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Lucille A. Jewel

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# OIL AND WATER: HOW LEGAL EDUCATION'S DOCTRINE AND SKILLS DIVIDE REPRODUCES TOXIC HIERARCHIES

LUCILLE A. JEWEL\*

## INTRODUCTION

The longstanding categorical distinction that elevates doctrinal teaching over skills teaching<sup>1</sup> continues to harm the profession of law. In this Article, I consider two distinct effects produced by the doctrine/skills dichotomy. First, the dichotomy is responsible for reinforcing class, gender, and race segmentation in legal education, which limits the quality of instruction that law schools can provide and abets the reproduction of existing power relations in the legal profession and society at large.

Second, the antipodal positioning of doctrine and theory over skills and practice harms law schools' ability to prepare a new generation of law students to engage in both critical lawyering and law reform. As American society becomes increasingly unequal and as its criminal justice system barrels well past the breaking point, we desperately need the next generation of law students to participate in a new era of structural law reform. But unlike the last major era of reform in the United States (the Progressive Era), where ill-conceived top-down solutions were theorized and implemented by a small subset of elite lawyers, this time, reform should emerge from a coalition of lawyers hailing from all law schools and all levels of society. Even in legal education's current situation, with tenure for law professors on the chopping block due to declining student enrollment and legal employment prospects, law schools should commit to collapsing the false binary between doctrine and skills.

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\* Associate Professor of Law, University of Tennessee College of Law. I would like to thank Professors Meera Deo, Melissa Hart, Marina Angel, Lisa Pruitt, and Angela Harris for organizing this crosscutting AALS session. I am also grateful to my co-presenters, Professors Gregory S. Parks, Maurice R. Dyson, Faith J. Jackson, Edith Wu, Susan D. Rozelle, Anne E. Tweedy, Kristen K. Tiscione, Tamara F. Lawson, Angela Mae Kupenda, Maritza Reyes, Cassie Christopher, and Michael Green.

1 For a recent description of the skills/doctrine divide, see Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us about the Doctrine Skills Divide*, 64 J. LEGAL EDUC. 181 (2014) [hereinafter Edwards, *The Trouble With Categories*]. In this piece, I use the term "skills" to refer to legal writing, practice skills such as negotiation, mediation, counseling, and drafting, and law clinics. The skills/doctrine dichotomy applies to legal skills in a broad sense, but much of this article will focus on legal writing in particular.

In this Article, I will first describe the disparate treatment and conditions that make the skills professorate the “other professorate.” I will then explain how the dichotomy (1) reinforces harmful race, class, and gender hierarchies in the legal academy and (2) produces an elitist knowledge hierarchy that prevents students from obtaining a holistic legal education. Finally, I will argue that bridging the skills/doctrine divide is necessary to prepare all law graduates to participate in civics-based law reform.

## I. The Other Professorate

As so many authors have pointed out before, legal skills teachers are treated as second-class citizens, receiving lower pay, fewer faculty governance rights, and lesser titles than teachers hired on the tenure-track to teach doctrinal courses.<sup>2</sup> Legal skills teachers are “something other (or less) than tenured or tenure-track doctrinal professors in the overwhelming majority of American law schools.”<sup>3</sup> A legal skills teacher is often physically separated from his/her doctrinal colleagues, occupying offices in a law clinic’s

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2 For articles addressing status issues and legal writing teachers, see Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117 (1997); Mary Beth Beazely, “Riddikulus!”: *Tenure-Track Legal-Writing Faculty and the Boggart in the Wardrobe*, 7 SCRIBES J. LEGAL WRITING 79 (2000); Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 UMKC L. REV. 253 (2004) [hereinafter Durako, *Occupational Segregation*]; Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. LEGAL EDUC. 562 (2000) [hereinafter Durako, *Second Class Citizens in the Pink Ghetto*]; Pamela Edwards, *Teaching Legal Writing as Women’s Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN’S L.J. 75 (1997) [hereinafter Edwards, *Teaching Legal Writing as Women’s Work*]; David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105 (2003–2004); Lorne Sossin, *Discourse Politics: Legal Research and Writing’s Search for a Pedagogy of Its Own*, 29 NEW ENG. L. REV. 883 (1994); Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467 (2004–05) [hereinafter Stanchi, *Who Next, the Janitors?*]; Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 3 (2001); Kent D. Syverud, *The Caste System and Best Practices in Legal Education*, 1 J. ASS’N LEGAL WRITING DIRECTORS 12 (2002). For articles that address the lower status of clinical faculty, see Bryan L. Adamson et al., *The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy*, 36 J. LEGAL PROF. 353 (2012); Todd A. Berger, *Three Generations and Two Tiers: How Participation in Law School Clinics and the Demand for “Practice-Ready” Graduates Will Impact the Faculty Status of Clinical Law Professors*, 43 WASH. U. J.L. & POL’Y 129 (2013); Brent E. Newton, *Preaching What They Don’t Practice: Why Law Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105 (2010).

3 Mitchell Nathanson, *Dismantling the “Other”: Understanding the Nature and Malleability of Groups in the Legal Writing Professorate’s Quest for Equality*, 13 J. LEGAL WRITING INST. 79, 80 (2007).

basement or a windowless office in some far-flung wing of a school's faculty suite.<sup>4</sup> Skills teaching is often perceived as unrewarding “donkey work,” with a teacher's time better spent researching and writing scholarly articles or preparing for a doctrinal class.<sup>5</sup> When we think of the professional identity of a law professor, the dominant conception of the law professor is the “heroic” doctrinal professor, an identity that excludes skills teaching.<sup>6</sup>

The skills/doctrine binary first began to appear in American legal education around the time that Langdell's casebook method took hold. Langdell and the professors who adopted his casebook method used appellate opinions in conjunction with incisive questioning of a few students in the class to produce dialogue designed to help students think like lawyers. The casebook method caught on so quickly in part because of its efficiency—it allowed one professor to reach large numbers of students.<sup>7</sup> Rather than the passive lecture method, Langdell's method was interactive and, surprisingly, skills focused.<sup>8</sup> A little known fact is that Langdell himself remained committed to teaching skills to law students in an intensive way; in his civil procedure course, his students drafted pleadings and argued in simulated court hearings held every week.<sup>9</sup>

Thus, the skills/doctrine divide did not initially appear with Langdell and his casebook method.<sup>10</sup> However, later law professors, adopting Langdell's casebook method, began emphasizing their expertise with legal doctrine as a way to establish professional prominence and distinguish themselves from professors molded in the older law teaching style, the lecture method.<sup>11</sup> One of the ways the Langdellian professor distinguished himself

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4 See Durako, *Occupational Segregation*, *supra* note 2.

5 William Pedrick & William A. Reppy, Jr., *Should Permanent Faculty Teach First-Year Legal Writing? A Debate*, 32 J. LEGAL EDUC. 413 (1982).

6 Sossin, *supra* note 2, at 883–84; Edwards, *The Trouble With Categories*, *supra* note 1, at 200.

7 ROBERT STEVENS, *LAW SCHOOL LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 53, 63 (1983).

8 See W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 49–50, 52 (1997–98) (Langdell viewed his teaching as interactive and he approached legal education from the perspective of the learner); Edwards, *The Trouble With Categories*, *supra* note 1, at 192 (Langdell and his cohorts described case method teaching as teaching students legal reasoning, an “imaginative” activity).

9 Carter, *supra* note 8, at 65–66.

10 Edwards, *The Trouble With Categories*, *supra* note 1, at 197.

11 John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311, 311–16, 320–22 (1985); Carter, *supra* note 8, at 93, 104, 106 (1997–1998). The casebook method eventually de-emphasized skills because

from older law professors (most of whom were practicing lawyers) was to emphasize legal doctrine and theory and de-emphasize skills and practice.<sup>12</sup>

The skills/doctrine dichotomy gained a deeper foothold in the 1960s and 1970s when clinical legal education emerged. At this point, established casebook professors differentiated themselves from this alternative style of law teaching by placing clinical education in a separate and unequal category—legal skills.<sup>13</sup> In this manner, legal skills teachers became “otherized.”<sup>14</sup> Practical law teachers—clinical legal faculty and legal writing faculty—were (and are) not treated the same as doctrinal teachers, in terms of hiring, compensation, faculty governance, and job security.<sup>15</sup> In addition to the disparate treatment of skills teachers, the dichotomy placed (and continues to place) a high value on knowledge connected to legal doctrine and theory and a low value on knowledge related to skills acquisition.<sup>16</sup>

The skills/doctrine dichotomy has become cognitively imprinted in the minds of legal educators and remains firmly ingrained in legal education’s institutions and culture.<sup>17</sup>

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of tensions with the practicing bar. Professor Langdell faced opposition from state bar associations’ entry requirements, which required bar applicants to spend a certain amount of time in a law apprenticeship but did not grant credit to Harvard law graduates for time spent pursuing their degree. Carter, *supra* note 8, at 30–32. Ultimately, Langdell elected to stop negotiating with the state bar authorities on the matter, which “he had to know . . . meant a move away from the bar itself. Carter, *supra* note 8, at 30–32. As a result of these tensions, legal education did move away from the practicing bar, as law professors began to emphasize their theoretical and scholarly prowess and exclude practicing lawyers from university-centered legal education. Carter, *supra* note 8, at 94, 97–105.

12 See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 75–78 (1976); STEVENS, *supra* note 7, at 55; Carter, *supra* note 8, at 106; Schlegel, *supra* note 11, at 313–14.

13 Edwards, *The Trouble With Categories*, *supra* note 1, at 198–99.

14 See generally Douglas D. McFarland, *Self-Images of Law Professors: Rethinking the Schism in Legal Education*, 35 J. LEGAL EDUC. 232, 242 (1985) (describing the practice-oriented teacher as being “engaged in a hard-fought, continuing, bitter struggle with the traditionl [sic] legal scholar. . . .”); Norman Redlich, *Clinical Education: Stranger in an Elitist Club*, 31 J. LEGAL EDUC. 201, 207 (1981–1982) (noting that traditional law faculty insist that practice oriented skills are not important); Robert E. Oliphant, *When Will Clinicians Be Allowed to Join the Club*, 3 LEARNING & L. 35, 36 (1976) (stating that traditional law faculty view clinical teaching as falling outside the core mission of legal education, which is to graduate persons “learned in the law”).

15 See Edwards, *The Trouble With Categories*, *supra* note 1, at 199.

16 See *supra* note 1, at 219.

17 See *supra* note 1, at 205–10.

However, because categories are a construct of the institutions that give birth to them, they are never final; categories shift when institutions adopt new mindsets.<sup>18</sup> As set forth in the next Parts, the skills/doctrine dichotomy has produced palpable harm to our students, our professorate, and our profession. Relevant to where we are as a society, the dichotomy prevents formation of a critical mass of new law graduates who will be armed with both the theoretical and practical knowledge necessary to reform and transform our law.

## II. Class, Gender, and Racial Hierarchies and the Skills/Doctrine Divide

In terms of class, gender, and race, the divisions within the legal academy mirror the unequal divisions within the rest of American society. As set forth in more detail below, these cleavages threaten the legal profession in several ways.<sup>19</sup> Less elite law professors (who are probably more socioeconomically diverse) are relegated to teaching skills and writing, subjects that have been labeled as non-substantive and perceived to lack power and punch. More elite law teachers (who most likely hail from privileged backgrounds) enjoy a professional identity that connects doctrinal teaching to intellectualism, complexity, and ideas that have a bearing on large-scale social issues. The end result is that legal education's hierarchy makes it so that the production of legal knowledge is controlled by a small subset of advantaged individuals, elite law teachers, and their students. For elite lawyers in a position to influence government and society, too much social distance creates the risk that legal solutions will be shortsighted and tone-deaf, in terms of the people affected by the decisions.<sup>20</sup>

The structure also institutionalizes gender segmentation in the professorate, with the vast majority of tenured professors being male and the vast majority of skills professors being female.<sup>21</sup> The feminization of skills teaching is another way that skills teaching is devalued and kept separate from conceptions of power as it relates to law. Finally, the hierarchy raises very serious obstacles to achieving a sustainable diversity for racial and ethnic minorities teaching legal skills and legal writing.<sup>22</sup> The resulting lack of diversity in the skills professorate continues to harm the legal academy, students, and the profession.

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18 See *supra* note 1, at 207–08; see also Mark L. Johnson, *Mind, Metaphor, and Law*, 58 MERCER L. REV. 845, 849 (2007).

19 See *infra* notes 23–43 and accompanying text.

20 See *infra* notes 75, 98–103 and accompanying text.

21 See *infra* notes 44–48, 53–56 and accompanying text.

22 See *infra* notes 58–63 and accompanying text.

### A. Class Hierarchy

As a general matter, professors who obtain positions as traditional doctrinal teachers are most likely to hail from a privileged background.<sup>23</sup> This general premise can be validated with two analytical steps. First, a recent formative study on law professor credentials found that 86% of professors hired onto a tenure-track between 1996 and 2000 received their J.D. degrees from a top-twenty-five law school.<sup>24</sup> Earlier studies replicated this finding, although the percentages were not as steep (60% of all professors received a J.D. from a top-twenty school).<sup>25</sup> Redding's 86% figure reflects that law school hiring committees are using law school alma mater in an increasingly narrow way. If anything, law schools are becoming more rigid in their approach to credentials, not less so. The top-twenty (or twenty-five) schools are often referred to as "producer" or "feeder" schools for the law professorate.<sup>26</sup>

The second step necessary for this analysis requires a look at the socioeconomic status ("SES") makeup of students who matriculate at the traditional law professorate's feeder schools. Richard Sander's empirical work captures the truth that in the United States, the top law schools are the realm of well-off students.<sup>27</sup> Sander writes,

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23 See *infra* notes 24–36 and accompanying text.

24 Richard E. Redding, "Where Did You Go To Law School?" *Gatekeeping for the Professorate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 597, 599 (2003).

25 Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 507 (for the 1975–76 school year, nearly 60% of all law professors received their J.D. from a top-twenty law school); Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 194, 226, 227 tbl. 27 (1991) (a survey of tenure-line hires in the early 1990s revealed that nearly 60% of the professors in the sample received their J.D. from a top-twenty law school).

26 See Redding, *supra* note 24, at 597, 599; see also Daniel Martin Katz et al., *Reproduction of Hierarchy? A Social Network Analysis of the American Law Professorate*, 61 J. LEGAL EDUC. 76 (2011–2012) (social network theory shows that historically elite schools are still the central hubs in the law professorate's network).

27 Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631, 632–33, 637 (2011). I agree with Professor Sander's analysis only so far as it concretizes the problem of SES diversity in law schools. As I have written elsewhere, I disagree with Sander's argument that SES affirmative action should be emphasized over race-based affirmative action programs in education. Sander's theory would work only if racial minorities already enjoyed broad social, cultural, and economic equality (which they do not), or if SES categories were truly transitive for ethnic minority and majority individuals (but they are not: middle-class African Americans are in a much more precarious position than middle-class whites). See, e.g., Lucille A. Jewel, *Merit and Mobility: A Progressive View of Class, Culture, and the Law*, 43 U. MEM. L. REV. 239, 272–83 (2012) [hereinafter Jewel, *Merit and Mobility*].



Across the spectrum of law schools, there is a lopsided concentration of law students towards the high end of the socioeconomic spectrum, which becomes more lopsided with the eliteness of the law school. At the most elite twenty law schools, only two percent of students come from American households with low SES (that is, SES in the bottom quartile), while more than three-quarters come from households with high SES (SES in the top quartile) and well over half come from households with *very high* SES (SES in the top decile). One way of describing this disparity is *that roughly half the students at these schools come from the top tenth of the SES distribution, while only one-tenth of the students come from the bottom half*.<sup>28</sup>

Thus, socioeconomic under-representation exists on law school faculties because law school hiring committees continue to place great value on elite credentials, which strongly correlate with socioeconomic privilege.<sup>29</sup> The lack of SES diversity within the top schools is a longstanding issue. At these schools, levels of socioeconomic diversity are similar to what they were in the 1960s.<sup>30</sup> At the lower-ranked law schools, however, the SES disparities are substantially smaller, meaning that there are more middle-class and working-class individuals in the student body.<sup>31</sup> From the foregoing data points, we can induce that most traditional law professors originate from a privileged background.

Moreover, law students gain admission to law professor feeder schools through high scores on the LSAT and high college G.P.A.s, which also correlate with pre-existing social and economic advantage.<sup>32</sup> These students then trade on their existing cultural capital (test-taking skills and interpersonal know-how)<sup>33</sup> and social capital (family and social

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28 Sander, *supra* note 27, at 637 (emphasis added).

29 See generally Michael J. Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias*, 87 ST. JOHN'S L. REV. 171 (2013) (connecting the lack of SES diversity at law professor feeder schools with a general lack of SES diversity in the law professorate) [hereinafter Higdon, *A Place in the Academy*].

30 Sander, *supra* note 27, at 633.

31 Sander, *supra* note 27, at 638.

32 LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 68 (2002) (performance on the SAT strongly correlates with parental wealth).

33 For a detailed explanation of cultural capital and its relationship to traditional metrics for the evaluation of merit, see Jewel, *Merit and Mobility*, *supra* note 27, at 262–91.

networks)<sup>34</sup> to acquire competitive clerkships and jobs at large law firms, experience that law school hiring committees place a premium on.

The system then sorts the teachers with lesser credentials into the less desirable positions, non-tenure-track skills and writing teachers. In a study of credentials for legal writing teachers, data showed that elite schools were less represented. While statistics indicate that 60–86% of tenure-line professors received a J.D. from a top-twenty law school,<sup>35</sup> a recent study analyzing alma maters of 428 legal writing professors found that only 28% of legal writing professors received a J.D. from a top-twenty-law school.<sup>36</sup>

The differences in credentials are then used to legitimize the unequal and unfair treatment afforded to the skills professorate. This system operates on a narrative of merit, a legitimizing myth<sup>37</sup> that helps reproduce pre-existing social relations. The dominant narrative explains that skills teachers naturally land where the market places them because they failed to perform as well on quantitative merit measurements.<sup>38</sup> The problem with this line of thinking is two-fold. First, it masks the socioeconomic and cultural factors that impact performance on metrics that supposedly evaluate merit.<sup>39</sup> Second, quantitative merit metrics do not accurately measure one's ability to excel as a lawyer or, by extension, a law teacher.<sup>40</sup> In a landmark study that looked for statistically significant correlations between

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34 For a description of social capital, see PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT [SIC] OF TASTE* 114 (Richard Nice trans., 1984).

35 See *supra* notes 24–25 and accompanying text.

36 See Susan P. Liemer & Hollee S. Temple, *Did Your Legal Writing Professor Go to Harvard?: The Credentials of Legal Writing Faculty at Hiring Time*, 46 U. LOUISVILLE L. REV. 383, 418 (2008).

37 Bella L. Galperin et al., *Status Differentiation and the Protean Self: A Social-Cognitive Model of Unethical Behavior in Organizations*, 98 J. BUS. ETHICS 407, 415 (2011) (“Legitimizing myths are values, attitudes, beliefs, causal attributions, and ideologies that provide moral and intellectual justification for social practices that increase, maintain, or decrease levels of social inequality among social groups.”).

38 See Liemer & Temple, *supra* note 36, at 387 n.17.

39 See Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1174–75 (2008) (describing how merit indicators mask pre-existing disparities in economic and capital holdings) [hereinafter Jewel, *Bourdieu and American Legal Education*]; Jewel, *Merit & Mobility*, *supra* note 27, at 261–71 (explaining the complex cultural and economic factors that impact performance on standardized tests designed to measure cognitive merit).

40 Marjorie M. Shultz & Sheldon Zedeck, *Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering*, SOC. SCI. RES. NETWORK 1, 73–74 (2008), <https://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf> [perma.cc/5L6R-C63H] [hereinafter Shultz & Zedeck, *Identification*,

a LSAT score and essential lawyering competencies, Marjorie Shultz and Sheldon Zedeck found modest correlations for only eight out of twenty-six essential competencies.<sup>41</sup> Those eight correlated competencies related mostly to analysis, reasoning, and advocacy.<sup>42</sup> Shultz and Zedeck also found, however, that LSAT scores *negatively correlated* with client-centered lawyering skills, such as networking and community service.<sup>43</sup>

We can draw a strong inference that skills and writing professors are more socioeconomically diverse than traditional tenure-line professors, meaning that teachers from less advantaged backgrounds are more represented in the skills professorate. While socioeconomic diversity is a good thing, it is not a positive development when that diversity mirrors and reproduces the unequal distributions of wealth and power that exist outside the academy. In fact, as explained below, there are strong reasons to create a SES equilibrium for skills and doctrinal professors. We need more teachers from privileged backgrounds teaching law students skills, and more teachers from under-privileged backgrounds teaching law students doctrine.

## B. Gender Hierarchy

The skills professorate is also segmented by gender.<sup>44</sup> According to the most recent statistics from the Legal Writing Institute, 71% of legal writing teachers are women,

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*Development, and Validation for Successful Lawyering*]; Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 L. & SOC. INQUIRY 620, 641–42 (2011) [hereinafter Shultz & Zedeck, *Predicting Lawyer Effectiveness*].

41 Shultz & Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, *supra* note 40, at 641.

42 The correlated competencies included analysis and reasoning, creativity, problem solving, researching law, writing, and integrity. See Shultz & Zedeck, *Identification, Development, and Validation for Successful Lawyering*, *supra* note 40, at 73; Shultz & Zedeck, *Predicting Lawyering Effectiveness*, *supra* note 40, at 641.

43 Shultz & Zedeck, *Identification, Development, and Validation for Successful Lawyering*, *supra* note 40, at 73–74; Shultz & Zedeck, *Predicting Lawyering Effectiveness*, *supra* note 40, at 641; see also Richard O. Lempert, David L. Chambers & Terry K. Adams, *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 L. & SOC. INQUIRY 395 (2000) (this empirical study found that high LSAT scores correlated with less altruism and less pro bono service, but greater levels of career dissatisfaction).

44 See Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313 (2000); Richard K. Neumann, Jr., *Women in Legal Education: A Statistical Update*, 73 UMKC L. REV. 419 (2004).

29% are men.<sup>45</sup> Using 405(c)<sup>46</sup> status as a rough baseline for clinical faculty, recent ABA statistics indicate that 62.6% of law teachers holding 405(c) status are female and 37.3% are male.<sup>47</sup> These same statistics indicate that 67.2% of tenured professors are male and 32.7% are female.<sup>48</sup>

Teaching skills, and especially legal writing,<sup>49</sup> has long been placed within a feminized frame, because of the intensive student interaction required, the undesirable grading work, and low status,<sup>50</sup> and because writing and skills have historically been excluded from the

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45 *Report of the Annual Legal Writing Survey*, AM. ASS'N LEGAL WRITING DIRECTORS & LEGAL WRITING INST. 59 (2014) [hereinafter AWLD/LWI SURVEY], <http://www.alwd.org/wp-content/uploads/2014/07/2014-Survey-Report-Final.pdf> [<http://perma.cc/X6EF-NQ55>].

46 405(c) refers to a standard appearing in the American Bar Association's law school accreditation standards. It provides that law schools should afford "full-time clinical faculty members a form of security of position reasonably similar to those provided to other full-time faculty members." AM. BAR ASS'N, CH. 4, REVISED STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 27, 29, Standard 405(c) (2014–2015), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2014\\_2015\\_aba\\_standards\\_chapter4.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2014_2015_aba_standards_chapter4.authcheckdam.pdf) [<http://perma.cc/TC48-SPA8>]. 405(c) status has become shorthand for faculty serving on a separate tenure-track or under presumptively renewable long-term contracts. *Id.* at Interpretation 405-6 ("A form of security of position reasonably similar to tenure includes a separate tenure-track or a program of renewable long term contracts."). Although the standard specifically mentions clinical faculty, many schools grant skills and writing faculty 405(c) status, even though the standards do not mandate this level of security for writing faculty. *See id.* at Standard 405(d) ("A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction . . . and (2) safeguard academic freedom."). 405(c) status grants job security to faculty members, but the separate track concept allows law schools to compensate these teachers at a lower rate than other full-time law faculty.

47 *Statistics, Law School Faculty and Staff by Ethnicity and Gender*, AM. BAR ASS'N (2013) [hereinafter ABA, LAW SCHOOL FACULTY AND STAFF BY ETHNICITY AND GENDER], [http://www.americanbar.org/groups/legal\\_education/resources/statistics.html](http://www.americanbar.org/groups/legal_education/resources/statistics.html) [<http://perma.cc/467Q-EWU2>] (compiling data from the ABA's 2013 questionnaire to all approved law schools).

48 *See id.* (when the category is broadened to all tenure-line faculty, 56.6% are male and 43.4% are female).

49 *See generally* Durako, *Second-Class Citizens in the Pink Ghetto*, *supra* note 2; Edwards, *Teaching Legal Writing as Women's Work*, *supra* note 2; Stanchi & Levine, *supra* note 2.

50 Skills professors teach in a more communal, student-centered, and nurturing way (in comparison with the traditional Socratic professor) and, accordingly, are viewed as engaging in more feminine behavior. Mary A. Lynch, *Why Don't Males Do the Fair Share of House/Care Work?: Theories about Gender Differences Regarding Institutional & Communal Work in American Law Schools in a Time of Economic Distress*, SOC. SCI. RES. NETWORK (2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2443503](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443503) [<http://perma.cc/6RVF-PN9D>].

masculinized conception of the traditional law teacher.<sup>51</sup> This is similar to the feminized category that writing instruction has been placed in at the undergraduate level.<sup>52</sup>

Along with the gender segmentation is a sizeable gap in pay.<sup>53</sup> As my colleague Kristen Tiscione has deduced, the average legal writing teacher likely makes fifty-five cents for every dollar that a male tenure-track law professor makes.<sup>54</sup> Law school leaders have been quoted as celebrating the savings achieved by targeting female teachers with children and paying them a fraction of what a doctrinal professor makes.<sup>55</sup> Again, as with socioeconomic disparities in the legal academy, the gender hierarchy is often framed (unsatisfactorily) in terms of the market; the price paid for a legal writing instructor is what the market will bear for a quality teacher.<sup>56</sup>

### C. Race Hierarchy

The story for minority skills teachers is more complicated, and placed in context, the numbers tell an intersectional<sup>57</sup> story. Recent ABA statistics indicate that 20% of tenured

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51 See McFarland, *supra* note 14, at 238–40. McFarland’s description of the traditional law professor as a teacher who presents students with “hard-nosed, sharp teaching” and who emphasizes the “hard facts, cold logic, and concrete realities” is a masculinized image.

52 MARC BOUSQUET, *HOW THE UNIVERSITY WORKS: HIGHER EDUCATION AND THE LOW WAGE NATION* 44 (2008) (“The sectors in which women outnumber men in the academy are uniformly the worst paid, frequently involving lessened autonomy—as in *writing instruction* . . .”) (emphasis added); see generally EILEEN E. SCHELL, *GYPSY ACADEMICS AND MOTHER-TEACHERS: GENDER, CONTINGENT LABOR, AND WRITING INSTRUCTION* (1997).

53 See Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. 551 (2001).

54 Kristen Konrad Tiscione, Lisa T. McElroy & Amy Vorenberg, *The More Things Change . . . : Exploring Solutions to Persisting Discrimination in Legal Academia* (unpublished handout) (on file with author).

55 Stanchi, *Who Next, the Janitors?*, *supra* note 2, at 489–90 (citing Larry Smith, *Tulane Taps ‘Mommy-Track’ for Legal Writing and Research Instructors*, 8 L. HIRING & TRAINING REP. 13 (1991)).

56 Durako, *Second Class Citizens in the Pink Ghetto*, *supra* note 2, at 580, 584; Ann C. McGinley, *Discrimination in Our Midst: Law Schools’ Potential Liability for Employment Practices*, 14 UCLA WOMEN’S L.J. 1, 4–5 (2005).

57 The word intersectional denotes that oppression experienced by individuals of color cannot be easily captured in a single exclusive category. Women of color, for instance, experience discrimination on account of their gender *and* their race. Accordingly, their experiences cannot be reduced to one form of discrimination or the other. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). An intersectional analysis must also be applied for SES and individuals of color. For instance, SES for African Americans is not transitive in relation to SES for whites.

and tenure-track faculty are minorities.<sup>58</sup> Racial minorities comprise 37.4% of the United States population, thus, law schools still have a long way to go to achieve representative levels of diversity. However, it appears that minorities *are more represented on the tenure-track than they are in clinics and legal writing*. ABA statistics indicate that for teachers holding 405(c) status (typically afforded to clinicians), 14.3% are minorities.<sup>59</sup> For legal writing teachers, the ABA's statistics<sup>60</sup> indicate a 10.9% minority representation. The survey conducted by the Legal Writing Institute and Association of Legal Writing Directors indicates a 12.1% minority representation among legal writing teachers.<sup>61</sup> The most recent AALS statistics available (from 2009) indicate that 16.6% of clinicians were non-white and 13.6% of legal writing teachers were non-white.<sup>62</sup>

Why is the tenure-line law professorate more racially diverse than the skills professorate? Bias in hiring decisions likely plays a role. Another explanation is that minority law teachers are making the rational decision to reject skills teaching jobs in favor of tenure-line positions. Being familiar with second-class treatment, there is little incentive for a teacher of color to experience further unequal treatment within a law school. As Professor Terri A. McCurdy-Chubb writes, "The convergence of both marginalizations [being of color and of teaching legal writing] makes the field of legal writing, in its current configuration, bad ground for women of color to 'invest their resources of education, intelligence, time and talents so as to produce a fruitful yield.'"<sup>63</sup> Skills professors of color have shared stories of being mentored, for good reason, not to take on a legal writing or skills job or to use a

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See Jewel, *Merit and Mobility*, *supra* note 27, at 272–83.

58 ABA, LAW SCHOOL FACULTY AND STAFF BY ETHNICITY AND GENDER, *supra* note 47.

59 ABA, LAW SCHOOL FACULTY AND STAFF BY ETHNICITY AND GENDER, *supra* note 47. Inexplicably, for teachers identified as teaching legal skills full-time (it is unclear what this skills category encompasses), 22.35% are identified as racial minorities. See ABA, LAW SCHOOL FACULTY AND STAFF BY ETHNICITY AND GENDER, *supra* note 47.

60 ABA, LAW SCHOOL FACULTY AND STAFF BY ETHNICITY AND GENDER, *supra* note 47.

61 ALWD/LWI SURVEY, *supra* note 45.

62 AM. ASS'N OF LAW SCH., STATISTICAL REPORT ON LAW FACULTY 2008–09, RACE & GENDER AND SUBJECTS TAUGHT (on file with author and available by request from the University of Illinois AALS Archives).

63 Teri A. McMurtry-Chubb, *Writing at the Master's Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 DREXEL L. REV. 41, 43 (2009) [hereinafter McMurtry-Chubb, *Writing at the Master's Table*] (internal citation omitted); see also Lorraine K. Bannai, *Challenged X 3: The Stories of Women of Color Who Teach Legal Writing*, 29 BERKELEY J. GENDER L. & JUST. 275 (2014).

skills/writing job only as a temporary steppingstone toward a better placement.<sup>64</sup> The skills/doctrine dichotomy, with skills and writing at the bottom, makes it nearly impossible to achieve a sustainable diversity for legal writing and legal skills teachers.

#### D. Why are These Hierarchies a Problem?

The social, gender, and racial divisions in the law professorate are not harmless products of institutional, historical, or market forces. Rather, these divides impoverish both law teaching and the production of legal knowledge in a way that impedes a law graduate's ability to make their way into the legal profession, confront the problems of implicit bias, and practice law critically, aiming for social justice and law reform.

With respect to class hierarchy and the skills/doctrine divide, while there are exceptions to the socioeconomic generalities discussed above,<sup>65</sup> nonetheless, the end result is that the gatekeepers of the profession (those teachers with the most power to impact the production of legal knowledge) derive from a limited number of institutions, which are enclaves for the most advantaged subset of the American populace.<sup>66</sup> With this kind of segmentation, power is retained and reproduced in part because of the traditional law professor's intellectualized professional identity.<sup>67</sup> The traditional law professor views himself and herself in heroic terms; his or her objective is to produce "men and women with breadth of vision, enabling them to create and shape human institutions bringing order and justice to society."<sup>68</sup> In this narrative, teachers of legal writing and legal skills merely teach students how to perform discrete tasks, things that do not have any impact on the big ideas necessary to achieve

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64 McMurtry-Chubb, *Writing at the Master's Table*, *supra* note 63, at 45.

65 There are more than a few tenure-track law professors who hail from working-class backgrounds. See Higdon, *A Place in the Academy*, *supra* note 29, at 167–78 (explaining the obstacles faced by financially disadvantaged students who desire to teach law on the tenure-track); Lisa Pruitt, *How You Gonna' Keep Her Down on the Farm*, 78 UMKC L. REV. 1085 (2010) (explaining the cultural dissonance produced when a law student with a working class background attends law school).

66 Others have expressed similar sentiments. See Fossum, *supra* note 25, at 547 (questioning whether "it is wise that the power to produce the legal profession's 'gatekeepers' rests so completely in the hands of a few elite law schools"); Katz et al., *supra* note 26, at 76–77 (remarking on the unique power of a small set of elite law professors to impact the law through scholarship and teaching).

67 The traditional legal professor "sees himself or herself engaged in a serious intellectual exercise that may bring pain to the students." McFarland, *supra* note 14, at 238.

68 McFarland, *supra* note 14, at 239.

reform in the law.<sup>69</sup> The elite law professor's professional identity (being involved with complex ideas that can positively impact society) is not disconnected from reality. The doctrinal law professor's students, especially at elite law schools, will receive a highly credentialed form of legal knowledge that will help them assume positions as high-powered lawyers, judges, and law professors. Because law teachers explicitly or implicitly encourage students to adopt worldviews that resemble their own, they tend to reproduce law's existing power relations and hierarchies in subsequent generations of lawyers and law teachers.<sup>70</sup> If one of the goals of legal education is to prepare students to challenge and transform broken institutional, political, and social structures that continue to breed inequality, law schools need a diverse corps of teachers to help students forge imaginative solutions from a variety of perspectives.

The gender segmentation that exists between doctrinal and skills teachers (especially in legal writing) also reproduces existing power relations in law. That the vast majority of legal writing teachers are female reifies the notion that writing exists separate from and beneath the founts of the most powerful legal knowledge (the male tenured law professor's doctrinal classroom). But this association of power with doctrine fails to recognize the power that an individual legal advocate wields. For instance, an expert advocate exercises agency over the law to craft principles that advance his or her client's interest. In this way, legal writing becomes law-making,<sup>71</sup> which is deeply connected with power, albeit on a micro-level.<sup>72</sup> However, the gendered skills/doctrine dichotomy fails to legitimize the power that writing and skills teacher imparts to his or her students.

Finally, the gendered notions attached to legal skills courses like legal writing reinforce a false sense that these courses are merely remedial in nature (implicit in this is that female professors, stereotyped as caregivers, are best suited for teaching remedial classes). That legal writing is remedial is supported by the view that legal writing is a skill that one either

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69 See McFarland, *supra* note 14, at 239. The traditional law teacher views skills teaching as "how-to-do-it things." McFarland, *supra* note 14, at 239.

70 PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE 5–11 (2d prtg. 1990).

71 James Boyd White, *Doctrine In A Vacuum: Reflections On What A Law School Ought (And Ought Not) To Be*, 36 J. LEGAL EDUC. 155, 162 (1986) (when students consider and apply the law, they are actually engaging in the process of making law).

72 For an explanation of how legal power works on a more micro level, see William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1449 (1992).



possesses or does not possess,<sup>73</sup> excellence in writing, including legal writing, is achieved through a process. The “you have it or you don’t” view of legal writing also harms those students who do not assimilate into law’s discourse communities with ease, especially underprivileged students who do not possess the cultural and social capital that would orient them to law’s upper-class linguistic culture.<sup>74</sup>

The skills professorate needs more socioeconomic diversity and more gender diversity. Given the current imbalances, we need more men and more lawyers from advantaged backgrounds in our ranks. One might ask why skills teachers should want privileged persons in our outsider club. One compelling reason is that teachers with social and cultural power signify that the subject is worth knowing and mastering. Imagine, for instance, if [insert any famous legal scholar at a top five law school] started enthusiastically teaching a class on legal writing. This would be a game changer for how students perceive legal writing and its teachers.

Moreover, because skills teachers often teach the unwritten rules of the profession, things like cultural norms, interpersonal know-how, and successful communication in an office setting, the skills professorate requires teachers who have successfully navigated the halls of power and prestige. We need professors who can pass this tacit knowledge on to a new generation of students, especially in non-elite law school settings. Because non-elite law schools are likely to draw more students who are first generation professionals, students at these schools would benefit from robust mentoring on the complicated cultural repertoires that link to professional success. For instance, success in a law office environment often requires actors to appropriately shift modalities between polite deference, self-promotion, and active competition. These strategies will often come naturally to students who have

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73 For a recent view of the you either have it or you don’t theory, see Paul Campos, *What Law Schools Accomplish: We’re Talking About Practice*, INSIDE THE LAW SCHOOL SCAM (Aug. 29, 2011, 7:13 AM), <http://insidethelawschoolscam.blogspot.com/2011/08/what-law-schools-accomplish-were.html> [http://perma.cc/DK66-EN2X] (opining that by the time one gets to law school, “you can write well or you can’t”). For an older variation of this theme, see William L. Prosser, *English As She is Wrote*, 7 J. LEGAL EDUC. 155 (1954) (holding the position that the rudiments of writing cannot be taught in college [at the time this article was written, the law degree was an undergraduate degree] because “it is too late”).

74 See generally Teri A. McMurtry-Chubb, *Toward a Disciplinary Pedagogy for Legal Education*, 1 SAVANNAH L. REV. 69, 69–75 (2014) [hereinafter McMurtry-Chubb, *Toward a Disciplinary Pedagogy*]. In this article, Professor McMurtry-Chubb describes law’s discourse communities (law school’s discourse community and the practicing lawyer’s discourse community) and explains how legal education has never explicitly taught the process by which students enter and become members of these communities. *Id.* at 75–76. Professor Chubb-McMurtry theorizes that ignoring the discourse community assimilation process causes law schools to maintain exclusivity at the expense of underprivileged newcomers. *Id.*

social capital (in the form of family members and social connections) that connects to professional success. But for first generation professional students, there is no easy reference point for these so-called “soft skills.”

As explained in the next Part, we might be entering an era in which structural law reform becomes a reality. Because of legal education’s historic role in forming new lawyers who have the capacity to transform the law and help make new law, law schools should aspire to a professorate that is connected to all students and representative of all students. Accepting that doctrinal teachers will continue to teach students how to theorize and think deeply about complex legal problems that affect society at large, doctrinal teachers must not be too socially distanced from the ordinary people that law reform will impact.<sup>75</sup> If law schools allow only privileged persons (the prototypical advantaged white male) to lead students in the production of new legal knowledge, knowledge that might soon become embedded in the infrastructure of our law, then the internal worldviews of these few law teachers will reproduce themselves in the minds of law students and in the law itself. This could reinforce the status quo and hamper legal change. Law schools should be moving more women, more persons of color, and more socioeconomically disadvantaged lawyers into the traditional doctrinal teaching path and not automatically shunting non-traditional candidates into legal writing and skills positions. This would likely require that law school hiring committees drop an overly rigid approach to what qualities equate with merit in a law professor candidate.

The under-representation of professors of color poses a serious problem throughout the legal academy, but, as detailed above, it is an especially pernicious problem for the skills professorate. In skills and writing instruction, law students need the expertise of professors of color. Qualifying this argument so as to not essentialize, professors of color add value to legal analysis because they have unique expertise that enables them to expose students to analytical frameworks that recognize difference.<sup>76</sup> Greater exposure to contextualized frameworks helps students approach legal problems with more empathy and mount challenges to pre-existing legal categories that implicitly support inequality and injustice.

Skills professors of color are also needed for their cultural expertise. The skills

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75 Social distance produces a “gap between decision-makers and the people those decisions impact.” CHRIS HAYES, *TWILIGHT OF THE ELITES* 186 (2012). Bad decisions result from too much social distance. “[P]hysical and social distance between groups enhances group members’ ability to depersonalize or dehumanize the other group and hence to psychologically distance themselves from the other groups’ experiences.” Galperin et al., *supra* note 37, at 414.

76 Teri A. McMurtry-Chubb, *Writing at the Master’s Table*, *supra* note 63, at 43–44.

professor guides her students into law's discourse community,<sup>77</sup> a space where elite, white culture predominates. Success in this community requires the lawyer to seamlessly adopt a repertoire that includes formal language and upper-class manners.<sup>78</sup> Because law's discourse community will likely be foreign to non-traditional students, students of color, and students from disadvantaged backgrounds, the skills professor, who has successfully navigated these legal spaces, can provide valuable direction. Finally, skills professors of color who come to the academy from law practice have most likely experienced the effects of implicit and explicit bias in the courtroom or in law offices. Strategies that counter bias represent another form of knowledge that law schools should seek out in teachers.

Finally, diversifying the ranks of skills teachers will help eliminate bias within the skills professorate itself. Because legal writing teachers are overwhelmingly female and white, it is quite possible that in hiring new writing professors, bias operates implicitly<sup>79</sup> as teachers hire those that are just like them. The lack of diversity among skills faculty has the potential to harm not just our students, but our teaching as well. Moreover, given the hard data on implicit bias, racial privileges may be impacting our teaching in ways that we do not realize. For instance, a white teacher might be attempting to connect with his or her students, but instead, he or she might be signaling micro-aggressions. Diversifying the skills professorate would enrich faculty development with competing viewpoints and cross-cultural mentoring, which would ultimately benefit our teaching. Achieving more balance and representation throughout the legal academy would not be such a challenge if skills and doctrinal teaching were equated in all respects.

### III. Knowledge Hierarchy, the Skills/Doctrine Divide, and Legal Reform

The skills/doctrine divide has enabled another harmful hierarchy relating to the type of knowledge that law students are able to access. Specifically, law students at elite schools benefit from a legal education that values scholarship and theory, whereas law students at lesser-ranked schools receive a "practice-ready" legal education that focuses more on legal skills.<sup>80</sup>This is a problem at both ends of the spectrum—students at the higher-ranked

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77 See McMurtry-Chubb, *Toward a Disciplinary Pedagogy*, *supra* note 74.

78 See Jewel, *Bourdieu and American Legal Education*, *supra* note 39, at 1197.

79 See generally Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

80 Jon M. Garon, *Take Back The Night: Why An Association of Regional Law Schools Will Return Core Values to Legal Education and Provide an Alternative to Tiered Rankings*, 38 U. TOL. L. REV. 517, 524 (2007); Laurel Terry, *Taking Kronman and Glendon One Step Further: In Celebration of 'Professional Schools,'*

schools would benefit from more practice training and students at the lower-ranked schools would benefit from access to theoretical inquiries. While a practice focus is not a new concept in legal education, in the current law school climate, the practice-ready identity has become popular as a marketing term.<sup>81</sup> Students at top schools receive modest amounts of skills training and skills teachers at the top schools are usually afforded the worst treatment (in terms of salary and job security).<sup>82</sup> The lack of skills training for elite law graduates is justified in part because most elite law graduates will be hired by big law firms, where they will receive high-quality mentoring under the so-called Cravath associate-to-partner mentorship model.<sup>83</sup> Students at lower-ranked schools receive more instruction on skills, and skills teachers at these schools are more likely to be treated fairly when it comes to job security and salary.<sup>84</sup> Students at the less elite schools need skills training because they must be able to practice, with little mentoring support, as soon as they receive their law licenses.

Viewed in a historical context, elite law schools began to emphasize theory and scholarship (and de-emphasize law practice) as a way to carve out a new professional identity connected to impactful law reform. At the elite law schools during the Progressive Era, Langdell's case method fused with reformist law school missions that understood "law as an instrument of social engineering, with broad public implications that transcended

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100 DICK. L. REV. 647, 670–71 (1996); see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (pointing out that elite law schools tend to offer more theoretical and critical courses than less elite schools).

81 For a particularly cynical view of the practice-ready trend, see David Barnhizer, 'Deaning' in a Period of Transformational Chaos: Part I, LAWNEXT (Oct. 9, 2014), <http://lawnext.org/deaning-in-a-period-of-transformational-chaos-part-i/> [<http://perma.cc/7T5F-BKEV>] ("The sole reason that some law schools are now trumpeting 'professional,' 'skills' and 'practice-ready' courses is due to a state of panic aimed at attracting applicants and appeasing critics among their own graduates and the legal profession.").

82 See Liemer & Temple, *supra* note 36, at 410 (citing Jan Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. LEGAL EDUC. 530, 539–40 (1995)).

83 See Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1870 (2008) (describing the Cravath system [named after the Wall Street law firm Cravath, Swain & Moore] whereby firms establish a reputation by hiring the best students from the best schools and providing them with high-quality training and mentoring). Even after the great recession, with many clients expressing unwillingness to pay rookie associates an hourly rate for training, large law firms continue to invest resources for associate mentoring and training. See Maria Zilberman, *Associate Training Programs Go from Ad hoc to All-In*, 138 RECORDER 1 (July 21, 2014).

84 See Liemer & Temple, *supra* note 36, at 410 (citing Levine, *supra* note 36, at 539–40).

client-caretaking.”<sup>85</sup> After the excessive inequality and corruption that marked the Gilded Age, the governmental activism of the Progressive Era allowed elite lawyers real opportunities to apply scholarly theories to produce top-down societal solutions. In order for lawyers to engage in this reform, law professors advocated that law schools should function as laboratories “to produce legal solutions for social malfunctions.”<sup>86</sup> A focus on interdisciplinary and theoretical research helped fuel the law school’s new reformist mission.<sup>87</sup>

However, during this era, legal education’s reformist mission was unabashedly elitist. Only a “small class of men” teaching at a limited number of institutions was considered qualified to lead students in the path toward redeeming the nation.<sup>88</sup> As the elite law teacher’s professional identity emerged, it branched away from the practicing lawyer.<sup>89</sup> Elite law professors strived to connect their institutions to the new university model of legal education (the proper laboratories for law reform) and distance themselves from stand-alone practice oriented schools.<sup>90</sup> Law professors argued that, because a practicing attorney must remain loyal to the client and principles of *stare decisis*, the practicing attorney could not engage in the kind of radical thinking necessary to effect broad social change.<sup>91</sup>

Not all of the professors advocating for a reformist mission perceived a disconnect between theory and practice. After the Great Depression, Karl Llewellyn recognized the need of law schools to engage with practical training.<sup>92</sup> Llewellyn remained committed to an interdisciplinary approach to legal knowledge, but in his view, theory connected with practice because all lawyers must recognize the social and economic facts and policies that

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85 AUERBACH, *supra* note 12, at 76. “In the two decades preceding World War I a sense of public responsibility and an identification with political reform provided law teachers with their special identity. Their mission was to redeem the profession and reform the nation.” AUERBACH, *supra* note 12, at 81.

86 AUERBACH, *supra* note 12, at 77.

87 See Anders Walker, *Bramble Bush Revisited: Llewellyn, The Great Depression and the First Law School Crisis, 1929–1939*, 64 J. LEGAL. EDUC. 145, 178 (2014).

88 AUERBACH, *supra* note 12, at 82.

89 Carter, *supra* note 8, at 94, 103, 106; AUERBACH, *supra* note 12, at 93.

90 See Walker, *supra* note 87, at 178; AUERBACH, *supra* note 12, at 97–99.

91 AUERBACH, *supra* note 12, at 83, 91.

92 Walker, *supra* note 87, at 164–65.

impact all cases.<sup>93</sup>

In the present, the idea of elite expertise—that elite law schools are the exclusive repositories of knowledge that will aid in the reform of society—remains in the culture of legal education.<sup>94</sup> The idea is visible in that students at top law schools have more opportunities to learn about interdisciplinary approaches to law as well as structural critique approaches found in feminist legal theory, critical race theory, and queer legal theory. Students at lower ranked schools have less access to radical and critical perspectives on the law, with the justification being that these students need more exposure to practice skills.<sup>95</sup>

The explanation for this continuing theory/skills difference is that students at top law schools are being prepared for work at large law firms (where practice skills will be learned), or for work in government service (where complex thinking about big issues is required and skills mentoring is provided), or for the law professorate (where theoretical and scholarly knowledge is required). Critical theory is considered a frivolous luxury good for students at the lower-ranked schools because these students have no alternative but to start practicing law, with little mentoring or support, as soon as they receive their law licenses.

This de facto division of legal knowledge is destructive for several reasons. Although critical legal theories flow from a progressive foundation, their exclusion from the curricula of lower-ranked schools ironically operates as a status closure device, a sociological phenomenon where privileged members of a group exclude others from entry.<sup>96</sup> This hierarchy sends the message that only law students of a certain type (most probably from socioeconomically privileged backgrounds) are qualified to deploy the kind of knowledge

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93 Walker, *supra* note 87, at 165.

94 The influential Lasswell-McDougal Report best encapsulates the continuous vitality of the elite lawyer as elite policy-maker. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *YALE L.J.* 203, 206 (1943) (“The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.”); *see also* Gerald P. Lopez, *Training Future Lawyers To Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 *W. VA. L. REV.* 305, 323 (1989) (describing legal education’s continued “romance” with formal law and with the technocratic role of lawyers).

95 *See supra* note 80.

96 *See, e.g.*, Stanchi, *Who Next, The Janitors?*, *supra* note 2, at 467–68 (describing the marginalization of legal writing faculty as a status closure mechanism); Jewel, *Bourdieu and American Legal Education*, *supra* note 39, at 1169 (describing educational credentials as a status-closure mechanism).

connected to structural critique and law reform. In effect, this knowledge hierarchy prevents non-elite law students from accessing the symbolic capital<sup>97</sup> generated by institutions that specialize in theory and critique.

More problematically, this knowledge hierarchy produces social distance in would-be law reformers and law critics. In effect, it functions as another variation of the elitist claim to expertise that arose in the Progressive Era. While the Progressive Era provided some valuable reforms aimed to improve the lives of the poor, women, and children, other reforms of that era—eugenics approaches to criminal justice,<sup>98</sup> Jim Crow policies,<sup>99</sup> and the disenfranchisement of African American voters<sup>100</sup>—were not so laudable. Many of these ill-conceived top-down solutions were the directives of elite men with xenophobic and racist mindsets. Beyond the progressive era, the social distance afflicting government technocrats explains such deleterious policy failures as the war in Vietnam,<sup>101</sup> and more recently, the (non)response to Hurricane Katrina and the housing market crash.<sup>102</sup> Without a system of feedback between decision-makers and the people that are impacted by the decisions, collective solutions will inevitably fail.<sup>103</sup>

The reforms of the Progressive Era were ignited after the Gilded Age, a period of deepening inequality, political corruption, and excesses of industrialized capitalism. Similarly, our own era is pocked with deepening inequality, untrammelled free-market capitalism, big money in politics, and deepening racial divides.<sup>104</sup> It is possible (or perhaps

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97 Symbolic capital refers to levels of prestige and honor based on credentials. See Jewel, *Bourdieu and American Legal Education*, *supra* note 39, at 1157.

98 See, e.g., Charlotte Lyn Bright, et al., *Gender and Justice in the Progressive Era: An Investigation of Saint Louis Juvenile Court Cases, 1909–1912*, 24 JUST. Q. 657 (2007); Angie C. Kennedy, *Eugenics, “Degenerate Girls,” and Social Workers During the Progressive Era*, 23 AFFILLIA: J. WOMEN & SOC. WORK 22 (2008).

99 Brian R. McGee, *Rhetoric and Race in the Progressive Era: Imperialism, Reform, and the Ku Klux Klan*, in RHETORIC AND REFORM IN THE PROGRESSIVE ERA 311 (J. Michael Hogan ed., 2003) (citing C. VANN. WOODWARD, THE STRANGE CAREER OF JIM CROW 74 (1974)).

100 *Id.* at 321 (explaining that Southern Progressives considered removing African Americans from the ranks of registered voters to be a “reform”) (citing STEVEN J. DINER, A VERY DIFFERENT AGE: AMERICANS OF THE PROGRESSIVE ERA 212 (1998)).

101 *Id.* at 45.

102 *Id.* at 17, 191–215.

103 HAYES, *supra* note 75, at 183, 186.

104 See Paul Krugman, *Why We’re In A New Gilded Age*, N.Y. REV. BOOKS (May 8, 2014) (reviewing THOMAS

just wishful thinking) that a tipping point will occur that pivots the United States into an era of reform. If and when this happens, society needs lawyers of all ranks and tiers to be able to roll up their sleeves and engage in the hard work of law reformation and transformation.

A new generation of law reformers might target the criminal justice system, mass incarceration, immigration, tax policies, rural/urban divides, the social safety net, money in politics, education, and other targets. Preventing students from acquiring theoretical insights for these structural problems impedes knowledge-based power and obstructs action-based reform. In this context, knowledge creates power for those who critique the large-scale operations of the state, which, when combined with a community-based will of the people, gives rise to the power to radically restructure the law. Blocking access to these forms of power will likely lead to a repeat of the Progressive Era's missteps, producing tone-deaf state action "that is predatory toward its own citizens, indifferent to their desires, and subject to the inbred whims and compulsions of its ruling class."<sup>105</sup>

In addition to large-scale reform, legal change also happens in the trenches, through individual lawyering. For instance, Gideon's Promise, the organization that is building a dedicated corps of public defenders to stand up to trends of racialized policing and mass-incarceration, is but one example of reform happening on the micro level.<sup>106</sup> Moreover, the idea that legal theory exclusively relates to macro level structural reform is false. As Karl Llewellyn recognized years ago, theoretical approaches improve the craft of legal practice.<sup>107</sup> Lawyers need to know, for instance, how cultural forces relating to race and gender can produce implicit bias that can infect the thinking of juridical actors—judges, jury members, and other lawyers.

For the same reason that it is unadvisable to limit theoretical knowledge to students matriculating at elite schools, it is unadvisable to limit practical knowledge to students attending lower-ranked schools. All lawyers, no matter what their rank, need instruction in

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PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014)), <http://www.nybooks.com/articles/archives/2014/may/08/thomas-piketty-new-gilded-age/> [<http://perma.cc/DFV3-ND62>]; see also Neil Irwin et al., *America's Racial Divide, Charted*, N.Y. TIMES (Aug. 19, 2014), [http://www.nytimes.com/2014/08/20/upshot/americas-racial-divide-charted.html?\\_r=0&abt=0002&abg=1](http://www.nytimes.com/2014/08/20/upshot/americas-racial-divide-charted.html?_r=0&abt=0002&abg=1) [<http://perma.cc/58JR=W3XF>] (visually documenting the deep racial fissures existing in the United States).

105 HAYES, *supra* note 75, at 183.

106 GIDEON'S PROMISE, <http://gideonspromise.org> [<http://perma.cc/6TP8=PNXV>] (last visited July 28, 2015).

107 See *supra* notes 92–93.



practice, but also in theory.<sup>108</sup>

#### IV. Concluding Thoughts—Empowering the Reformists of the Future

The skills/doctrine dichotomy harms all stakeholders in legal education. Because legal education is at a crossroads, there are opportunities to consider reform. However, as the corporatization of higher education is applied to legal education, this could be a moment for retrenchment. As more and more undergraduate institutions dispense with tenure and cast large numbers of teachers into adjunct pools,<sup>109</sup> an argument to collapse the skills/doctrine divide by creating parity between skills faculty and doctrinal faculty may seem unrealistic.

Nonetheless, there are compelling reasons to remove the unworkable skills/doctrine category system. Placing skills on the same level as doctrine will also halt the reproduction of a legal culture that reinforces existing power relations. First, collapsing the dichotomy will achieve a greater amount of socioeconomic, gender, and racial diversity within the law professorate, which will directly improve the quality of instruction. Infusing doctrinal faculty with more SES diversity will expose students to a broader range of mindsets, decreasing the risk of reproducing existing social structures.

For skills teaching, advantaged law professors who have succeeded in elite settings might pass that knowledge on to less privileged students. Infusing the skills professorate with more male teachers will send a positive message as to the value of skills teaching and learning. The skills professorate needs additional professors of color to provide students with candid expertise on overcoming bias in legal practice settings, help students conduct analysis from a contextualized framework, and teach students how to recognize when established legal categories implicitly reinforce discrimination. A more racially diverse skills professorate will also improve faculty development across the board, enabling faculty members to become better attuned to recognizing and combating implicit bias in

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108 I have previously argued that the emphasis on theory and interdisciplinary knowledge ignored the career realities of non-elite law students. Jewel, *Bourdieu and American Legal Education*, *supra* note 39, at 1204–05. My views have evolved here. Non-elite law students should have access to critical forms of knowledge, not because this knowledge interfaces with career prospects in a practical sense, but because any effort to rebuild United States legal institutions and systems must be a representative endeavor.

109 See Adrianna Kezar & Daniel Maxey, *The Changing Academic Workforce*, TRUSTEESHIP MAG. (May/June 2013), <http://agb.org/trusteeship/2013/5/changing-academic-workforce> [<http://perma.cc/GD8A-ANH4>] (documenting the trend in higher education of hiring more adjuncts and fewer tenure-track teachers).

their own teaching.

Second, collapsing the skills/doctrine dichotomy will help arm a new generation of law students with all the tools necessary to remedy our ailing legal and justice system. After the police killings of Mike Brown, Eric Garner, Tamir Rice, and others, many would agree that aspects of the United States justice system need to be completely torn down and rebuilt. As Professor Michelle Alexander eloquently explained:

The American Justice System Is Not Broken. It is doing precisely what it is designed to do. The sooner we wake up to this reality, the sooner we can get to work building the kind of movement that holds real promise of transforming not only our “justice” system but the American culture that created it. The system does not need to be “fixed”. [sic] It is not broken. It needs to be dismantled and replaced or utterly transformed. The only remaining question—after all that we’ve seen—is whether we are willing to speak the truth, face our history, and finally put an end to our nation’s history and cycle of creating these caste-like, dehumanizing, race-based systems in America.<sup>110</sup>

Thus, the kind of legal work we need to do requires all hands on deck and all tools in the toolbox. The reformist lawyers of the future must be armed with both big picture theories and small-scale strategies. For these projects, we need lawyers who can deploy critical legal theory, grasp the nooks and crannies of legal doctrine, and be surefooted when it comes to advocacy within the legal system. If we want to prepare the next generation of lawyers to rebuild the infrastructure of the United States system, we must view practice skills as more than just technical know-how, more than just working a business as usual law job. Practice-ready must also mean ready to do battle from both inside and outside the legal system.

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110 Michelle Alexander, *The American Justice System Is Not Broken*, FACEBOOK (Dec. 4, 2014), [https://www.facebook.com/permalink.php?story\\_fbid=725623807525579&id=168304409924191](https://www.facebook.com/permalink.php?story_fbid=725623807525579&id=168304409924191) [<http://perma.cc/5W6Y-JCHD>].