, both challenge the status quo in U.S. legal culture. Critical outside scholars have challenged (and are challenging) the culture from an epistemological angle, pointing out deep flaws in law's enlightenment foundations (sometimes referred to as classical liberalism).[12] Legal writing and skills teachers are analogous outsiders, studying and teaching rhetoric and persuasion in a critical way that is contextualized through social, gender, and racial everyday life. Both groups have been subjected to the silencing discipline within the legal academy.

Legal formalism[13] is the name most associated with traditional legal culture.[14] Much of U.S. law's ethos arises from enlightenment ideals, the belief that humans can successfully use reason and rationality to solve most problems.[15] An understanding of this culture, the substrate of U.S. legal education, illuminates how legal meanings and legal minds are shaped. Legal formalism has shaped the collective consciousness of countless lawyers as they become acculturated to "think like lawyers."[16] Thinking like a lawyer is quite helpful for the process of solving legal problems, but it can constrain and limit the legal imagination.[17] Understanding how this collective mindset develops also sheds light on its limiting effects.

Legal formalism developed in the nineteenth century.[18] American law professors shaped U.S. law by organizing the vast sea of common law concepts into clean and orderly categories.[19] Influenced by William Blackstone's efforts to impose order on U.K. common law, these professors divided U.S. law into practical, useful, categories.[20] Christopher Columbus Langdell is perhaps the best

10. *See generally* Lucille Jewel, *Old School Rhetoric and New School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMM. & RHETORIC: JALWD 39, 55-56 (2016) [hereinafter Jewel, *Enduring Power of Categories*].

11. *Id*. at 59.

12. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

13. *Legal Formalism*, BLACK'S LAW DICTIONARY (10th ed. 2014).

14. *See* Ernest J. Weinrib, *Legal Formalism*, 97 YALE L.J. 949, 953-57 (1988).

15. *See* Jewel, *Enduring Power of Categories*, *supra* note 10, at 55.

16. *See generally* ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" (2007).

17. *See* James Boyd White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be*, 36 J. LEGAL EDUC. 156, 159 (1986)

18. Larry A. DiMatteo, *Reason & Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 405 (2004) (quoting E. ALLAN FARNSWORTH, CONTRACTS 31 (1999)).

19. *Id.*

20. *See* Jewel, *Enduring Power of Categories*, *supra* note 10, at 47-48.

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known legal information architect of this era.[21] As Dean of Harvard Law School, Langdell authored the first contracts law casebook and is credited with organizing contract law pursuant to modern doctrinal principles, such as formation (including subcategories of offer and acceptance), breach, and damages.[22]

Langdell's efforts to organize and make sense of American law were inspired by natural scientists in practice at the time, who were cataloging and categorizing plant and animal species.[23] Amidst this organizing activity came Langdell's idea that "law is a science" and that to solve most legal problems, all one had to do was consult a case book, find the rule, and apply it to the facts.[24] Langdell deployed this approach to law teaching, devising the casebook method, where he taught students through Socratic questioning, using appellate case opinions as the base materials for solving problems.[25] Langdell's pedagogy (intertwined with his formalist approach to law) brought forth the IRAC[26] method of legal analysis and the Socratic method, which still pervades legal education today.[27] The idea that law could be reduced to principles of logic and science reflected the era's epistemological paradigm. Legal formalism was most certainly inspired by enlightenment principles emphasizing objectivity, reason, and competition. Deep respect for enlightenment principles continues in legal culture today.[28]

Legal formalism produced an undeniably helpful method for engaging with the vast amount of legal information in the U.S. common law system. Without the presence of legal categories housing researchable and synthesizable rules, the practicing lawyer's job would be impossible. While legal formalism's teaching methods—the Socratic method and IRAC—remain strongholds in legal education, other teaching methods have emerged with pedagogical value.[29] Moreover, as a strain of jurisprudential thought, legal formalism is no longer the only legal method; other modes of thought (such as legal realism, the legal process school, the critical legal studies movement, and critical race and feminist theories) have emerged.[30] These other theories have augmented the process of producing legal

21. Bruce A. Kimball & Pedro Reyes, *The "First Modern Civil Procedure Course" as Taught by C.C. Langdell*, *1870-78*, 47 AM. J. LEGAL HIST. 257, 294-95 (2005).

22. *See* Jewel, *Enduring Power of Categories*, *supra* note 10, at 49 (citing Catharine Pierce Wells, *Langdell and the Invention of Legal Doctrine*, 58 BUFF. L. REV. 551, 566 (2010)).

23. Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 548, 597 n.276 (1997).

24. *See* Jewel, *Enduring Power of Categories*, *supra* note 10, at 47.

25. K.K. DuVivier, *Goodbye Christopher Columbus Langdell?*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10475, 10476 (2013).

26. *See generally* Gerald Lebovits, *Cracking the Code to Writing Legal Arguments: From IRAC to CRARC to Combinations in Between*, 82 N.Y. ST. B.J. 64 (2010).

27. Kimball & Reyes, *supra* note 21, at 295.

28. *See* DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW 6 (1997) ("Law ... has often been seen as the province—whether in reality or only aspiration—of reason rather than emotion, of principle rather than raw power.").

29. Lucille Jewel, *The Doctrine of Legal Writing: Briefs That Changed the World by Linda Edwards*, 1 SAVANNAH L. REV. 45, 66 n.135 (2014) [hereinafter Jewel, *Doctrine of Legal Writing*].

30. *Id.* at 57-59. Other jurisprudential styles have emerged since Langdell's time, including legal realism, the legal process school, and critical legal studies.

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meanings, but they have not fully replaced legal formalism as the go-to method for legal analysis.[31]

Legal formalism is efficacious, but it has its faults. One point of critique is that legal formalism limits the analysis to the precedential rule, and the relevant facts limit the social and non-legal context that can be engaged with.[32] Law-trained anthropologist Elizabeth Mertz observed this phenomenon in her masterful study of U.S. legal education, which she published in book form in 2007.[33] Mertz's book, *The Language of Law School: Learning to Think Like a Lawyer*, collects her anthropological observations of students at a major U.S law school.[34] After observing countless classroom dialogues between professors and students, Mertz developed her theory:

> Legal training focuses students' attention away from a systematic or comprehensive consideration of social context and specificity. Instead, students are urged to pay attention to more abstract categories of legal (rather than social) contexts, reflecting a quite particular, culturally driven model of justice.[35]

Mertz observed that in the law school classroom, the Socratic professor accomplishes this acculturation process by controlling the conversation.[36] This occurs when the professor validates appropriate student responses by inserting them back into the conversation and ignores inappropriate student responses.[37] Inappropriate student responses are those that stray too far from the deductive logical structure of the law—relevant facts, rules, precedent.[38] Professors do this by interrupting, cutting off, and responding to student comments in the dialog.[39] In this way, the professor controls what legal meanings are produced.[40] Thus, the emotional and normative forces within a case are subjugated to concepts such as procedure, precedent, and rule structure.[41] Feminists have commented that the law's formalist aspirations (instantiated in traditional pedagogy) "to be rational, objective, abstract and principled [is] like men."[42] "Given that women were long excluded from the practice of law, it should not be surprising that the traits

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31. *Id.* at 59.

32. *See* Regina Austin, *"Bad for Business": Contextual Analysis, Race Discrimination, and Fast Food*, 34 J. MARSHALL L. REV. 207, 207 (2000).

33. *See generally* MERTZ, *supra* note 16.

34. *Id.*

35. *Id.* at 5.

36. *Id.* at 54-56.

37. *Id.* at 54-55.

38. *Id.* at 56.

39. *Id.*

40. *Id.* at 54-55.

41. *Id.* at 58-59.

42. Carrie Menkel-Meadow, *Portia in a Different Voice*, 1 BERKELEY J. GENDER L. & JUST. 1, 44 (2013) [hereinafter Menkel-Meadow, *Portia in a Different Voice*] (quoting Frances Olsen, *The Sex of Law* (unpublished manuscript). The quoted portions of Olsen's essay were later published within a book. *See* Frances Olsen, *The Sex of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 692-93 (David Kairys ed., 1998).

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associated with women are not greatly valued by law."[43] Thus, traditional legal methods reify a voice of lawyering that is male derived.[44] It has been posited that woman lawyers speak in a different voice,[45] a voice that is connected to others, empathic, and caring.[46] Minority legal scholars also speak in a different, but not monolithic, voice; one that centers on the personal and palpable experiences of centuries-long subordination and oppression.[47] Traditional law, however, excludes these voices on the ground that such perspectives are inappropriate for academia and non-rigorous.[48]

Related to the above point—that traditional legal meanings marginalize voices of women and minorities—is the contention that students from non-traditional backgrounds are often alienated by traditional legal pedagogy. The Socratic method is indisputably competitive and inquisitorial,[49] and it validates those students "who think fast in a highly structured, performance-on-display atmosphere."[50] Mertz and others have shown that, generally, African American law students speak less than their white counterparts[51] and that women speak less than men.[52] Women report being put off by the excessive gamesmanship of the Socratic method.[53]

If legal education reproduces collective thought patterns related to the law,[54] then we can see the deleterious effect of excluding voices in the process of making legal meanings. When minority and female students are silent, their experiential knowledge is not given weight in the socialization process.[55] These actors become culturally invisible and mainstream dominant thought patterns become more dominant.[56] More often than not, traditional law instruction obfuscates and elides structural forms of social, racial, and gender discrimination that pervade everyday

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43. *Id.*

44. Menkel-Meadow, *Portia in a Different Voice*, *supra* note 42, at 44-45.

45. We should exercise caution at this point to avoid broad-stroke essentialism.

46. Menkel-Meadow, *Portia in a Different Voice*, *supra* note 42, at 43-50 (citing CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982)).

47. *See* Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 HOW. L.J. 1, 20-24 (1996); Matsuda, *supra* note 12, at 324.

48. *See* Robinson, *supra* note 47, at 34-36 (explaining how the work of minority law scholars is often dismissed as inferior by the white, mostly male gatekeepers in legal academia).

49. The method has been referred to as requiring "excessive gamesmanship." LANI GUINIER, MICHLLE FINE, & JANE BALIN, BECOMING GENTLEMEN 13 (1997). Harvard Law Dean Roscoe Pound once described Langdell's pedagogy as requiring "class-room logical acrobatics" that only men (trained in Langdell's method) could perform. JEROLD S. AUERBACH, UNEQUAL JUSTICE, LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 84-85 (1976).

50. GUINIER ET AL., *supra* note 49, at 16.

51. MERTZ, *supra* note 16, at 184-203 (discussing her observations of African American students).

52. GUINIER ET AL., *supra* note 49, at 12-16, 47 (discussing a study of women law students).

53. *Id.* at 13-15.

54. *See generally* Lucille Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155 (2008) [hereinafter Jewel, *Bourdieu and American Legal Education*].

55. MERTZ, *supra* note 16, at 202-03.

56. *Id*. at 203.

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U.S. life.[57] These stories are the type of information that in formalistic pedagogy are often excluded from the conversation.[58] In this way, dominant legal meanings that leave out alternative explanations based on lived social, racial, and gender experiences are forged. Thus, legal formalism has been appropriately critiqued for amplifying a male, white perspective[59] and limiting the viewpoints and perspectives of women and people of color.[60] Traditional legal thought tends to overlook creative modes for rethinking legal problems, because they do not fit into the paradigm.[61] Because the law is cloaked with so much power (i.e., the power of the State), these one-sided legal meanings fail to achieve the normative ideal that law should be an instrument of democracy.

Nonetheless, legal formalism, as applied in legal education, is not altogether a bad thing. Traditional legal education has successfully professionalized scores of lawyers, for over a century. Learning the language of the law, to "think like a lawyer," is necessary in order for lawyers to translate their client's stories into the formal language of the law. It would be a straw-man argument[62] to blame legal formalism for all that ails our legal system. In the United States, training in abstract and deductive legal thought has been supplemented by other modes of law training, including legal skills training.[63] Excellent lawyers are taught (often in the legal skills classroom) to use the Aristotelian concepts of logos and pathos[64] to construct their case theory. Skills teachers have become adept at teaching law students how to use narrative to construct persuasive legal theories.[65] In this context, pathos forms the basis for needed context to make lawyering fully human.

In the critique of legal thought and legal education, however, context infusions from legal skills teachers are often overlooked.[66] Within critical legal theory circles, legal skills teaching exists in a separate silo. Legal writing and legal

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57. *Id*. at 207-08.

58. *Id*.

59. Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 886-87 (1989) ("If the law has been defined largely by men, and if its definitions, which are presumed to be objective and neutral, shape societal judgments as to whether a problem exists or whether a harm has occurred, then can the law comprehend and adequately address women's experiences of harm?").

60. Austin, *supra* note 32, at 207 ("If race truly mattered, legal argument, writing, and scholarship would pay much more attention to context than it does today."). *See also* MERTZ, *supra* note 16, at 6.

61. *See generally* Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions? The Triple Helix Dilemma Revisited*, 99 L. LIBR. J. 307, 308 (2007) (explaining that law's existing categories can constrain thinkers searching for innovative solutions to legal problems).

62. Wells, *supra* note 22, at 552.

63. Suzanne E. Rowe, *Legal Research, Legal Writing, & Legal Analysis: Putting Law School into Practice*, 29 STETSON L. REV. 1193, 1193-95 (2000).

64. *See* Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDISC. L.J. 613, 619 (2013).

65. *See generally* RUTH ANNE ROBBINS, STEVE JOHANSEN & KEN CHESTEK, YOUR CLIENT'S STORY (2012).

66. For a well-stated explanation of how teacher/scholars can fuse progressive legal theory with law practice to create a holistic style of lawyering, see Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707 (1996).

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skills professors are cordoned off (sometimes literally, with offices in the basement of the law school), away from the tenure-track and tenured professors who teach "substantive" law courses and write law review articles.[67] Skills professors are paid less on the basis that they do not engage in this kind of scholarly work.[68] Moreover, critical outsider scholarship, despite being rebellious and risky (for obtaining tenure), is nonetheless a creature borne out of elite law schools.[69] Non-elite law schools have long emphasized practical training, which has historically occupied a separate (and inferior) category from doctrinal teaching.[70]

What collective thought patterns have been forged in this years-long process of law inculcation? Neurorhetoric, an emerging discipline that combines rhetoric with neuroscience, explains how thought structures can become entrenched in the brain.[71] When individuals are exposed over and over again to certain thought patterns, those thought patterns become wired together through the brain's synapses.[72] Alternative modes of thinking become attenuated, dried out streams.[73] These questions are important because legal education is not just about teaching future lawyers. Law educators are also contributing to the collective neurological mindset that we all adhere to.

When law students come out of law school and into the profession, we hope that they have been initiated into a learned profession that values empathy and service. Law students, however, have also been repeatedly exposed to reiterations of law's hyper-competitive culture that relentlessly ranks individuals on their ability to perform analytical or adversarial tasks. For law students in this soup of hyper hierarchy and competition, the aphorism that "you are not your grades" rings particularly hollow, as almost all the signifiers define value based on intensive merit performance. Status in the profession heavily depends on performance in an abstracted environment—the LSAT, law school grades, the bar exam, etc. It is reasonable to theorize that highly toxic neural pathways are forged in this culture.[74] Just as the law is made up of so many either/or dichotomies, students are encouraged to view themselves as either/or propositions—I am either a success or

67. 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, 58 (2015).

68. Deborah J. Merritt, *The Market for Legal Writing and Clinical Professors*, L. SCH. CAFE (Jan. 5, 2018), https://www.lawschoolcafe.org/2018/01/05/the-market-for-legal-writing-and-clinical-professors/ [hereinafter Merritt, *Market for Legal Writing and Clinical Professors*].

69. *See* MARI MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 3-5 (1993) (describing CRT's origins at Harvard Law School); Jewel, *Bourdieu and American Legal Education*, *supra* note 54, at 1221-22 (explaining that non-elite law schools offer fewer opportunities for students learn about critical legal theories).

70. *See generally* Lucille Jewel, *Oil & Water: How Legal Education's Doctrine & Skills Divide Reproduces Toxic Hierarchies*, 31 COLUM. J. GENDER & L. 111 (2015) [hereinafter Jewel, *Oil & Water*].

71. Lucille Jewel, *Neuro-Rhetoric, The Law, and Race: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 669 (2017) [hereinafter Jewel, *Neuro-Rhetoric*].

72. *Id*. at 669-71.

73. *Id*. at 670-71.

74. *See generally* ROLLO MAY, THE MEANING OF ANXIETY 173 (1977) ("[I]ndividual competitive success is both the dominant goal in our culture and the most pervasive occasion for anxiety.").

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a failure, depending on my grades and rank.[75] Lawyer and law student stress and anxiety are further exacerbated by the specter of heavy student debt loads and a paucity of jobs.[76] It is likely that the high levels of attorney stress, anxiety, and mental health issues[77] are products of law culture's most unforgiving aspects.[78]

This essay addresses legal formalism for two reasons. First, through legal education, legal formalism is the substrate upon which professional legal culture is reproduced in the United States.[79] In this way, understanding legal formalism helps us understand some of the ingrained cultural tics of legal education. For instance, legal formalism produced the professional identity of the traditional tenure-track law professor as a well-paid teacher who instructs on legal doctrine and writes law review articles.[80] This professional identity is a traditional legal meaning that has been challenged, particularly by arguments for the professionalization of legal writing professors. Thus, an understanding of legal formalism illuminates the last part of my essay, where I argue that low professional status for legal writing professors is a silencing discipline.

Second, as discussed in more detail below, legal formalism's enlightenment norms (particularly the foregrounding of the concept of "reason") played a large role during the intellectual debates about critical race theory and feminist legal theory in the 1990s. During this time period, traditional[81] intellectuals and academics charged that these kinds of legal thought were not appropriate patterns for law, or for law professors. There was a deep discomfort with the idea that perceptions of reality might differ depending on one's vantage point in society.[82]

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75. *See* Debra Austin, *Killing Them Softly: Neuroscience Reveals How Brain Cells Die from Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance*, 59 LOY. L. REV. 791, 794-95 (2014) ("Law schools often define student success in terms of grades, class standing, and journal participation.").

76. *See* LAW SCHOOL SURVEY OF STUDENT ENGAGEMENT, HOW A DECADE OF DEBT CHANGED THE LAW SCHOOL EXPERIENCE 19 (2015), http://pdfserver.amlaw.com/nlj/LSSSE%20Annual%20Report%202015[1].pdf.

77. NAT'L TASK FORCE ON LAWYER WELL-BEING, AM. BAR ASS'N, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE 7 (2017), https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf.

78. *See* Austin, *supra* note 75, at 793-94 ("Stress in legal education may also set the stage for abnormally high rates of anxiety and depression among lawyers."). *See also* JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS 11 (2005) (arguing that legal formalism might be a causal factor in addressing why lawyers are markedly unhappier than members of other professions, because it takes "the life out of work and the professions, depriving them of juice, richness, concreteness, and anything else that might render them of human interest").

79. *See generally* Jewel, *Bourdieu and American Legal Education*, *supra* note 54 (applying Bourdieu's theory of cultural reproduction to law schools, and arguing that as educational institutions, law schools reproduce both the collective culture and mindset of the legal profession).

80. John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311, 315-16, 323 (1985).

81. I refer to the group of intellectuals who criticized critical race theory and feminist legal theory as traditional because they represent the old guard of professors and intellectuals who championed more of a narrow approach to legal thought and meaning making.

82. *See infra* notes 131-141 and accompanying text.

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In the 2000s, this discomfort with indeterminacy fell away as research on cognitive biases, behavioral economics, biases in witness identification, and persuasion psychology all pointed to the reality that the mind is not entirely separable from the body.[83] In other words, the enlightenment's ideal of rational "reason" does no match up with how people really think.[84] Nonetheless, the 1990s intellectual debate can be seen, in a sense, as a silencing mechanism, a way to limit radical or progressive legal voices that depart from traditional legal meanings (forged out of a formalist process). Thus, this essay now delves into the 1990s' intellectual legal history, for the purpose of describing the landscape, but also unmasking the silencing forces involved.

II. I LOVE THE 1990S

To get to the 1990s, we start in the 1970s, where a progressive intellectual movement known as critical legal studies emerged. Relying on post-modern theories, critical legal studies scholars argued that the underlying structure of law was deeply hierarchical and slanted to favor those already in power.[85] Out of the critical legal studies movement came identity-based movements focused on race and gender.[86] In the 1990s, these movements gained prominence in the legal academy and included (but was not limited to) scholars teaching and writing in areas of critical race theory, feminist legal theory, and queer legal theory.[87] Normally, it would be problematic to locate all of the progressive identity-based legal theories in one category, as they each offer differing methods and perspectives. But this essay focuses on the common thread that these theories share—their radical progressivism, their rejection of enlightenment principles, and their controversial nature. With the caveat that each theory should stand on its own and be viewed with a high level of granularity, this essay will discuss these theories together under the umbrella term "critical outsider scholars." Further, in discussing what motives drive outsider scholarship, this essay draws mostly upon the lucid explanations offered by critical race theorists. It is also worth noting that other scholars in this genre have written from the vantage point of gender, sexual orientation, and other historically oppressed groups.

Critical outsider scholars approached law from an "avowedly political" perspective and rejected legal formalism's abstracted contexts as the foundation for solving legal problems.[88] Instead of the traditional method for case analysis, critical outside scholars infused context into their work by presenting their legal arguments in the form of stories and narratives. Critical outsider scholarship's array of rhetorical inventions include "personal histories, parables chronicles,

83. *See infra* notes 153-159 and accompanying text.

84. *See infra* note 155 and accompanying text.

85. *See* Carrie Menkel-Meadow, *Taking Law and _____ Really Seriously: Before, During and After "The Law"*, 60 VAND. L. REV. 555, 567-72 (2007) [hereinafter Menkel-Meadow, *Taking Law Seriously*].

86. *Id*. at 575-76.

87. In their book, Daniel Farber and Suzanna Sherry single out "critical race theory, radical feminism, and … 'gaylegal theory'" as targets for critique. FARBER & SHERRY, *supra* note 28, at 5.

88. MATSUDA ET AL., *supra* note at 69, at 3.

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dreams, stories, poetry, fiction, and revisionist histories"[89] to highlight inequality in race—Derrick Bell's *Space Invaders*,[90] Richard Delgado's *The Rodrigo Chronicles*,[91] and Patricia J. Williams's stories[92] are the seminal representations of the genre. Rather than engage in a narrow "case-crunching" style of legal analysis, these thinkers raised provocative points through narrative. Several of these authors used stories—stylized dialogue (Delgado), science fiction (Bell), or nonfiction memoir (Williams)—to surface legal concepts that could not normally be seen in the standard deductive logical structure of law.

In the parable of *The Space Traders*, Bell tells a story set in the future that imagines what would happen if aliens came to earth and offered an astounding sum of money (enough to bail out all bankrupt state and local governments), alien technology nuclear fuel, and alien chemicals for cleaning up the U.S.'s toxic environment.[93] In return, all the U.S. had to do was to allow the aliens to take all African American U.S. citizens back to the aliens' home planet.[94] In Bell's story, despite some opposition to the deal, the citizens vote to enact a constitutional amendment to complete the deal with the aliens.[95] Bell writes that this chronicle was meant to illustrate the intractable obstacles that continue to prevent authentic progress for blacks in U.S. society, namely, that whites do not wish to give up any advantages to engender racial justice.[96] To make his point, Bell imagines "how this country would respond to a crisis in which the sacrifice of the most basic rights of blacks[] would result in the accrual of substantial benefits to all whites."[97]

With the *Rodrigo Chronicles*, Richard Delgado authored a number of chronicles featuring dialogues between a fictional law graduate student, Rodrigo, and his law professor mentor (based on Delgado).[98] The conversations that unfold in these narratives emphasize, in a jargon-free and grounded style, the structural and implicit forces that prevent authentic racial justice from being fully realized in the U.S. For instance, in the fourth Rodrigo's chronicle, Rodrigo deftly explains how neutral rules[99] rarely detect discrimination because legal rules "are made against a background of assumptions, interpretations, and implied exceptions, things everyone in our culture understands but that seldom, if ever, get expressed

89. *Id.* at 5.

90. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 158-94 (1994) [hereinafter BELL, FACES AT THE BOTTOM OF THE WELL]. *The Space Traders* chronicle is also reproduced in two law review articles. *See generally* Derrick Bell, *Racism: A Prophecy for the Year 2000*, 42 RUTGERS U. L. REV. 92 (1989); Derrick Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393 (1990) [hereinafter Bell, *After We're Gone*].

91. *See generally* RICHARD DELGADO, THE RODRIGO CHRONICLES (1995) [hereinafter DELGADO, THE RODRIGO CHRONICLES]; RICHARD DELGADO, THE COMING RACE WAR? (1996).

92. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

93. BELL, FACES AT THE BOTTOM OF THE WELL, *supra* note 90, at 159-60.

94. *Id*. at 160.

95. *Id*. at 192.

96. Bell, *After We're Gone*, *supra* note 90, at 396.

97. *Id*. at 397.

98. *See generally* DELGADO, THE RODRIGO CHRONICLES, *supra* note 91.

99. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

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explicitly."[100] Rodrigo also opines that where equally qualified black and white candidates seek a job, the whites with hiring authority will tend to hire the white candidate, on the basis of amorphous concepts such as "good fit" and better "collegiality."[101] Here, Delgado's Rodrigo is presciently describing implicit racial bias, which will, in the 2000s, become accepted social science.[102]

The Alchemy of Race and Rights contains stories about Williams's freighted relationship with the law, the legal academy, and the palpable pain of experiencing de facto racism.[103] In one compelling chapter, Williams writes of her preference for having a written lease in contrast with her white colleague Peter Gabel (a founder of the Critical Legal Studies movement), who, as a skeptic of law's ability to achieve democratic social relations, was content with a handshake deal.[104] Williams emphasizes her lived experience as a black female in her explanation:

> As black, I have been given by this society a strong sense of myself as already too familiar, personal, subordinate to white people. I am still evolving from being treated as three-fifths of a human, a subpart of the white estate. I grew up in a neighborhood where landlords would not sign leases with their poor black tenants, and demanded that rent be paid in cash ....[105]

In another part of the book, Williams wrote about her experience at a Benetton store in SoHo, New York.[106] Williams grounded her experience by citing various *N.Y. Times* accounts of retail stores using entry buzzers in a racially discriminatory way.[107] A young retail clerk, upon seeing Williams ring the buzzer (a common security device in New York at the time), mouthed the words "we're closed," even though it was 1:00 p.m. and even though other (white) shoppers were inside the establishment.[108] Williams was refused entry and there was nothing she could do.[109] As a matter of context, Williams noted that in the late 1980s and 1990s, Benneton was running its "United Colors of Benetton" campaign, which intentionally used diversity and multi-cultural themes to market its designer clothing.[110] In a visceral way, Williams contemplated the "blizzard of rage" she experienced, as the teenaged retail clerk was able to exert so much power over her.[111]

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100. DELGADO, THE RODRIGO CHRONICLES, *supra* note 91, at 63, 67.
101. *Id*. at 64-65.
102. *See infra* note 158 and accompanying text.
103. *See generally* WILLIAMS, *supra* note 92.
104. *Id*. at 146-48.
105. *Id*. at 147.
106. *Id*. at 44-45.
107. *Id*. at 44.
108. *Id.* at 45.
109. *Id.*
110. *Id.* For an example of a vintage Benetton advertisement from this era, see *Benetton*, DEAR GOLDEN (July 30, 2013), http://deargolden.blogspot.com/2013/07/benetton.html (collecting images of the United Colors of Benetton campaign).
111. WILLIAMS, *supra* note 92, at 44-45.

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Williams's chapter then morphs into a story within a story. She wrote about her experience with the retail clerk and the buzzer and then enlarged the text and reproduced it on a large poster, which she taped to Benetton's storefront window, after it "was truly closed."[112] Then, Williams published her experiences in essay form for a law review symposium on excluded voices.[113] In that context, Williams recounted the marginalization that took place at the hands of the law review's editors (supervised by a faculty member) who removed references to Benetton (because they could not verify the story in a footnote) and who edited out all references to her race (because it did not "advance the discussion of any principle").[114] Williams persuaded the editors to reinsert the reference to her identity, explaining "that my story became one of extreme paranoia without the information that I am black."[115] This particular chapter in Williams book vividly illustrates the two-punch reality of: (1) living in a society replete with racist micro-aggressions that wound but which are not legally actionable; and, (2) being unable to voice that experience in law's "formalized, color-blind, liberal" language.[116]

Critical outsider scholars heavily influenced legal scholarship when they emerged and formed critical mass in the mid- to late-1990s. At Tulane Law School from 1997-2000, I gained exposure to these canonical texts through coursework on Critical Race Theory and Feminist Legal Theory. As a law student struggling with an intense feeling of alienation from, and anxiety about, the law (and its formalist principles), I found these works to be liberating. These scholars introduced highly controversial concepts of implicit bias,[117] race and gender micro-aggressions,[118] and intersectional[119] discrimination. Today, these concepts seem like foregone conclusions, but at the time, they were intensely controversial.

Believing that traditional "law is a cage within which radical social transformation is impossible," critical outsider scholars intentionally turned away from formalistic and abstract legal reasoning.[120] The path-breaking scholars had the intuition that "[s]tories … can change the baseline."[121] Stories "can change consciousness, change the narrative stock by which we interpret new stories."[122] By first saying what had previously been "unsayable,"[123] critical outsider scholars were early adopters who introduced novel concepts into the discourse.

112. *Id.* at 46.

113. *Id.* at 47.

114. *Id.* at 47-48.

115. *Id.* at 48.

116. *Id.* at 44-51.

117. Much of Rodrigo's observations are observations of implicit bias.

118. Williams's Benneton story is a story about a micro-aggression, a term that, at the time, had not entered the public vernacular.

119. *See generally* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

120. Matsuda, *supra* note 12, at 329.

121. DELGADO, RODRIGO CHRONICLES, *supra* note 91, at 203.

122. *Id.*

123. *See* Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195, 208-09 (2014) (explaining how certain legal theories start out on the fringe, but then get "onto the wall," and become mainstream concepts).

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Neurorhetoric explains that through this process, new thought patterns for thinking about the law were activated; actual neural pathways have eventually become entrenched into new collective mindsets.[124] This is progressive legal scholarship's greatest potential. Even if the verbalized ideas are not adopted by official legal actors like judges and legislators, written scholarship sets in motion a process to change collective consciousness and mindsets. This scholarship also carries value in its counter-narrative function, to challenge and question traditional legal meanings. Although traditional scholars would deny that legal meanings produced through a reasoned application of formal legal process are stories, they are, in fact stories with real effect that reify social reality.[125] It is valuable to have competing views.

In addition to the movement's use of experiential narratives, another controversial aspect of critical outsider scholarship was its acerbic critique (and rejection) of liberalism's enlightenment ideals of reason, objectivity, and formalism. Critical outsider scholars rightly pointed out the canons of Western liberal thought, from the enlightenment[126] to the founding fathers,[127] are based on undeniably racist premises and assumptions. Western enlightenment philosophers based their theory of reason and democratic civilization on a violent dichotomy that set reason and (European) civilization in one corner and the state of nature lived by savages (read, nonwhite) in the other.[128] And all of the founding fathers shared Thomas Jefferson's belief that blacks were "inferior to the whites in the endowments both of body and mind."[129]

The 1990s brought forth the sounds of Public Enemy, De La Soul, Nirvana, and Sonic Youth. The fashion trends centered on flannel shirts, Doc Marten boots, and thrift store Levi's jeans. The 1990s also presented the American public with quite a few challenging incidents involving race, gender, the law, and the concept of truth. The O.J. Simpson trial, the Anita Hill/Clarence Thomas controversy, and Bill Clinton's affair with Monica Lewinsky presented the public with disparate narratives and differing perspectives. There was a sincere struggle to make sense of mercurial facts in an increasingly media-saturated world. The American public wrestled with what they were seeing on the screen. Ethics issues abounded as talented and powerful lawyers (Anita Hill, Clarence Thomas, Bill Clinton, Johnny Cochran) sparred in very public forums to influence, persuade, and shape

124. Jewel, *Neuro-Rhetoric*, *supra* note 71, at 671.

125. *See* Steven Paskey, *The Law Is Made of Stories: Erasing the False Dichotomy Between Stories and Legal Rules*, 11 LEGAL COMM. & RHETORIC: JALWD 51, 51-52 (2014) (both rules and formalist templates for legal reasoning contain stock stories and elements of a narrative story). *See also* Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 666 (1993) ("Empowered groups long ago established a host of stories, narratives, conventions, and understandings that today, through repetition, seem natural and true.").

126. *See* David P. Waggoner, *An Inquiry into White Supremacy, Sovereignty, and the Law*, 45 SW. L. REV. 897, 900-01 (2016).

127. *See* Bell, *After We're Gone*, *supra* note 90, at 394-95.

128. Waggoner, *supra* note 126, at 899-900.

129. Bell, *After We're Gone*, *supra* note 90, at 395 (quoting DONALD L. ROBINSON, SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820, at 91 (1971)).

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perceptions of "the facts." Scholars and intellectuals were rankled by the sentiment that the facts—and the truth—might depend on individualized vantage points.[130]

Against this cultural backdrop, writers (scholars, judges, journalists) took aim at critical outsider scholarship, targeting both its narrative subjectivity and rejection of liberal enlightenment principles.[131] In 1997, after a series of critiquing articles, Daniel A. Farber and Suzanna Sherry of Minnesota Law School published a book attacking critical outsider scholarship.[132] The authors specifically focused on the work of Derrick Bell, Richard Delgado, Catherine MacKinnon, and Patricia Williams.[133] The authors' main thrust of argument is that critical outsider scholars should be faulted for abandoning "moderation, and common sense" in claiming "that reality is socially constructed."[134] Farber and Sherry also charged that narrative approaches to developing legal arguments lack rigor and have the potential to "distort legal debate" and persuade too heavily by appealing to channels of thought "outside the level of reason."[135] With respect to Patricia Williams's Benneton story, Farber and Sherry bluntly asked, "[W]hat is the point of this story?"[136] Rather than actively listen for Professor Williams's artful multi-layered meanings, the authors dismiss her work because "[t]he point of these stories remains obscure in part because of the paucity of explicit reasoning connecting them to a clear conclusion."[137] Arguing from the traditional law professor's perch of formalism, Farber and Sherry dispensed judgment on account of a lack "of clear analytic framework," which can "stall rather than expedite public discourse."[138]

Farber and Sherry's book then became a springboard that others used to pile on criticism of outsider scholarship. In reviewing the Farber/Sherry book, Judge Richard Posner concurred with Farber and Sherry's conclusions, expressing his view:

> Rather than marshal logical arguments and empirical data, critical race theorists tell stories—fictional, science-fictional, quasi-fictional, autobiographical, anecdotal—designed to expose the pervasive and debilitating racism in America today. By

130. *See generally* Ann Althouse, *Invoking Rashomon*, 2000 WIS. L. REV. 503 (remarking upon the many 1990s media references to the 1950 Japanese film masterpiece, RASHOMON, which told a story from four very different perspectives); Jeffrey Rosen, *The Bloods and the Crits*, NEW REPUBLIC (Dec. 9, 1996), https://newrepublic.com/article/74070/the-bloods-and-the-crits (problematizing critical race theory because it enabled [in the author's view] the type of lawyering that produced the O.J. Simpson acquittal).

131. *See generally* Randall L. Kennedy, *Racial Critiques in Legal Academia*, 102 HARV. L. REV. 1745 (1989); Arthur D. Austin, *Storytelling Deconstructed by Double Session*, 46 U. MIAMI L. REV. 1155 (1992); Arthur Austin, *Deconstructing Voice Scholarship*, 30 HOUS. L. REV. 1671 (1993); Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992).

132. FARBER & SHERRY, *supra* note 28.

133. *Id.* at 13.

134. *Id.* at 3.

135. *Id.* at 39.

136. *Id.* at 85.

137. *Id.* at 86.

138. *Id.*

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> repudiating reasoned argumentation, the storytellers reinforce stereotypes about the intellectual capacities of nonwhites.[139]

Former Ninth Circuit Judge Alex Kozinski chimed in to agree with Farber and Sherry's assessment, quipping that "[e]nlightenment concepts are now considered a bit quaint and a bit dated—like stale granola."[140]

Judge Kozinski also linked critical outsider scholarship to law student learning, expressing disapproval that "[l]aw students are now being taught—at least by some of their professors—that truth does not exist or, in any event, does not matter."[141] Others have echoed Kozinski's concern about what law students were being taught. Other commentators expressed the same view, concern about students being exposed to critical theories that took a nihilist view of the law and law practice.[142] The view was that critical and radical legal theories did not adequately prepare students for law practice.[143] As pointed out above, in the 1990s, critical outsider scholars were under sharp attack for both their ideas and their choices for expressing them.[144] There was also the view that the type of scholarship produced by the movement was sub-par and not sufficiently rigorous to obtain tenure. Thus, young scholars were (and are) advised not to write radical scholarship until they obtain tenure.[145] Because of the power dynamics at play, the criticism of critical outsider scholarship functioned as a form of silencing discipline. The movement's critics hailed from secure positions; the members of the movement were, for the most part, new interlopers. The critics had tradition

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139. Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40, 42.

140. Alex Kozinski, *Bending the Law, Review of Beyond All Reason: The Radical Assault on Truth in American Law*, N.Y. TIMES (Nov. 2, 1997), http://www.nytimes.com/books/97/11/02/reviews/971102.02kosinst.html. Ironically, in the course of criticizing outsider scholarship for not being sufficiently rational and logical, Kozinski inserts a humorous metaphor about stale granola, a classic *narrative* technique.

141. *See id.* On this point, Farber and Sherry, as well as Judges Posner and Kozinski, take issue with Patricia Williams's chapter on the Tawana Brawley case. *See, e.g.*, FARBER & SHERRY, *supra* note 28, at 95-96; Posner, *supra* note 139, at 42; Kozinski, *supra* note 140. All of these critics suggest that Williams, in her telling of the story, asserted that that the truth does not matter. In the Tawana Brawley case, a fifteen-year-old child was found naked and unresponsive, with urine-soaked cotton stuffed in her nose and ears. WILLIAMS, *supra* note 92, at 169. In her statement to prosecutors, Brawley named six white men as her attackers. *Id.* at 170. It later came out that the child's accusations were probably false. FARBER & SHERRY, *supra* note 28, at 95. In her account of the incident, Williams expresses a deep amount of cynicism about the process and the various self-serving actors (including a searing appraisal of Rev. Al Sharpton) who flanked around the child and turned the incident into a race-based media spectacle. WILLIAMS, *supra* note 92, at 169-78. Although Williams treated the child with empathy, I don't view her chapter as an assertion that the truth does not matter.

142. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34-36, 39-40, 47 (1992) (explaining the harm of exposing students to impractical teaching that is too steeped in critical theory and not grounded enough in practical doctrine); Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (arguing that scholars who espouse nihilism about the law should "depart the law school" as they "threaten[] to rob his or her students … to act on [the] professional judgment as they may have acquired").

143. Edwards, *supra* note 142, at 36-37.

144. DELGADO, RODRIGO CHRONICLES, *supra* note 91, at 192.

145. Lee, *supra* note 4, at 91 (citing Delgado, *supra* note 4, at 561).

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(formalism, reason, and objectivity) on their side. The critical outsiders were doing something entirely new, which was viewed as a serious threat to the traditional way of doing things. The old guard attempted to maintain order and control over the production of legal meanings, but critical legal outsiders prevailed in changing cultural mindsets. This is not to say, however, that there was not some chilling effect, as younger scholars tempered their voices to hew to dominant views, in an effort to protect their careers.

We can learn a lot by evaluating the course of relatively recent intellectual history. The two jurists most dismissive of critical outsider scholarship have retired. Judge Posner abruptly retired from the bench to take up a laudable project involving justice for pro se litigants.[146] Judge Posner is admired for his high principles and his endearing love of cats.[147] Very recently, a former clerk alleged that Judge Kozinski had engaged in sexual misconduct and emotional abuse with his clerks (allegations that were then repeated by other former Kozinski clerks).[148] After those allegations surfaced, Judge Kozinski abruptly retired from the Ninth Circuit.[149]

The idea that social reality is constructed and that reason is infallible does not seem radical now. First, with respect to the traditionalists' emphasis on enlightenment principles and "reason," we have seen the rise of behavioral economics, which accepts that human economic actors cannot be expected to act rationally in a consistent manner.[150] Rather, humans exhibit "bounded rationality, bounded willpower, and bounded self-interest."[151] Second, other work on cognitive biases,[152] the idea that humans do not often reach decisions rationally

146. Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provacateur*, N.Y. TIMES (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html.

147. LawProfBlawg & Eric Segall, *Pixie for President: Why Judge Posner's Cat Deserves Your Vote*, ABOVE THE LAW (Oct. 11, 2016), https://abovethelaw.com/2016/10/pixie-for-president-why-judge-posners-cat-deserves-your-vote/.

148. Matt Zapotosky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who Say He Touched or Kissed Them*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html?utm_term=.0c8fcde98c30; Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.f91f8bf3264f.

149. Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html.

150. *See* Shahram Heshmat, *What Is Behavioral Economics?*, PSYCHOL. TODAY (May 3, 2017), https://www.psychologytoday.com/blog/science-choice/201705/what-is-behavioral-economics.

151. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476-79 (1998) (emphasis omitted). *See also* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009). Richard Thaler won the Nobel Prize for economics in 2017.

152. *See generally* ROBERT KAHNEMAN, THINKING, FAST AND SLOW (2013). Robert Kahneman won the Nobel Prize for economics in 2002.

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and logically, also contributes to the continuing erosion in the Cartesian idea that reason is reliable. Third, cognitive scientists have compellingly argued that reason itself is not disembodied as Descartes supposed.[153] Rather, reason is embodied, it rises from the body and does not transcend it.[154] Fourth, neuroscientists studying political reasoning have found that subjects who engage in faulty and illogical reasoning feel pleasure (the same type of pleasure that drugs induce) when that reasoning leads them to conclusions that align with their personal political preferences.[155] In other words, we get a fix when we depart from "reason."[156] Fifth, research on implicit racial bias, emerging from an ongoing project at Harvard, strongly supports the inference that de facto discrimination happens every day on an interpersonal level.[157] Sixth, every day we are confronted with claims of alternative facts and fake news.[158] And finally, the reality in the U.S. today—documented police killings, stratospheric mass incarceration, violent rounding up of immigrants, and a reality-show presidency—is worse than the most despairing 1990s critical legal theory fiction. The critical legal outsiders intuitively documented and anticipated great many of these social phenomena.

Before moving to the next section, one other point is worth mentioning. The writers who produced the trail blazing scholarship during the 1990s taught in tenure-track positions or were tenured. Unlike the intellectual field in the 1990s, the greatest threat for the production of progressive legal meanings does not derive from professional peers who disagree with the message or even methods. Rather, the ascendance of neoliberal rationality, and its application to legal education, poses the greatest threat to the production of scholarship that can change the status quo. Neoliberal principles of labor cost saving, deployed to limit tenure and tenure-track positions, can shut down voices.

For years, neoliberal rationality has been applied to the segment of the law professorate dedicated to teaching legal writing (and legal skills). This part of the legal academy is also highly segmented by gender. Because it directs teaching labor toward classroom teaching (but not producing scholarship), neoliberal rationality functions as a silencing discipline. Because it is probable that the de-professionalization trend will spread further within the legal academe, I urge my

153. *See generally* GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT (1999).

154. *See generally id.*

155. Jewel, *Neuro-Rhetoric*, *supra* note 71, at 674 (citing DREW WESTEN, THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION 14 (2007)).

156. *Id.*

157. Information on Harvard's Implicit Association Test (the IAT) can be found at *Project Implicit*, https://implicit.harvard.edu/implicit/. *See also* MALCOLM GLADWELL, BLINK 77-86 (2005) (explaining the IAT). For thorough explanations of implicit bias as it relates to law, see Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006).

158. *See* Eric Bradner, *Conway: Trump White House Offered 'Alternative Facts' on Crowd Size*, CNN (Jan. 23, 2017), https://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html; *Fake News in 2016: What It Is, What It Wasn't, How to Help*, BBC (Dec. 30, 2016), http://www.bbc.com/news/world-38168792.

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friends and colleagues who enjoy security of position[159] (and the higher pay that goes along with it) to listen to this warning story.

III. NEOLIBERALISM'S THREAT: DE-PROFESSIONALIZATION AND ITS IMPACT ON ACADEMIC FREEDOM

We start, again, in the 1990s. In August 1991, a story appeared on the second page of *The Lawyer Hiring and Training Report*, a news publication devoted to law firm and law school hiring trends.[160] The news item described Tulane Law School's decision to tap the "Mommy-Track" for legal research and writing instructors.[161] In the story, Tulane's Dean remarks that the "[m]ommy-track" is a good solution to the problem of finding legal research and writing instructors.[162] "The school will pay them a few thousand dollars per school year for the part-time teaching."[163]

Though the Tulane mommy-track news item was published almost thirty years ago, its precepts are still accurate. The mommy-track appellation admits to the gender segmentation in the field of legal writing. Mommy-track also conveys the reality that legal writing positions do not receive the same security of position as traditional law teaching jobs. Furthermore, Tulane's salary strategy (a few thousand dollars per school year) reflects the low status afforded to legal writing instructors.

Then and now, legal writing professors occupy the lowest rung in the law school caste system, with clinicians occupying only a slightly higher perch.[164] Legal writing professors are 72% female; clinical faculty is 62% female.[165] Only 18% of legal writing faculty are tenured or on a tenure track, although 6% of

159. I am one of the few professors who teach legal writing on a unified tenure track. At the University of Tennessee College of Law, there are no distinctions between legal writing, clinical, or doctrinal faculty. We are all treated exactly the same, in pay and security of position. I would add that the University of Tennessee is one of the most affordable law schools in the country. *See* Mike Stetz, *Best Value Law Schools*, NAT'L JURIST, Fall 2017, at 22-25, https://bluetoad.com/publication/frame.php?i=443086&p=&pn=&ver=html5. A lengthy point about the cost of offering security of position and equal pay structures to legal writing/legal skills faculty is beyond the scope of this article. My own institution illustrates equity is possible, while still keeping tuition low.

160. Larry Smith, *Tulane Taps 'Mommy Track' for Legal Writing and Research Instructors*, 11 LAW. HIRING & TRAINING REP. 9, 13 (Aug. 1991). It is an ironic coincidence that this document hailed from my alma mater.

161. *Id.*

162. *Id.*

163. *Id.*

164. *See* Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 LEGAL COMM. & RHETORIC: JALWD 12, 13-15 (2002).

165. Robert Kuehn, *Clinical Legal Education by the Numbers*, 26 CLINICAL LEGAL EDUC. ASS'N NEWSL. 1, 6 (2017). Historically, clinical law teachers and legal writing teachers have occupied slightly different tiers in the professorate "caste" system, with legal writing teachers at the bottom. *See* Syverud, *supra* note 164, at 13-15.

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writing faculty are on a separate "programmatic" tenure track.[166] ABA statistics indicate that 56.6% of tenure-line professors are male and 43.4% are female.[167]

The median salary for *all* non-tenure-track legal writing professors as of 2015 is $73,000,[168] $32,000 less than $105,000,[169] a typical salary for an *assistant* (early-career) tenure-track professor. Similarly, Professor Deborah Merritt's analysis of publicly available salary data from an anonymized top-25 law school indicates a $82,614 pay gap between clinical assistant professors and tenure-track assistant professors.[170] For professors at the senior level, the non-tenure track and tenure-track pay gap widens to $97,322.[171] The standard rationalization for the unequal treatment of legal writing (and clinical) professors is that "[a]pplicants for legal writing and clinical positions are plentiful ..., so the market drives their salaries and status down."[172] The mommy-track concept reflects a neoliberal approach to teaching labor—de-professionalize the labor, pay the least amount possible, and chalk up the discriminatory gender issues to the market.

Neoliberalism is a loaded word, but its connotations are quite useful for explaining current realities in legal education. In a nutshell, neoliberalism refers to the political logic that foregrounds the market and individuals in competition as the primary actors in society.[173] It imports the market-model system of choice and efficiency and applies that system across the board to all individuals.[174] The ascendance of neoliberalism has been described as a "stealth revolution" that has successfully erased intelligent, legitimate, and democratically centered alternatives to market ordering.[175]

In general, neoliberalism's powerful market logic conflicts with democratic demands for "reasonable level[s] of economic opportunity, distributive fairness, workplace security, community and solidarity, and civic equality."[176] Neoliberalism's enormous rhetorical power works through its value free framework. Instead of top-down moral valences that determine social outcomes,

166. Kuehn, *supra* note 165, at 7. Programmatic tenure tracks offer a security of position, but usually pay less in salary than the standard "doctrinal" tenure track.

167. Jewel, *Oil & Water*, *supra* note 70, at 120 n.48 (citing *Statistics, Law School Faculty and Staff by Ethnicity and Gender*, AM. BAR ASS'N (2013), http://www.americanbar.org/groups/legal_education/resources/statistics.html).

168. *See* ASS'N OF LEGAL WRITING DIRS. & THE LEGAL WRITING INST., 2015 REPORT OF THE LEGAL WRITING SURVEY 77 & 78 (2015), http://www.alwd.org/wp-content/uploads/2017/03/2015-survey.pdf.

169. *See* Kuehn, *supra* note 165, at 7 (citing SOC'Y OF AM. LAW TEACHERS, 2015 SALARY SURVEY 2 & 3, https://www.saltlaw.org/wp-content/uploads/2015/10/SALT-salary-survey-2015-REVISED-final.pdf).

170. Deborah J. Merritt, *Salaries and Scholarship*, L. SCH. CAFE (Jan. 13, 2018), https://www.lawschoolcafe.org/2018/01/13/salaries-and-scholarship/.

171. *Id.*

172. Merritt, *Market for Legal Writing and Clinical Professors*, *supra* note 68.

173. *See* BROWN, *supra* note 5, at 10, 17, 28, 30, 42.

174. Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. & CONTEMP. PROBS. 71, 73 (2014).

175. BROWN, *supra* note 5, at 68-69, 115-16.

176. David Singh Grewal & Jedediah Purdy, *Introduction: Law & Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 4 (2014).

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market forces and consumer choices operate on a diffuse level, free from interrogation, to order society.[177] Thus, the standard answer to the question of why legal writing professors are paid less and employed in more contingent work arrangements (it is the market) is a neoliberal answer to the problem that conveniently shifts the inquiry away from other explanations such as endemic gender hierarchy).

Neoliberalism primarily treats human beings as capital investments, productive machinery—"human capital."[178] With respect to work, neoliberalism eschews any commitment, grounded in a sense of the collective good and moral responsibility, to provide individual workers with a secure, life-long job that carries a living wage.[179] In this manner, neoliberalism has ushered in an era of disaggregated production, offshore jobs, and temporary staffing models.[180] Cost savings, particularly labor costs savings, are a particular focus. Temporary and lean staffing models, offering employer's the greatest amount of flexibility, are heralded as the solutions to the problem of "marginal utility," the idea of limiting jobs at the exact point where productivity is highest.[181]

Within higher education, neoliberalism's market logic has given universities the green light to eradicate tenure-line positions and replace them with adjunct, contingent teaching labor. Thirty-five years ago, 75% of all college teachers were tenurable; now, only 25% of college teachers are tenurable.[182] In past years, there have been numerous news stories about the plight of adjunct instructors struggling to make ends meet in dead-end contingent jobs that fail to pay a living wage.[183] In undergraduate education, the tenure/adjunct line is also gendered. "The sectors in which women outnumber men in the academy are uniformly the worst paid, frequently involving lessened autonomy—as in writing instruction …."[184]

In terms of the content of higher education, the neoliberal approach values knowledge that can be directly translated into job readiness. Education as job training has replaced the post-WWII idea that a liberal arts education in humanities is helpful for educating individuals for participation in democracy.[185] The only exception is at the elite schools, which are able to deliver a liberal arts degree that can be converted to valuable social capital.[186] The same practical trend is true for

177. Blalock, *supra* note 174, at 99.

178. MALCOLM HARRIS, KIDS THESE DAYS: HUMAN CAPITAL AND THE MAKING OF MILLENNIALS 5 (2017).

179. Lifelong social support in exchange for a life's work is referred to as the Fordist-Keynesian social compact. *See* Loic Wacquant, *Crafting the Neoliberal State*, 25 SOC. F. 197, 201 (2010).

180. *Id.*

181. Grewal & Purdy, *supra* note 176, at 21.

182. MARC BOUSQUET, HOW THE UNIVERSITY WORKS: HIGHER EDUCATION AND THE LOW WAGE NATION 2 (2008).

183. *See, e.g.*, Caroline Frederickson, *There Is No Excuse for How Universities Treat Adjuncts*, THE ATLANTIC (Sept. 15, 2015), https://www.theatlantic.com/business/archive/2015/09/higher-education-college-adjunct-professor-salary/404461/.

184. BOUSQUET, *supra* note 182, at 44. *See generally* EILEEN E. SCHELL, GYPSY ACADEMICS AND MOTHER-TEACHERS: GENDER, CONTINGENT LABOR, AND WRITING INSTRUCTION (1997).

185. BROWN, *supra* note 5, at 181.

186. *Id.*

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law schools, with many of the non-elite schools focusing on practice skills while the most elite law schools remain committed to legal education as a holistic and interdisciplinary experience.[187]

With respect to managing higher education, universities have come to resemble corporations. "[W]hile corporations developed research and administrative 'campuses,' universities have become increasingly corporate in physical appearance, financial structure, evaluation metrics, management style, personnel, advertising, and promotion."[188] Tenure-line teaching positions have waned, but at the same time, new administrative positions have been created, creating a thick middle-management class within the university and weakening the principle of faculty governance.[189]

Universities have also come to adopt corporate governance mechanisms that overemphasize metrics and values. Wendy Brown writes that "all spheres of existence are framed and measured by economic terms and metrics, even when those spheres are not directly monetized."[190] In legal education, this rankings obsession dovetails nicely with the pre-existing forms of competitive ranking and hierarchy already part and parcel of law school culture (law school rank, class rank, LSAT score, author citation rank, etc.). This intertwined synergy between classic law school culture and neoliberal culture is perhaps a topic best saved for a different piece. It is worth noting, however, that legal education's current obsession with outputs (jobs, practice ready, learning outcomes) is a distinctly neoliberal phenomenon.

The ABA Standards that govern law schools (compliance is required for accreditation) allow school administrators to continue to employ market-driven labor cost savings practices to keep legal writing (and legal skills) pay depressed and security of position hampered.[191] Section 405(c) of the Standards provides that clinical faculty should have "a form of security of position reasonably similar to tenure" and section 405(d) provides that legal writing teachers should be granted "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 [required] legal writing instruction ... and (2) safeguard academic freedom."[192] Additionally, section 405(d) allows schools to offer writing professors short term

187. *See* Jewel, *Bourdieu and American Legal Education*, *supra* note 54, at 1221-22.

188. BROWN, *supra* note 5, at 199.

189. The growth of university administrators (deans, vice deans, assistant provost, etc.) is known as "administrative bloat." *See* JAY P. GREENE ET AL., GOLDWATER INST., ADMINISTRATIVE BLOAT AT AMERICAN UNIVERSITIES: THE REAL REASON FOR HIGH COSTS IN HIGHER EDUCATION 1 (2010), https://goldwaterinstitute.org/article/administrative-bloat-at-american-universities-the/ (select hyperlink at the bottom of article to download the pdf). Administrative bloat represents the application of neoliberal (or corporate) management principles onto the structure of higher education. Administrative bloat "deprioritize[s] education and prioritize[s] business administration." HARRIS, *supra* note 178, at 57. *See also* BROWN, *supra* note 5, at 127 (explaining that neoliberal governance privileges decision-making by management or administration over democratic processes (e.g., faculty governance) where debate and contestation produces the end results).

190. BROWN, *supra* note 5, at 10.

191. 2017-2018 ABA STANDARDS AND RULES, *supra* note 8, at 29.

192. *Id.*

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(as little as nine months) contracts, with no presumption of renewal.[193] For traditional law professors, ABA Standard 405(b) mandates that "[a] law school shall have an established and announced policy with respect to academic freedom and tenure."[194] Thus, the law professorate's caste system is instantiated by the regulations that govern the accreditation of law schools.

Tenure-line law professors—they may be coming for you, too. Although the ABA regulations still require tenure for traditional law professors, some changes to the regulations have given law schools more flexibility for reducing teaching labor costs, which attenuate the tenure standard, even for traditional professors.[195] One recent change is that the ABA no longer employs a student/teacher ratio in its qualitative analysis of a school's program of legal education.[196] It used to be that a school was incentivized to hire a certain amount of full-time tenure-track teachers in an effort to maintain good student/teacher ratios.[197] Under these regulations, 405(c) and 405(d) faculty were counted as a fraction of a full-time professor.[198] Now, with the student/faculty ratio removed, schools have more flexibility to employ non-tenure-track professors, such as professors holding "professors of the practice" titles. Recently, a group of law deans attempted to remove tenure in its entirety from section 405 of the ABA regulations.[199] That attempt failed, but the relentless logic of neoliberalism has not abated. There is also political animus against the institution of tenure, with market logic of cost-savings used to justify its erosion.[200] It is likely that in the near future, as with undergraduate education, law schools will see an accretion of tenured positions.

The original point of tenure is that it secured academic freedom, which has traditionally been understood to protect professors who speak out on controversial topics.[201] However, neoliberalism's diffuse market logic has eradicated this line of thinking. Instead of a top-down inquiry into the *qualitative* value of a particular argument or line of thought, which was what occurred in the 1990s with the critical outsider scholars, neoliberalism asks what *economic* value does the activity bring to the table and how much does it cost. And the answer, for many educational institutions, is that faculty research and scholarship (particularly outside of STEM) is not worth its cost. The end result is that universities are employing adjuncts, contract teachers, and lecturers whose primary job description is to teach rather

193. *Id.*

194. *Id.*

195. *See supra* note 8 and accompanying text.

196. *See supra* note 8 and accompanying text.

197. *See supra* note 8 and accompanying text.

198. *See supra* note 8 and accompanying text.

199. *See* Ann Bartow, *American Law Deans Association (ALDA) Attacks Tenure and Long Term Contracts Standards §§ 205(c), 405, and 603(d)*, FEMINIST L. PROFESSORS (Mar. 30, 2006), http://www.feministlawprofessors.com/2006/03/american-law-deans-association-alda-attack-tenure-and-long-term-contracts-aba-standards-§§-205c-405-and-603d/.

200. Kimberly Hefling, *Walker Erodes College Professor Tenure*, POLITICO (July 12, 2015), https://www.politico.com/story/2015/07/scott-walker-college-professor-tenure-120009.

201. *1940 Statement of Principles on Academic Freedom and Tenure*, AM. ASS'N U. PROFESSORS, https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure (last visited Apr. 7. 2018).

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than research and write scholarship. This has a silencing effect.[202] Free speech is certainly impacted in this environment. Teachers outside of the tenure line, whose contracts are renewed on a contingent basis, are conditioned to speak very carefully.[203] But what is different in the contemporary landscape is that *the very activity of speech* has been written out of the equation. It is not part of the job description. As one adjunct blogger writes: "The precious time and energy to research and write and give papers have become unaffordable luxuries. Are rights to speech real when the economic ability to employ those rights is lacking?"[204]

The absence of tenure for legal writing professors functions as a silencing discipline in two ways. First, traditional freedom of speech is constrained. But the second way is novel and represents a new kind of silencing discipline that is very much a product of neoliberal trends in higher education. Since first convening as a group in the 1980s, legal writing professors have developed into a professional collective with sophisticated pedagogical practices and a growing body of scholarship on critical rhetoric, persuasion, and legal process strategies. This has happened despite the fact that legal writing professors are not expected, or paid, to produce scholarship. In many ways, legal writing scholarship is as critical and radical as it is practical.[205]

In many respects, this corner of legal writing scholarship has been inspired and influenced by the critical outsider approaches in the 1990s. For instance, legal writing (and clinic) professors developed the Applied Storytelling project,[206] a scholarly project that critically evaluates practices of rhetoric and persuasion in a law advocacy context. Recently, a group of Applied Storytelling scholars came together for a symposium on race and advocacy, which was published in the Maryland Law Review.[207] Legal writing (and clinic) professors also ignited the Feminist Judgements project, a series of books in which law scholars take judicial opinions and rewrite them from a feminist perspective.[208] In all of these projects,

202. *See generally* Eva Swidler, *Adjuncts and Academic Freedom*, ACADEME BLOG (Sept. 19, 2016), https://academeblog.org/2016/09/19/adjuncts-and-academic-freedom/.

203. *Id.*

204. *Id.*

205. *See generally* Teri A. McMurtry-Chubb, *"Burn This Bitch Down!: Mike Brown, Emmett Till, and the Gendered Politics of Black Parenthood*, 17 NEV. L.J. 619 (2017); Susan Salmon, *Reconstructing the Voice of Authority*, 51 AKRON L. REV. 143 (2017); Brad Desnoyer & Anne Alexander, *Race, Rhetoric, and Judicial Opinions*, 76 MD. L. REV. 696 (2017); Carrie Sperling & Kimberly Holst, *Do Muddy Waters Shift Burdens*, 76 MD. L. REV. 629 (2017); Elizabeth Berrenguer, *The Color of Fear: A Cognitive-Rhetorical Analysis of How Florida's Subjective Fear Standard in Stand Your Ground Cases Reifies Racism*, 76 MD. L. REV. 726 (2017); Sherri Lee Keene, *Stories That Swim Upstream: Uncovering the Influence of Stereotypes and Stock Stories in Fourth Amendment Reasonable Suspicion Analysis*, 76 MD. L. REV. 747 (2017); Donald R. Caster & Brian C. Howe, *Taking A Mulligan: The Special Challenges of Narrative Creation in the Post-Conviction Contex*t, 76 MD. L. REV. 770 (2017).

206. *See generally* Christopher Rideout, *Applied Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD 247 (2015).

207. *See* Symposium, *Race and Advocacy*, 76 MD. L. REV. 629, 629-791 (2017).

208. *See generally* FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT (Kathryn Stanchi et al. eds., 2016).

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legal writing scholars have adopted the critical outsider movement's position that narrative and stories can positively expand legal consciousness for the better.

Some of the professors involved in these scholarly pursuits are among the small minority of legal writing teachers on a tenure-line track. But many are not. Although scholarship is not required in many legal writing positions, professors still engage in the activity as a way to move up into a better professional position or because of personal intellectual curiosity. There are multiple anecdotes of legal writing professors being told by their deans not to write scholarship—not because of the content of their work, but because the endeavor takes time and energy away from their full-time teaching obligations. The legal writing professor's dean may not renew the professor's contract, not because he/she disagrees with the contents of the professor's scholarship, but because he/she views the law professor as insubordinate for writing anything in the first place. In this way, legal writing's work structure limits the production of valuable legal meanings.

Again, they may be coming for you, tenure-track and tenured law professors. The erasure of research and legal scholarship from law professor job descriptions applies to those professors who teach doctrinal courses, particularly those who are hired as professors of the practice or lecturers, positions that typically do not include remuneration for research and scholarship.[209] Although the Socratic method is the low-cost "Model-T" of legal education,[210] enabling one professor to reach a vast amount of law students in one lecture classroom, it would be cheaper still to have that professor teach three or four classes a semester, in lieu of only two, with time for scholarship endeavors. ln this way, this trend is disturbingly relevant beyond the legal skills professorate.

Moreover, neoliberal market logic denies the value of alternative discourses, regardless of their origin, from doctrinal or writing teachers. As discussed above, in response to legal formalism's silencing of contextualized voices from the margins,[211] alternative jurisprudential movements pushed the envelope to challenge existing categories and thought patterns.[212] As one's scholarship influences one's teaching, this *discourse dynamic* benefits students, helps them to see beyond the IRAC structure to envision creative strategies for using the law, for progressive policy-making or social justice for individual clients. Neoliberalist logic, however, views this discourse dynamic as a luxury item that distracts from the true purpose of education, which is training for work.[213] As the reasoning goes, law schools should focus on teaching students the law and practice skills so that they can get jobs. Ethics is a matter of learning enough to pass the MPRE.

Moreover, this silencing discipline operates in a masked way. In the academic debates in the 1990s, traditional voices implied that critical outsider scholarship was subpar, not worthy of tenure. Such views likely caused a chilling

209. *See supra* notes 190-194 and accompanying text.

210. Schlegel, *supra* note 80, at 323.

211. *See supra* notes 33-61 and accompanying text.

212. *See* Menkel-Meadow, *Taking Law Seriously*, *supra* note 85, at 564-76 (discussing, among others, legal realism, law & society, critical legal studies, and outsider theories as modes of jurisprudence that challenged the legal formalism's foundations).

213. *See* BROWN, *supra* note 5, at 188-92.

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effect, but the silencing occurred in the context of a competitive debate in which all the players valued the activity itself, even if there was disagreement over the content. Now, market logic holds that the very activity of engaging in research and scholarship is not valued, and because it is not paid for (it is not part of the job description), it does not exist.

Neoliberalism, taken too far, will siphon the very life and soul out of academic debate. In all previous controversies that have unfolded on law review pages, there was argument between *human* authors. In the 1990s, in arguing whether enlightenment-based norms of reason and objectivity were superior to context infused narrative approaches, there was never a suggestion that individual humans could not and should not theorize solutions to legal problems. While neoliberalism places great emphasis on individual "human capital" performance in a competitive system,[214] at the same time, it removes the romantic concept of individual authorship. Instead of human thinking, problems are solved by a vast, diffuse apparatus of things categorized as market forces.[215] In the 1990s, scholars brought forth radical concepts for other thinkers to inspect and critique. Now, instead of using human thought—infused with moral, spiritual, and yes, even enlightenment principles—decisions are passively made using benchmarks, best practices, guidelines, and big-data algorithms deployed to locate the maximum amount of profitability and utility.[216]

Nonetheless, neoliberalist logic is highly persuasive in the context of legal education, particularly in light of the intense stakes—high student debt loads and fewer government and private firm law careers (which are themselves products of neoliberal trends). And teaching labor is very expensive. But this logic misses the point that lawyers are not just workers; they are professionals charged with solving uniquely human problems, a process that requires the development of intellectual curiosity and criticality. While neoliberalist logic about the purpose of legal education does not differ much from earlier arguments about the need for practicality in legal education,[217] the difference here is that law teaching jobs are being structured to wholly remove critical, interdisciplinary, and theoretical inquiries from the job itself. This prevents any discourse dynamic from sprouting up in the first place. And all of this is happening without democratic process, faculty governance, or participation; it is often accomplished through fiat by university administrators and technocrats.[218]

CONCLUSION

The market-based logic that enables silencing discipline is dangerous for any member of the academy who speaks and writes about issues that challenge the

214. Blalock, *supra* note 174, at 88-89; BROWN, *supra* note 5, at 32-33.

215. For a concise, contemporary explanation of the apparatus concept, see PASI VALIAHO, BIOPOLITICAL SCREENS: IMAGE, POWER, AND THE NEOLIBERAL BRAIN 11-13 (2014).

216. BROWN, *supra* note 5, at 34-33. *See generally* FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015).

217. *See generally* Edwards, *supra* note 142.

218. *See supra* notes 184-185 and accompanying text.

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status quo. Thoughtful and critical scholarship, which influences teaching, shifts law student knowledge from a beginner's primitive understanding of the law to a lawyer's professional understanding. Teaching and scholarship (along with service) have long formed the foundation of a university professor, including the traditional law professor. For some time now, however, scholarship has been absent from the job descriptions of most legal writing professors. Despite this, after two decades of professionalization, legal writing professors have produced a body of meaningful scholarship on the topics of legal rhetoric, communication, and persuasion. Inspired by critical race theory, feminist legal theory and other outsider approaches, current legal writing scholarship sets forth strategies for foregrounding context, empathy, and lived experience within the framework of formal legal narratives.[219] It is critical, but also practical.

However, market logic silences this work by refusing to value the work itself, regardless of its content. This logic could easily migrate to other areas of the law school, making it such that all professors must teach more, and write and think less. This is especially true in light of the fact that legal scholarship is not, as a general rule, connected to outside grant money. Incisive legal scholarship is valuable to the legal discourse community because it produces ethical, holistic, and thoughtful lawyers, even if it does not line up directly with a positive economic outcome at any given moment. I encourage all members of the academy to look at this pattern.

219. *See supra* notes 200 & 203 and accompanying text.

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