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# A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics

*Peter Brandon Bayer\**

## I. A PLEA FOR RATIONALITY AND DECENCY

### A. *The Derailing of a Career*

I was about to enter my tenth year of teaching legal writing and my fifth year as director of the writing program at St. Thomas University School of Law. On my office wall were several diplomas: a J.D. from New York University, a masters in Sociology from that institution and an LL.M from Harvard. I have experience in legal practice including four years as a civil rights attorney and three years representing disabled individuals before the Social Security Administration. I clerked for a United States district court judge, and I have had published well-placed law review articles as well as numerous newspaper “op-ed” pieces and a full article in the *New York Times Magazine*.

I believe my record of teaching, writing and committee work, both at St. Thomas and at other schools, evinces a high level of proficiency coupled with complete dedication. While my work certainly was not flawless, I thought I had earned a reputation as a caring, effective professional in the classroom, a strong director of my department and a dependable law school citizen. I was understandably dumbfounded when, on April 7, 2000, the Dean (of one year) summoned me and two other writing professors into his office to announce bluntly that he had unilaterally decided to overhaul the legal writing program and that our contracts would not be renewed.

Formerly, the writing department consisted of myself and five full-time writing professors. Henceforth, there would be 3 full-time

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\* Prof. Bayer has taught legal research, analysis and writing for over 10 years. He was Director of the writing program at St. Thomas University School of Law from 1995-2000. Prof. Bayer earned a J.D. and an M.A. (Sociology) from New York University (1978) and an LL.M. from Harvard University (1984).

professors supervising twelve adjunct instructors. To the best of my knowledge, the Dean had not consulted with any faculty members, nor had he sought advice from the host of available outside legal writing professionals. During the 1999-2000 academic year, I met with the Dean and drafted two detailed memoranda both explaining the pedagogy practiced by St. Thomas' writing professionals and urging the hiring of one or two additional faculty members to lower class sizes in light of the relatively weak analytical and compositional skills of the majority of the first and second year students. I did not recommend moving from full-time professional teachers to adjuncts. The Dean's decision to completely rework the style and substance of the writing program was apparently based exclusively on his own counsel.

The Dean announced to the faculty that my dismissal was in no fashion based on a lack of either capability or effectiveness. Rather, in light of my plea for small classes, he decided to use adjunct instructors instead of hiring additional professional writing teachers. In that manner, without warning, without discussion with other concerned persons, without consulting experts, without regard for my years of service, without consideration of its probable effect on my decade-long career, and with neither expressions of gratitude nor a significant promise of support, I suddenly found myself out of my profession. It was remarkably disrespectful and cold-blooded, an extreme but not anomalous example of the disregard with which a sizeable majority of American law schools treat both legal writing programs and the dedicated experts who teach that vital and difficult subject.<sup>1</sup>

The Dean's stunning reversal of my career underscores the difficult reality faced by most legal writing faculty at American law schools. As a general matter, few, if any, of us have job security, faculty votes, or even offices on the main faculty wing. Despite my productive work and extensive experience, my income as program

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1. Indeed, the Dean did not tell me of his decision until the end of the first week in April, well after the hiring season for law teachers had ended. Significantly, very shortly before his announcement, the Association of American Law Schools ("AALS") had conducted a pivotal inspection expected to result in the recommendation that St. Thomas Law School be admitted into that respected body. The Dean instructed the writing professors to approach the AALS inspectors to discuss what the Dean then called our "very good" writing program. Indeed, in the written report explaining the school's qualifications for AALS membership, the Dean included a detailed description of the writing program that I had drafted for St. Thomas's recent accreditation re-inspection by the American Bar Association ("ABA"). Quoting at length from my abstract, the ABA's re-inspection committee's written report designated the writing program as "first rate."

director was lower than the salary paid to the least experienced tenure-track professor; and, the most senior writing faculty member, after years of dedicated service, made barely half the income of a tyro assistant professor.

The reasonable person may well ask why the academy has so starkly and unkindly trivialized our work, marginalized our existence in the law school community and, despite our important contributions to legal education, made our professional lives a matter of institutional inconsequence.

### *B. The Theory of Fairness – Standards of Law School Governance*

Although I am not the first to write on the disparate treatment of legal writing faculty,<sup>2</sup> I wish to build on the work of my predecessors by demonstrating that *as a matter of academic ethics, informed by cardinal legal standards of decency*, the disparate treatment and adverse terms and conditions imposed on writing professors are not simply unfair but defy the ethical aspirations of American law schools. Specifically, as the construct for analysis, I will establish and utilize the proposition that the discordant status of legal writing professors fails to satisfy minimal professional ethics. As a model, I will show that it is not even minimally rational under the Equal Protection Clause of the United States Constitution, our nation's bedrock protection against arbitrary, irrational, unreasonable and unfair treatment.

The American Bar Association ("ABA"), the institution empowered to set the requisites for minimal excellence that law schools must maintain to be accredited academies of legal education, has promulgated "Standards" setting forth criteria necessary for accreditation.<sup>3</sup> Although no Standard directly addresses ethical conduct among the faculty, schools are expected to educate their students regarding attorneys' "ethical responsibilities."<sup>4</sup> Doubtless, a high standard of ethics likewise

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2. See, e.g., Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMPLE L. REV. 117 (1997).

3. "Since 1952 the [ABA's] Council of the Section of Legal Education and Admissions to the Bar has been approved by the U.S. Department of Education as the recognized national agency for the accreditation of professional schools of law . . . . The Standards describe the requirements a law school must meet to obtain and retain ABA approval." ABA Standards, *Forward* (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/standards/foreword.html>>.

4. ABA Standards, *Preamble* (1) (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/standards/preamble.html>>. See also, e.g., ABA Standard 302(b) (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/standards/chapter3.html>>.

should guide the interrelations of law faculties.<sup>5</sup> Indeed, in a 1986 paper, the ABA's Commission on Professionalism unequivocally stated that because, "the law school experience provides the student's first exposure to the profession and . . . professors inevitably serve as important role models for students, . . . *the highest standards of ethics and professionalism should be adhered to within law schools.*"<sup>6</sup>

Similarly, in its *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities*, the Association of American Law Schools ("AALS")<sup>7</sup> strongly admonishes that, "the highest standards of ethics and professionalism should be adhered to within law schools . . . both because of the intrinsic importance of those [ethical] standards and because law professors serve as role models for law students."<sup>8</sup> Moreover, the AALS' *Statement of Good Practices* advises that law schools should abide by the *Statement of Professional Ethics of the American Association of University Professors* ("AAUP").<sup>9</sup> That document, in turn, provides this stringent reproach: "As colleagues, professors have the obligations that derive from common membership in the community of scholars. *Professors do not discriminate against or harass colleagues . . . . Professors acknowledge academic debt and strive to be objective in the professional judgment of colleagues.*"<sup>10</sup> Thus, the AALS and, to a correlative extent, the ABA prescribes that, "As colleagues . . . *professors do not discriminate against or harass colleagues.*" By its plain language, this comprehensive prohibition is not limited to such familiar bases as race, sex, religion and national

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5. Cf. ABA Standards, *Appendix 1* (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/standards/appendix.html>> (suggested standards for academic freedom).

6. The Association of American Law Schools ("AALS") Handbook, *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities* (visited Aug. 19, 1999) <<http://www.aals.org/ethic.html>> (citing AMERICAN BAR ASSOCIATION COMMISSION ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 19 (1986) (emphasis added)).

7. "The AALS is a non-profit association of 162 law schools. The purpose of the association is 'the improvement of the legal profession through legal education.' It serves as the learned society for law teachers and is legal education's principal representative to the federal government and to other national higher education organizations and learned societies." *What Is The AALS?* (visited Aug. 19, 1999) <<http://www.aals.org/about.html>>. Law schools apply for membership based on a set of criteria and inspection procedures established by the AALS. *Id.*

8. See AALS Handbook, *supra* note 6.

9. *Id.*

10. American Association of University Professors, *Statement on Professional Ethics* (visited Aug. 19, 1999) <<http://www.aaup.org/Rbethics.htm>> (emphasis added).

origin. Rather, the ban is predicated on the overarching collegial relationship among faculty, thereby forbidding any and all forms of arbitrary or unreasonable professional "discrimination" and "harassment."

Outside of more familiar contexts such as race and gender, the accrediting organizations do not provide a detailed framework with which to measure the appropriateness of discriminatory or beleaguering treatment. Our legal training encourages us to utilize general frameworks to help both order and explicate the meaning of facts and theories rather than interpret situations purely in the abstract. Therefore, I will employ a familiar, poignant, accessible and law-related model as the paradigm to explain why the particularized disparate treatment of legal writing faculty undoubtedly violates the ABA's, AALS' and AAUP's mandated ethical requisites. Specifically, I rely on the Equal Protection Clause, the provision of the United States Constitution that embodies the minimal standards of legal morality. Indeed, to show how untoward the treatment of writing faculty is, I will *not* attempt the politically ticklish task of analogizing it to racial, sexual, religious or similar forms of discrimination. Instead, I will appeal to the bulwark proposition and promise of equal protection: governmental classifications are unconstitutional if they are unjust.<sup>11</sup> Official actions that are not so much as "rational," therefore, fail to meet the most basic standards of dignity and personhood recognized by our Constitution.<sup>12</sup>

Of course, the equal protection components only apply to governmental actions, not to purely private conduct,<sup>13</sup> thus, any equal protection argument regarding the treatment of writing faculty would have *legal* force only against law schools owned or operated by municipalities, states or other governmental entities. Nonetheless, it is difficult to think of a more apt model to inform the ethical standards incumbent upon law schools than the general

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11. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996) (*citing* *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)). As Professor Laurence Tribe has noted regarding the Supreme Court's equal protection jurisprudence, "the notion that equal justice under law may serve as an indirect guardian of virtually all constitutional values is evidenced by more than a maxim carved in marble on the United States Supreme Court." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-21, at 1514 (2d ed. 1988). For a more complete discussion of the moral imperatives of equal protection, see, *infra*, notes 16-59, and accompanying text.

12. See *infra* notes 16-104 and accompanying text.

13. See *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

framework of minimal fairness under equal protection. The design of equal protection, after all, confronts the heart of the ethical concerns espoused in the applicable ABA, AALS and AAUP mores. Equal protection encompasses the meaning of "common membership" in a community and defines when treatment crosses from legitimate to unacceptable discrimination or harassment.<sup>14</sup> It is appropriate and fitting that law faculties — those entrusted to educate students in the law — conform their behavior to the strictures of equal protection because equal protection analysis is one, although hardly the only, model of ethics and fairness that elucidates the professional ethical paradigm. Thus, the equal protection model as applied to the standing of legal writing should arouse the sense of fairness that a general discussion of legal writing's merits has not yet achieved.

Part II of this article provides a definition of "rationality" under equal protection and links that definition to certain ethical precepts of fairness such as the proposition that classifications cannot be predicated on *animus* or inaccurate stereotypes.<sup>15</sup> Part III details the modes of disparate treatment exacted upon legal writing faculty solely because of their status as writing faculty. Part IV describes and debunks the main "rational" bases upon which law schools justify their disparate treatment. Having discredited the purported rational justifications, Parts V and VI of this article explain why the disparate treatment of writing professors is unfairly discriminatory under minimal equal protection standards, and thus should be considered not simply an unwise policy, but a patently unethical practice that contravenes the standards set by the AALS, the ABA and the AAUP.

## II. THE DEFINITION OF RATIONALITY

### A. *The Constitutional Promise of Minimally Rational Behavior from All Levels of Government*

The Fourteenth Amendment states, in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction*

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14. See generally TRIBE, *supra* note 11, at 1514. Equal protection as a shield against irrational discrimination is discussed, *infra*, in Part II.

15. This definition expands and explicates the earlier analysis I set forth in Peter Brandon Bayer, *Rationality and the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1, 5-52 (1988).

*the equal protection of the laws.*"<sup>16</sup> Logic and experience dictate that the requirement that no State deny equal protection of the laws not be considered a barricade absolutely blocking governmental bodies from classifying and differentiating among individuals and groups.<sup>17</sup> Such a ridiculous reading of the Amendment would deprive government of its most important authority: the ability to set policy based on meaningful distinctions among societal actors. Thus, "[a]ll persons similarly circumstanced shall be treated alike, [even though] [t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."<sup>18</sup> In harmony with the foregoing, "[t]he Equal Protection Clause . . . keeps governmental decisionmakers from treating differently persons who are in all *relevant respects* alike."<sup>19</sup> This does not mean that legislative classifications must be perfectly conceived; but, neither may they be arbitrarily drawn.<sup>20</sup>

To discern when governmental classifications cross the admittedly vague boundary from acceptably "rough" to constitutionally infirm — that is, to determine when legislation wrongfully distinguishes among actors who are "in all relevant aspects alike" — the courts admonish that, at the very least, legislation must be "rational," or, stated inversely, governmental bodies may not devise classifications subjecting individuals to arbitrary or irrational treatment.<sup>21</sup> As a general matter, then, the Constitution protects individuals' liberty from capricious intrusions perpetrated through irrational official actions on the national, state and local tiers.<sup>22</sup> Granted, this limitation on government is

16. U.S. CONST. amend. XIV, §1 (emphasis added).

17. See *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

18. *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) and *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). Indeed, for 120 years the Supreme Court has understood that "[t]he Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies." *Missouri v. Lewis*, 101 U.S. 22, 31 (1879). See also, e.g., *Holden v. Hardy*, 169 U.S. 366, 388 (1898).

19. *Nordlinger*, 505 U.S. at 10 (emphasis added) (citing *F.S. Royster Guano Co.* 253 U.S. at 415). See also, e.g., *Stefanoff v. Hays County*, 154 F.3d 523, 525-26 (5th Cir. 1998); *Mills v. Maine*, 118 F.3d 37, 47 (1st Cir. 1997).

20. *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336, 343 (1989). See also, e.g., *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *Heller v. Doe*, 509 U.S. 312, 321 (1993); *Nordlinger*, 505 U.S. at 10; *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70 (1913).

21. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-64 (1981); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968); see generally *TRIBE*, *supra* note 11, at 1439-46.

22. The equal protection analysis applicable to states under the Fourteenth Amendment



quintessentially nebulous, even by the standards of American constitutional law. There is no clear definition of “rational” and “irrational” and, very often, judicial determinations of unlawful irrationality seem more *ad hoc* than premised on a well defined paradigm.<sup>23</sup> Nonetheless, the constitutional proscription against irrational or arbitrary governmental conduct is, at the very least, a pledge of fealty, albeit an indeterminate one, to the concept of minimally fair treatment under the law. Regardless of class, status or position in American society, every individual has the right to be free from irrational treatment by any level of government — a right that, in theory at least, is fully enforceable by the courts even if the plaintiff is the only person against whom the irrational treatment is directed.<sup>24</sup> The difficult question, of course, is determining when governmental actions are irrational.

*B. All Levels of Constitutional Scrutiny Actually Are Variants of Rationality Analysis*

Before proceeding to a definition of rationality, brief mention is appropriate of the various familiar “levels of scrutiny” against which equal protection challenges to official conduct are analyzed. *In reality, all purported “levels of scrutiny” are judicial renditions of “rationality.”*<sup>25</sup> Thus, understanding how the judiciary conceives “rationality” is integral to understanding the entire equal protection realm.

The Supreme Court has set forth three general “levels of scrutiny” under equal protection of which the two most exacting are “strict scrutiny” and the slightly less formidable “middle level” scrutiny. Governmental acts reviewed under “strict scrutiny” are presumptively unconstitutional and the government bears the burden of proving that its conduct nonetheless is lawful because of

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has been extended to restrict federal governmental actions as well under the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954); *FCC v. Beach Communications*, 508 U.S. 307, 312 (1993); *Regan v. Taxation with Representation*, 461 U.S. 540, 542 n.2 (1983).

23. See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 357-58 (1999).

24. *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074 (2000) (*per curiam*) (stating that the equal protection clause recognizes claims brought by a “class of one”); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923); *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918).

25. See *Cleburne*, 473 U.S. at 451-55 (1985) (Stevens, J., with Burger, C.J., concurring); Bayer, *supra* note 15, at 8-16; Note, *Justice Stevens’ Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987).

a “compelling interest.”<sup>26</sup> “[W]e have treated as presumptively invidious [and thus subject to strict judicial scrutiny] those classifications that disadvantage a ‘suspect class’ or that impinge upon the exercise of a ‘fundamental right.’”<sup>27</sup>

In addition, the federal courts apply under certain situations “middle” or “intermediate” scrutiny, a level of review that, like “strict scrutiny,” requires the government to prove the constitutional validity of the challenged enactment. Unlike strict scrutiny, however, the State’s burden is somewhat less than a required demonstration of “compelling interest.” Rather, “[t]he classification must be substantially related to an important governmental objective.”<sup>28</sup> “Middle level” scrutiny tests, *inter alia*, the constitutionality of official sex-based distinctions<sup>29</sup> and classifications predicated on illegitimacy of childbirth.<sup>30</sup>

By contrast, “rational” basis analysis, often referred to somewhat demeaningly as “mere rationality,” is purported to be the least rigorous standard by which to evaluate the constitutional validity of governmental action. Unlike the “strict scrutiny” or “middle level” standards, the government is not required to affirmatively justify the particular classification under judicial evaluation. Indeed, any governmental classification reviewed for “mere rationality” is presumptively valid unless, “the one attacking the legislative arrangement . . . negative[s] every conceivable basis which might support it.”<sup>31</sup>

“[T]he three levels[, however,] mask the reality of equal protection analysis, namely, that all equal protection challenges require the courts to make one basic determination: whether the challenged action is or is not rational.”<sup>32</sup> For instance, the Supreme

26. *See, e.g., Plyler*, 457 U.S. at 216.

27. *Id.* at 216-17. Race and national origin are the classic examples of “suspect classes.” *See, e.g., Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900, 904 (1995). Examples of fundamental rights are the right to travel, *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Saenz v. Roe*, 119 S. Ct. 1518 (1999), and the right to vote, *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

28. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The Court recently summarized the government’s burden under intermediate scrutiny as requiring an “exceedingly persuasive justification” for the challenged classification. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

29. *See, e.g., Virginia*, 518 U.S. at 530 (discrimination based on gender invokes a “skeptical scrutiny” predicated on the historical persistence of unjust discrimination against women); *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 136-37 & n.6 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-726 (1982).

30. *See, e.g., Picket v. Brown*, 462 U.S. 1, 7-8 (1983).

31. *Regan*, 461 U.S. at 547-48 (*citing* *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940)).

32. *Bayer, supra* note 15, at 11. Indeed, United States Supreme Court Justice John Paul

Court explained why race and national origin are considered “suspect” categories, “[s]ome classifications are more likely than others to reflect deep-seated prejudice *rather than legislative rationality* in pursuit of some legitimate objective . . . . Classifications treated as suspect tend to be irrelevant to any proper legislative goal.”<sup>33</sup> Thus, the core infirmity of a “suspect class” is that, almost invariably, it is an *irrational* criterion upon which to predicate legislative classification.<sup>34</sup> Similarly, the Court has clarified “middle level scrutiny” by explaining that it focuses upon “*the rationality* of the legislative judgment with reference to well-settled constitutional principles.”<sup>35</sup> Therefore, as I observed in

Stevens, one of the most outspoken critics of the “levels of scrutiny” analysis, unequivocally stated, “I have never been persuaded that these so called [levels of scrutiny] adequately explain the decisional process . . . . [Equal protection requires the inquiry] whether I could find a ‘rational basis’ for the classification at issue.” *Cleburne*, 473 U.S. at 451-52 (Stevens, J., concurring) (footnotes omitted). Thus, according to Justice Stevens, every review under equal protection analysis is, in fact, a judicial determination whether the challenged governmental act is rational. See Note, *supra* note 25, at 1153-64.

Justice (then judge) Ginsberg has indicated that she agrees with Justice Stevens’s conclusion regarding the actuality of equal protection analysis. See *FEC v. Int’l Funding Inst., Inc.*, 969 F.2d 1110, 1118 (D.C. Cir. 1992) (*en banc*) (Ginsburg, J., concurring and citing Justice Stevens’s concurring opinion in *Cleburne*); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 246 (1995) (Stevens, J., with Ginsburg, J., dissenting) (stating that “there is, after all, only one Equal Protection Clause.”)

33. *Plyler*, 457 U.S. at 216 (emphasis added); *accord* *J.W. v. City of Tacoma*, 720 F.2d 1126, 1128 (9th Cir. 1983).

34. Consider, as well, *Harper v. Virginia State Board of Electors* that invalidated under strict scrutiny Virginia’s poll tax. The Court ruled that “a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.” *Harper*, 383 U.S. at 666. The Court further noted that a poll tax is irrelevant and serves no rational interest related to voting because “[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax.” *Id.* Accenting that the ability to pay a tax is as irrelevant to qualifications for voting as are race, creed and color, *Harper* concluded that such factors “[are] not germane to one’s ability to participate intelligently in the electoral process . . . to introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.” *Id.* at 668. See also, e.g., *Burson v. Freeman*, 504 U.S. 191, 209 n.10 (1992) (explaining that *Harper* held that there was “no rational connection” between the poll tax and the asserted legitimate interests concerning elections.)

The poll tax was constitutionally infirm not because the Court applied the condemning “strict scrutiny” analysis but because the Court could identify no legitimate purpose for the tax. See, e.g., *Cleburne*, 473 U.S. at 452-53 (Stevens, J., concurring) (“The rational-basis test . . . explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause. It would be utterly irrational to limit the franchise on the basis of . . . skin color.”).

35. *Plyler*, 457 U.S. at 218 n.16 (emphasis added) (stating that the denial of free primary and secondary public education to the children of illegal aliens is a violation of equal protection). *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 144 (1980), overturned Missouri’s workman’s compensation provision permitting widows to collect benefits for the death of a spouse while only allowing widowers to collect if they are mentally or physically

an earlier work, “[t]he foregoing sampling shows that creation and application of each level of scrutiny really revolves around courts’ determinations of what is and is not rational . . . . A practical and meaningful understanding of the entirety of equal protection, therefore, requires thorough analysis of the process whereby official acts are deemed rational or irrational.”<sup>36</sup>

*C. A Framework of Rationality Based on Dignity, Personhood and Autonomy*

Granted, a review of precedent reveals no crystalline, and regular pattern resonating from decisions labeling certain governmental conduct irrational and those upholding arguably similar official policy as rational and lawful.<sup>37</sup> Yet, we are not without some general framework to aid in identifying, albeit imperfectly, irrational state action. The cardinal concept of the Court’s framework for rationality analysis is the well known standard that governmental action is rational if, “the classification rationally furthers a legitimate state interest.”<sup>38</sup> Thus, governmental action is constitutional if it is designed to promote a rational (legitimate) goal<sup>39</sup> and utilizes a rational (legitimate) means to attain that goal.<sup>40</sup> In a remarkable and nearly tautological explication, the Court has opined that, “[i]n general, the Equal Protection Clause is satisfied so long as there is a *plausible policy reason* for the classification.”<sup>41</sup> Thus, the federal judiciary posits that the Equal

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unable to earn their own wages or if they “prove actual dependence on . . . [their] wife’s earnings.” Applying middle level scrutiny, the Court found that the classification bore *no relationship* — that is, lacked rationality — to an important government objective. *Id.* at 150-51.

36. Bayer, *supra* note 15, at 16.

37. Scholars have been particularly frustrated with the seemingly haphazard manner with which governmental action has been struck down as irrational. *See, e.g.*, Farrell, *supra* note 23, at 415.

38. *Nordlinger*, 505 U.S. at 10; *see also, e.g., Heller*, 509 U.S. at 320; *Cleburne*, 473 U.S. at 439-41; *New Orleans v. Duke*, 427 U.S. 297, 303 (1976).

39. *See, e.g., F.S. Royster Guano Co.*, 253 U.S. at 415.

40. *See, e.g., Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1971); *Reed v. Reed*, 404 U.S. 71 (1971).

41. *Nordlinger*, 505 U.S. at 11; *see also Beach Communications, Inc.*, 508 U.S. at 313; *Sullivan v. Strop*, 496 U.S. 478, 485 (1990). Although there must be some rational basis supporting the underlying official behavior, that basis need not have been expressed by the official actor either when it devised or when it effectuated the challenged conduct. In fact, “a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *Beach Communications, Inc.*, 508 U.S. at 315; *accord, Nordlinger*, 505 U.S. at 15 (“The legislative facts on which the classification is apparently based rationally may have been considered to be true by the

Protection Clause is not violated so long as there is *any* conceivable rational basis to support the governmental conduct under review.<sup>42</sup> The Supreme Court has distilled rationality analysis through an often repeated mantra:

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, *equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.* In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any conceivable state of facts that could provide a rational basis for the classification.<sup>43</sup>

Doubtless, the federal courts accord great deference to legislative determinations challenged as irrational and, for sound policy reasons, most such challenges fail. However, applying the Supreme Court's purported framework of constitutional rationality is absurd. The reason is apparent: no governmental act, no matter how seemingly trivial, arbitrary or deleterious, is ever utterly lacking *some* rational basis. There is always some conceivable rational goal for any given governmental project, and even the most inane means employed to attain the legitimate goal arguably may be justified as acceptable. If official conduct falls within the ambit of equal

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governmental decisionmaker."); *Clover Leaf Creamery Co.*, 449 U.S. at 464; *Vance v. Bradley*, 440 U.S. 93, 111 (1979); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 322 (6th Cir. 1998). A sufficient rational basis may be discovered by either the original governmental actor or by the reviewing court long after the occurrence of the disputed state action regardless whether that basis was or could have been considered by the official actors at the time the state action was taken. *Nordlinger*, 505 U.S. at 15; *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969). Indeed, according to a perhaps surprising degree of judicial deference, the fact that the decision makers were empirically wrong does not necessarily render either their past actions or even continued identical conduct irrational. *See, e.g., Clover Leaf Creamery Co.*, 449 U.S. at 468 (stating that a legislative ban on the sale of milk in plastic containers in favor of milk in paper nonreturnable cartons is not irrational even when based on the misconception that the latter are more environmentally sound than the former when, in fact, the opposite is true).

42. *See, e.g., Beach Communications, Inc.*, 508 U.S. at 313; *Heller* 509 U.S. at 320; *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981) (explaining that governmental classifications must "rationally advanc[e] a reasonable and identifiable governmental objective"); *Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959).

43. *Beach Communications, Inc.*, 508 U.S. at 313 (emphasis added); *see also, e.g., Heller*, 509 U.S. at 319; *Sullivan*, 496 U.S. at 485; *Bowen v. Gilliard*, 483 U.S. 587, 600-03 (1987); *Dukes*, 427 U.S. at 303; *Dandridge v. Williams*, 397 U.S. 471, 484-85 (1970); *Madrid v. Gomez*, 105 F.3d 1030, 1041 (9th Cir. 1998); *Means v. Shyamcore*, 44 F. Supp. 2d 129, 133 (D.N.H. 1999); *Schenck v. City of Hudson*, 997 F. Supp. 902, 906 (N.D. Ohio 1998).

protection and if it promotes *any* rational end through conceivably nonarbitrary means, as the Court's rational basis framework insists, then *every* act of state is constitutionally immune from judicial invalidation.<sup>44</sup>

Judicial history, however, reveals that, albeit rare, official conduct may be deemed illegitimate even though it is not subject to strict or mid-level scrutiny. Contrary to the implications of rational basis theory, judges (as their titles imply) can and must *judge* the wisdom and propriety of legislative actions. Were it otherwise, the Constitution's promise that no individual under its jurisdiction will be subjected to irrational treatment by the government would be meaningless and dishonest.

Given its overarching normative component, in no manner may constitutional rationality be considered a "neutral" principle even if neutral principles extend beyond certain schools of logic to realms such as the distribution of scarce resources and the administration of justice by the various branches of government.<sup>45</sup> Rather, rationality under the equal protection components of the Fifth and Fourteenth Amendments protects every individual against "arbitrary" discrimination.<sup>46</sup> Legislation is "arbitrary" and, thus, unlawfully irrational, if, according to the judgment of the reviewing

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44. The Supreme Court's "technique of rational basis review can be so deferential as to amount to no review at all. Any statute could survive a review that freely hypothesizes purpose and does not insist that there be any connection in fact between a classification and such a hypothesized purpose." Farrell, *supra* note 23, at 359.

45. Indeed, the Court initially adopted the limited standard that regulation is rational so long as it "places under the same restrictions, and subjects to like penalties and burdens, all who . . . are embraced by its prohibitions . . ." *Powell v. Pennsylvania*, 127 U.S. 678, 687 (1888). But, not a decade later, the Court abandoned *Powell's* tautological definition of "rationality" in favor of one applying an independent, extra-statutory measure of analysis. See *Gulf Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 165-66 (1897); see also, e.g., *TRIBE*, *supra* note 11, at 1439-40; see generally Ellen E. Halfon, Note, *A Changing Equal Protection Standard? The Supreme Court's Application of a Heightened Rational Basis Test in City of Cleburne v. Cleburne Living Center*, 20 *LOYOLA LA. L. REV.* 921, 922-26 (1987). As Professor Ely cogently explained, if no standard of rationality for any official classificatory scheme is constitutionally required other than effectuating the classification itself, the classification of necessity "will import its own goal, each goal will count as acceptable, and the requirement of a 'rational' choice-goal relation will be satisfied by the very making of the [classificatory] choice." John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1247 (1970).

46. See, e.g., *Nordlinger*, 505 U.S. at 31-32 ("The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination . . . ."); *Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 82-83 (1988); *Clover Leaf Creamery Co.*, 449 U.S. at 461-64; *Levy*, 391 U.S. at 71; *Sunday Lake Iron Co.*, 247 U.S. at 352-53; *Nelson v. City of Irvine*, 143 F.3d 1196, 1205 (9th Cir. 1998) ("The rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary.")

court, the government has acted illegitimately.<sup>47</sup> Government acts illegitimately when the distinctions it draws are unfair and unjust.<sup>48</sup> As early as 1886 the Supreme Court held that if a law “is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”<sup>49</sup> While most often based on a group distinction, the courts have clarified that the right to be free from irrationally unfair government treatment is an *individual* right. For instance, Judge Richard Posner has written that the constitutional guarantee of rationality “provide[s] a kind of last-ditch protection against governmental action wholly impossible to relate to legitimate governmental objectives . . . . A class of one is likely to be the most vulnerable of all, and we do not understand therefore why it should be denied the protection of the equal protection clause.”<sup>50</sup>

It is hardly surprising, therefore, that governmental acts nullified as irrational usually involve matters of civil rights, personal dignity, selfhood in society, unfair denial of socioeconomic status in favor of the aggrandizement of a powerful class, and similar affronts to the autonomy of the individual.<sup>51</sup> In a much praised article in the

47. See, e.g., *Romer*, 517 U.S. at 624 (invalidating as irrational an amendment to the Colorado Constitution prohibiting “all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons . . . .”); *Cleburne*, 473 U.S. at 432 (holding that a local government violated equal protection by legislating special requirements for group homes for mentally retarded individuals based predominately on the local community’s distaste for having such group homes in the neighborhood).

48. See, e.g., Gerald Gunther, *The Supreme Court, 1971 Term – Forward: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1, 9 (1972) (explaining the judiciary’s use of rationality analysis as an “interventionist tool”).

49. *Nabozny*, 92 F.3d at 458 (quoting *Yick Wo*, 118 U.S. at 373-74, the court found that a student states a colorable equal protection claim against a public school district for knowingly allowing systemic verbal and physical harassment because the student is gay.)

50. *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995) (mayor’s personal distaste for plaintiff insufficient reason to deny plaintiff’s business a liquor license); see also, e.g., *Village of Willowbrook*, 120 S. Ct. at 1074 (equal protection clause recognizes claims brought by a “class of one”); *Sioux City Bridge Co.*, 260 U.S. at 445; *Sunday Lake Iron Co.*, 247 U.S. at 352.

51. See, e.g., *TRIBE*, *supra* note 11, at 1438 (personhood), 1514-21 (anti-subjugation theory). Borrowing from the philosophies of Kant and Rawls, Professor Edwin Baker offered the following general exegesis of the normative basis for equal protection analysis in general, and, thus, by implication, rationality analysis — “[a]ll people (or, at least, all members of the relevant community) rightfully can demand that the community treat them with full and equal respect and concern as autonomous persons.” Edwin Baker, *Outcome Equality and*

1972 *Harvard Law Review*, Professor Gerald Gunther analyzed decisions delivered during the Supreme Court's 1971 Term overturning government action lacking rational bases.<sup>52</sup> Gunther called such opinions rationality "with bite," observing that in certain instances, although unwilling to evoke strict or middle level scrutiny that would render the basis of classification presumptively unlawful, the Court occasionally uses rationality analysis as an "interventionist tool" to strike official conduct it deems unfair or unjust.<sup>53</sup>

A quarter of a century of subsequent precedent generally confirms Professor Gunther's analysis. Although an infrequent occurrence, the Court, applying rationality analysis as an "interventionist tool," has overturned governmental action on the basis of irrationality because any benefits resulting from the challenged policy were overwhelmed by its ensuing harm. The harm may have been intended by the State actors or may have been wholly unforeseen. Regardless, according to at least a majority of Justices, a detriment may sufficiently outweigh a benefit so that, in what we now know to be the heuristic parlance of constitutional evaluation, the conduct under review "lacks a rational basis." In this way, although scrupulously avoiding the labels of heightened scrutiny, rationality analysis echoes the standards and concerns found in cases on racial, ethnic and sexual discrimination; and, indeed, citations to race and gender cases often inform why the particular policy under review is irrationally unjust.

Within the overall framework that government conduct is irrationally unjust if it offends precepts of personhood, dignity, respect and autonomy, one may discern three sub-sets of irrationality: government conduct lacks sufficient rationality (1) if the decision to establish the classification is totally random or (2) if the classification is designed primarily to inflict harm or otherwise disadvantage a politically weak group or (3) if the classification creates or threatens the creation of a caste system.<sup>54</sup> These categories, coupled with ABA, AALS and AAUP precepts, will demonstrate that the disparate treatment of legal writing faculties fails to satisfy even the permissive tenets of "mere" rationality and, thus, breaches the ethical norms legal education is

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*Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 938 (1983).

52. See Gunther, *supra* note 48.

53. *Id.* at 9.

54. See generally Bayer, *supra* note 15, at 32-52.



obliged to uphold.

1. *Rationality Cannot Be Derived from Flipping a Coin*

The courts have held that government actions are irrational if they are random, formless or inconsistent. The primary example is *Reed v. Reed* which overturned as irrational an Idaho statute mandating that among individuals equally entitled to administer intestate estates, men would be chosen over women without providing women the opportunity to establish superior qualifications.<sup>55</sup> Although the unambiguous standard for selecting from among potential administrators likely promoted efficiency, Idaho's law offended the Fourteenth Amendment's prohibition against according "[d]ifferent treatment . . . to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."<sup>56</sup> Because the goal of efficiency could have been reached as easily by favoring women instead of men, Idaho could not rationalize sufficiently why men were preferred over women.<sup>57</sup> Thus, Idaho's accurate assertion that its statute promoted efficiency did not justify imposing a burden on women that might just as well have been imposed on men instead.<sup>58</sup>

A decade later, the Court explicated *Reed's* theory of constitutional fairness — "the State's articulated goal could have been completely served by requiring a coin flip . . . . Such legislative decisions are inimical to the norm of impartial government."<sup>59</sup> Of course, at times government must draw lines about which reasonable people might differ while not acting so arbitrarily that, as a matter of aggregate detriments and benefits, the resulting standard is unconstitutionally irrational.<sup>60</sup> However, as in *Reed*, when a substantial *unwarranted and unmerited* detriment

55. See *Reed*, 404 U.S. at 77.

56. *Id.* at 75-76.

57. See *id.* at 72-74.

58. Gender discrimination is now evaluated under the purported "middle level" scrutiny. See *supra* notes 28-29 and accompanying text.

59. *Lehr v. Robinson*, 463 U.S. 248, 266 n.24 (1983).

60. See *Beach Communications, Inc.*, 508 U.S. at 315-16; *Oregon v. Mitchell*, 400 U.S. 112, 117-18 (1970) (*per Black, J.*) (Act of Congress setting minimum voting age for state elections at 18 is unconstitutional); *id.* at 294-95 (*per Stewart, J.*) (states may set "reasonable" voting age, such as 21-years-old, for state elections); *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting) (legislation is not irrational simply because reasonable minds may differ over particular elements comprising legislative classifications).

is inflicted on an individual or group, a mere plea of enhanced efficiency is insufficient to justify the adverse treatment.<sup>61</sup>

*2. Classifications That Inflict Harm and Disadvantage a Politically Unpopular Group*

On several occasions, the courts have held as unconstitutionally irrational government classifications that serve no better purpose than to demean, humiliate or politically handicap unpopular individuals or groups. In such cases, the courts discerned no defensible motives underlying the challenged governmental practice sufficient to justify the harm inflicted on the adversely affected group. Rather, because they have done nothing to deserve the adverse treatment, the challenged policy unfairly, often cruelly, disadvantages the affected individuals for the pleasure of one or more empowered groups. As the Court forcefully admonished, “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>62</sup>

*Department of Agriculture v. Moreno* exemplifies the use of rationality analysis to strike legislation that vindictively attacks a disliked portion of society.<sup>63</sup> Pursuant to the Food Stamp Act of 1964, food stamps — a federal program designed to help poor people purchase food — were available to economically eligible “households” regardless of whether a household’s occupants were members of the same family. Under amendments adopted in 1971,

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61. In a similar fashion, the courts have struck classifications that, although neither necessarily drawn nor maintained for vindictive purposes, lack any reasonable form, internal consistency or merit, such that, in essence, they are too irrational to survive judicial scrutiny. In such instances, the impositions confound any legitimate design, the societal benefits are meager, and the classifications upon which the impositions are based appear as arbitrary as if derived from random acts such as flipping coins. *See, e.g., Greater New Orleans Broad. Assoc., Inc., v. United States*, 1999 WL 380810, at \*10-13 (U.S. 1999) (under the First Amendment, federal regulation of certain broadcast advertisements regarding lotteries and casino gambling “is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it”); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (under the First Amendment, federal regulation of labels of certain alcoholic beverages was so inconsistent and ineffective in affecting alcohol consumption that the “overall” scheme was irrational); *Berger v. City of Mayfield Heights*, 154 F.3d 621 (6th Cir. 1998); *Stefanoff v. Hays County*, 154 F.3d 523 (5th Cir. 1998); *Lewis v. Alabama Dep’t of Pub. Safety*, 831 F. Supp. 824 (M.D. Ala. 1993).

62. *Romer*, 517 U.S. at 634 (quoting *Moreno*, 413 U.S. at 534).

63. *See Moreno*, 413 U.S. at 534.

an eligible "household" could consist only of "related" individuals.<sup>64</sup> Jacinta Moreno, a fifty-six year-old diabetic, lived with and was cared for by Ermina Sanchez and Sanchez's three children.<sup>65</sup> Despite the beneficence of this impoverished family, the entire Sanchez household was denied food stamps because they cared for a disabled individual who was not their kin within their home.

Significantly, the Court did not imply a limited statutory exception that, as applied to households like the Sanchezes, the 1971 Amendments irrationally penalized families for the charitable act of harboring an incapacitated friend. Instead, striking the 1971 amendment, the Court discerned that the overarching and irrational Congressional purpose was "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."<sup>66</sup> The Court determined that Congress' distaste for the nonconformist but lawful lifestyle of "hippies" was an insufficient basis to deprive otherwise eligible individuals of governmental largesse.<sup>67</sup> Because it failed to promote significantly any legitimate goal, such as making food more readily available to poor persons, the harm caused by the 1971 amendment to the Food Stamp Act outweighed arguable benefits; thus, the amendment was irrational.<sup>68</sup>

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64. See *id.* at 529-32.

65. See *id.* at 531.

66. *Id.* at 534.

67. *Id.*

68. It should be accented that, while not necessarily irrelevant in equal protection litigation, *Moreno* demonstrates that the challenged classification does not have to address an "immutable characteristic" to be deemed irrational. The infirmity in *Moreno* was not that the Food Stamp Act penalized certain otherwise eligible recipients because of a characteristic over which they had little or no control such as skin color. To the contrary, the household membership standard was unjust because it penalized individuals for *choosing* to live lawful lifestyles disliked by certain segments of government. As the Sixth Circuit underscored a quarter of a century later, "*Moreno* . . . involved commune residents; [but] the principle would be the same if [the government discriminated] based on hair color, a college bumper sticker (perhaps supporting an out-of-state rival) or an affiliation with a disfavored sorority or company." *Stemler v. City of Florence*, 126 F.3d 856, 874 (6th Cir. 1997).

In the interest of thoroughness it should be noted that the Supreme Court has declined to extend *Moreno* in a series of subsequent holdings involving food stamps. See *generally* Farrell, *supra* note 23, at 374-82; *Knebel v. Hein*, 429 U.S. 288 (1977) (offering no substantive discussion of *Moreno*, and upholding a Department of Agriculture definition of "income" regarding eligibility for food stamps that included as countable earnings a state transportation allowance to cover traveling expenses to attend vocational school); *Lyng v. Castillo*, 477 U.S. 635 (1986) (sustaining regulations requiring that to be a "household" eligible to receive food stamps, co-habiting individuals who are either unrelated or distantly related must "customarily purchase food and prepare meals together."); *Lyng v. Int'l Union*, 485 U.S. 360 (1988) (upholding 1981 amendments to the Food Stamp Act disqualifying entire households from collecting food stamps so long as any member of the household was on strike).

Equally significant is *City of Cleburne v. Cleburne Living Center*, wherein a unanimous Court invalidated as irrational a zoning ordinance of Cleburne, Texas, requiring that proposed group homes for the mentally retarded obtain a special use permit not required for other group homes.<sup>69</sup> The *Cleburne* Court determined that singling out group homes for mentally retarded persons while placing no special permit requirements on other group homes only remotely fostered two of the City's purported legitimate goals — preventing homes from occupying a five hundred year flood plain and limiting both the physical size of group homes and the number of occupants therein.<sup>70</sup>

Importantly, the Court rejected as inherently unjust and, thus, irrational, the prime impetus underlying the Cleburne ordinance which was “the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as the fears of elderly residents of the neighborhood.”<sup>71</sup> All nine Justices agreed that discriminatory policies predicated on misinformation and spurious stereotypes epitomize the type of arbitrary treatment proscribed by the Constitution's equal protection clause:

[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings and the like . . . . “*Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.*”<sup>72</sup>

The most significant modern decision overturning official conduct as unconstitutionally irrational is *Romer v. Evans*, which invigorated the *Moreno-Cleburne* doctrine that fear, disdain and

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Granted, the post-*Moreno* opinions arguably are contrary to the spirit, if not the letter, of *Moreno* itself. See, e.g., *Castillo*, 477 U.S. at 646 (Marshall, J., dissenting); *Lyng*, 485 U.S. at 380-83 (Marshall, J., dissenting). Such disagreements are based on normative principles — political beliefs — that inform constitutional law. They do not represent a flaw in the overarching principle of rationality analysis that government acts unlawfully if: (1) a given policy or practice harms a politically unpopular group, (2) the underlying motive is to harm that group and (3) there are no countervailing beneficial effects to vindicate the challenged policy. Indeed, rather than lying fallow, as we shall see shortly, *Moreno* was rejuvenated by the Court in *Romer*, albeit in a context other than eligibility for food stamps.

69. See *Cleburne*, 473 U.S. at 450.

70. See *id.* at 449.

71. *Id.* at 448.

72. *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)) (emphasis added).

political unpopularity are illegitimate bases to legislate against groups and individuals.<sup>73</sup> *Romer* invalidated "Amendment 2," a provision of the Colorado Constitution, adopted by popular referendum in 1992, that repealed all statutes, ordinances and state precedents specifically prohibiting discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."<sup>74</sup> Furthermore, Amendment 2 mandated that any civil rights law specifically protecting gays, lesbians or bisexuals could be adopted only through amending the state constitution.

The Court aptly rejected as "implausible" Colorado's argument that Amendment 2 "puts gays and lesbians in the same position as all other persons . . . [and] does no more than deny homosexuals special rights."<sup>75</sup> Avowedly homosexual individuals and their supporters alone were prohibited from employing every avenue except constitutional amendment to champion civil rights protection of homosexual preferences. By stunning contrast, all routes of government remained fully open to persons advocating civil rights laws other than those designed to protect gays and lesbians from discrimination. The *Romer* Court concluded that the overarching purpose of Amendment 2 was to effectuate "animosity towards the class of affected persons," by denying them the opportunity to utilize the various branches of government to protect their interests.<sup>76</sup> Official enforcement of popular disdain alone, without a greater justification, is unfair; therefore, Amendment 2, enacted to handicap the burgeoning societal power of those who favor civil rights protection for gays and lesbians, was constitutionally irrational.<sup>77</sup>

These and other cases<sup>78</sup> demonstrate that recourse to fear,

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73. See *Romer*, 517 U.S. at 635.

74. *Id.* at 624.

75. *Id.* at 626.

76. *Id.* at 633, 635.

77. See *id.* at 634-35 (citing *Moreno*, 413 U.S. at 534).

78. See, e.g., *Plyler*, 457 U.S. at 220 (accenting that "legal burdens should bear some relationship to individual responsibility or wrongdoing," the Court held that states must provide public education to children of illegal aliens to the same extent that it provides education to the children of state citizens and resident aliens); *Levy*, 391 U.S. at 72 ("[I]t is invidious to discriminate against [illegitimates] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."); *Trimble v. Gordon*, 430 U.S. 762 (1977) (invalidating as irrational a portion of the Illinois probate code which limited the right of an illegitimate child to inherit via intestacy only from the mother's estate); *Esmail*, 53 F.3d at 179 (*per* Posner, J.) (mayor's vindictive refusal to renew qualified business' liquor license because mayor did not like the owner is unconstitutionally irrational); *Planned Parenthood v. City of Wichita*, 729 F. Supp. 1282 (D. Kan. 1990).

prejudice and political unpopularity are illegitimate bases to disadvantage groups of individuals. Simple concepts of fairness counsel that the protections provided by due process and equal protection of the laws become meaningless if the political system, even if supported by a majority of the electorate, may freely condemn the weak or politically ostracized elements of society to suffer disadvantageous treatment for reasons no better than the very helplessness which gives rise to that disparate treatment.<sup>79</sup>

*3. Governmental Action May Be Unlawful If It Creates Or Threatens to Create a Caste System*

Addressing concerns related to the irrationality of making and enforcing policies based on unfounded fears, misconceptions, stereotypes and *animus*, the courts emphasize that official conduct may be irrational if it creates or threatens to create a caste system within society. The pivotal case on this point is *Zobel v. Williams*,<sup>80</sup> wherein the Court struck a 1980 legislative program of Alaska that paid monetary “dividends” to Alaska citizens based on the duration of their residency. Residents received one dividend share — the value of which was legislatively established on an annual basis — for each year of their residency since 1959, the year of Alaska’s statehood.<sup>81</sup>

Although the residency provisions implicated infringement of the fundamental “right to travel” and, therefore, suggested the use of “strict scrutiny analysis,” the Court refrained from relying on that fundamental right, ruling instead that the statutory classification lacked a rational basis.<sup>82</sup> The *Zobel* majority, speaking through conservative Chief Justice Burger, agreed that linking the number of dividend shares to the duration of residency advanced the goal of expressing the State’s gratitude for the perseverance and loyalty of its longest term citizens; nonetheless, the goal itself was impermissibly irrational because a state may not link the apportionment of services or the distribution of largesse to either

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79. The foregoing protection applies even if the discrimination is imposed only against one or a very small number of individuals. See, e.g., *Village of Willowbrook*, 120 S. Ct. at 1075 (homeowning couple stated a cognizable equal protection claim by asserting that village’s requirement that couple grant a 33-foot easement to connect to water supply was “irrational and wholly arbitrary” when other homeowners were required to deed only a 15-foot easement).

80. 457 U.S. 55 (1982).

81. *Id.* at 57.

82. *Id.* at 63. Justice O’Connor concurred on the grounds that the Alaska dividend plan infringed upon the “right to travel.” *Id.* at 71-74 (O’Connor, J., concurring).

previous tax payments or the intangible contributions made by residents.<sup>83</sup> As explained by the Court:

If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residence. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.<sup>84</sup>

Three terms later in *Hooper v. Bernalillo County Assessor*, an opinion likewise authored by Chief Justice Burger, the Court extended *Zobel* to invalidate a New Mexico statute awarding a \$2000 property tax exemption to veterans of the Vietnam War who had been residents of the state prior to May 8, 1976.<sup>85</sup> The Court accented the principle that even though governmental preferences for veterans may be legitimate, discrimination between classes of Vietnam veterans based on the commencement date of state residency is unconstitutionally irrational:

[I]t is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a State bestows for national military service. Moreover, the legislature provided this economic boon years after the dislocation occurred. Established state residents, by this time, presumably had become resettled in the community and the modest tax exemption hardly bears directly on the transition to civilian life long after the war's end. Finally, the benefit of the tax exemption continues for the recipient's life. The annual exemption, which will benefit this limited group of resident veterans long after the wartime disruption dissipated, is a continuing bounty for one group of residents rather than simply an attempt to ease the veteran's return to civilian life.<sup>86</sup>

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83. *Id.* at 63 (citing *Shapiro*, 394 U.S. at 632-33 and *Vlandis v. Kline*, 412 U.S. 441, 449-50 (1973)).

84. *Id.* at 64 (footnotes omitted).

85. See *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985).

The *Hooper* Court concluded with this remonstrance of compelling poignancy:

The State may not favor established residents over new residents based on the view that the State may take care of 'its own,' if such is defined by prior residence. Newcomers . . . become the State's 'own' and may not be discriminated against solely on the basis of their [subsequent] arrival in the state . . . .<sup>87</sup>

Four terms after *Hooper* in *Allegheny Pittsburgh Coal Co. v. County Commission*, a unanimous Court struck as irrational the tax valuation scheme for commercial property in Webster County, West Virginia.<sup>88</sup> Specifically, the tax assessor "valued petitioner's real property on the basis of its recent purchase price, but made only minor modifications in the assessments of land which had not been recently sold . . . . [As a result,] [f]or the years 1976 through 1982, [petitioner] was assessed and taxed at approximately thirty-five times the rate applied to owners of comparable property."<sup>89</sup> Although "rough equality" is all that equal protection requires in tax assessment cases,<sup>90</sup> the Court, speaking through Chief Justice Rehnquist, determined that such gross and long-standing disparities were irrational.<sup>91</sup> "[T]he fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings."<sup>92</sup> Thus, *Allegheny* stands for the principle that the government cannot create a caste of property owners compelled to carry an unreasonably heavy share of the relevant community's overall tax burden.<sup>93</sup>

86. *Id.* at 621.

87. *Id.* at 623. *See also, e.g.*, Attorney General v. Santo-Lopez, 476 U.S. 898 (1986) (plurality opinion striking down, under heightened scrutiny, New York's civil service employment preference for resident veterans provided if they commence military service after establishing state residency).

88. *See Allegheny Pittsburgh Coal Co.*, 488 U.S. at 346.

89. *Id.* at 338, 341.

90. *Id.* at 343.

91. *Id.* at 343. The Court, therefore, differentiated *Allegheny Pittsburgh Coal Co.* from cases concerning a constitutional, "transitional delay in adjustment of assessed value . . . ." *Id.*

92. *Id.* at 346.

93. *See also, e.g.*, Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946); Cumberland Coal Co. v. Bd. of Revision, 284 U.S. 23 (1931) (tax assessor unconstitutionally assessed all coal in the same township at the identical rate despite differences in value of coals and costs of



*Zobel*, *Hooper* and *Allegheny* fit the framework of rationality suggested by this essay. Creating classes for the sake of creating classes threatens to impair the individuality, dignity and self-worth protected by the equal protection components of the Constitution. The creation of such castes forces the individual to alter chosen behavior or forgo state largesse, if indeed the classification even affords the individual the opportunity to deliberately plan in advance whether or not to perform certain acts or accept state services.

*It is noteworthy that the classifications in Zobel and Hooper were not drafted for invidious purposes.* Apparently, the Alaska and New Mexico legislatures did not intend to create hostile and conflicting castes in society by differentiating among long-time residents in the former and certain classes of Vietnam veterans in the latter. Nevertheless, the lack of untoward motives did not mitigate the unintended actual and potential disparate effects that overshadowed any arguable benefits arising from the statutory

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operations and transportation); *Sioux City Bridge Co*, 260 U.S. at 445 (government may not intentionally discriminate in tax assessments among similarly situated taxpayers); *Sunday Lake Iron*, 247 U.S. at 352-53.

In 1992, the Court declined to extend *Allegheny Pittsburgh Coal* to invalidate California's controversial 1978 referendum "Proposition 13." See *Nordlinger*, 505 U.S. at 18. In response to the rapid rise in property values, California voters enacted Proposition 13, an amendment to the state constitution, that, *inter alia*, (1) capped property taxes at 1% of properties' 1975-1976 assessed cash value, (2) set a 2% cap on all realty's annual increase in cash value over the 1975-1976 assessment, but (3) subject to limited exceptions, property that changed ownership could be reassessed at the purchase value. See *id.* at 4-6. Proposition 13 understandably produced huge disparities in the property tax base of homes of equal market value located within a particular community. As an example, for tax year 1988-1989, Nordlinger paid \$1701 while a similarly situated neighbor paid \$358, less than a quarter of the amount Nordlinger was taxed. *Id.* at 6-8.

The Court held that despite the grossly unequal burdens, the benefits of Proposition 13 overrode the disadvantages. The reduction of property taxes promoted community stability because lower income families and "mom and pop" businesses which had purchased property at relatively low cost were not forced to relocate due to onerous taxes predicated on unexpected escalations of property values. Moreover, the Court reasoned that, unlike a long-time owner who may be significantly encumbered by a sudden sharp increase in taxes, a potential purchaser knows what her tax base will be and can budget accordingly or forego the purchase. *Id.* at 12-13. According to the Justices' analysis, *Allegheny Pittsburgh Coal*, which concerned the disparate taxing only of certain large parcels of commercial realty, did not present the same prevailing concerns of community preservation, business vitality and protection of homeowners. *Id.* at 14-16.

Justice Stevens dissented alone, arguing that Proposition 13 unconstitutionally creates a caste system — a class of entrenched property owners who, regardless of actual necessity, enjoy an extraordinary tax advantage simply because they had bought property before 1978. He could discern no meaningful factual or theoretical distinctions in *Nordlinger* to make inapplicable the law of *Allegheny Pittsburgh Coal*, particularly because Proposition 13 covered the entire State of California. *Nordlinger*, 505 U.S. at 28-41 (Stevens, J., dissenting).

schemes. The controlling core principle is fairness — if after assessing the benefits and the detriments, one concludes that the challenged policy promotes more unfairness than fairness, the policy is unconstitutionally irrational.

Having established a framework delineating “rationality” under the Equal Protection Clause, this article turns next to a discussion of the numerous forms of disparate treatment imposed by American law schools on their legal writing faculties.<sup>94</sup> Then, the article debunks the purported justifications underlying the disparate treatment.<sup>95</sup> The article concludes by recalling the Supreme Court’s standards for determining rationality to show that the discriminatory terms and conditions of employment foisted on writing professors are unfair and, thus, contrary to the standards of ethics that law schools pledge to uphold.<sup>96</sup>

### III. THE DISPARATE TREATMENT OF LEGAL WRITING PROFESSORS

Among all full-time members of law school faculties, only legal writing teachers are subjected to systemic and persistent inequality ranging from remarkably disadvantageous terms of employment to disdain and segregation within their own law school societies.<sup>97</sup> With the endorsement, if not outright encouragement, of the American Bar Association (“ABA”), most law schools impose on legal writing professors a wide assortment of conditions distinctly and deliberately less desirable than those enjoyed by other full-time law teachers. Exceptions are rare indeed.<sup>98</sup> Reviewing the literature,

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94. See *infra*, Part III.

95. See *infra*, Part IV.

96. See *infra*, Part V.

97. This essay concerns the treatment of full-time legal writing professors. Virtually every law school requires students to take a formal legal analysis, research and writing course as part of their formative education during their crucial first year of law school. Uncommon among required courses, especially first year courses, not all legal writing programs are staffed by full-time professors. Indeed, although the predominant model, the use of full-time faculty is by no means the only common structure for this integral course.

According to a recent survey conducted by the Legal Writing Institute, of 145 responding law schools, 125 (86%) employ full-time legal writing professors, although a small number of those programs also utilize adjunct instructors, students-instructors or both. LEGAL WRITING INSTITUTE, 2000 SURVEY RESULTS questions 10, 11 (on file with author) [hereinafter 2000 Survey]. See also, e.g., Jan M. Levine, *Leveling the Hill of Sisyphus: Becoming a Professor of Legal Writing*, 26 FLA. ST. U. L. REV. 1067, 1090 (1999) (“A small and ever-shrinking number of law schools employ adjuncts to teach legal writing. Those that do are usually found in urban areas where the pool of talented lawyers is quite large.”)

98. Of course, not all law schools impose every conceivable form of disparate treatment onto their legal writing teachers. As described below, some schools allow their writing faculties certain perquisites and opportunities denied to similarly situated teachers at

Professor Ilhyung Lee, formerly a legal writing teacher, aptly noted, “[l]egal research and writing ‘gets no respect,’ has been ‘trivialized, demeaned and diluted,’ and is a subject of ‘institutionalized contempt.’”<sup>99</sup> In particular, writing faculties are subjected to six distinct although interrelated forms of disparate treatment.

#### A. *Adverse Contractual Status*

The first mode of discrimination consists of the myriad disadvantageous terms of employment exacted on full-time legal writing professors solely because of their rank. Perhaps most importantly, very few programs permit writing professors to seek tenure, that most prized source of professional security and acknowledgment of excellence. It is no secret that tenure ranks high among benefits enjoyed by undergraduate and graduate professors.<sup>100</sup> Indeed, tenure is integral to safeguarding academic freedom and a robust variety of scholarship.<sup>101</sup> Similar to partnership in a law firm, tenure is the Academy’s reward to journeyman teachers, imparting a high measure of respect and valuable employment security; thus, it encourages teachers to attain their full potential no matter how unique, challenging or controversial their studies may be.<sup>102</sup>

Tenure is the right of passage from apprenticeship to fellowship in the community of scholars. Any full-time teacher who cannot compete for tenure can never be a complete or fully respected member of her academic society. Such a teacher, no matter how credentialed, dedicated and accomplished, will always be an outsider if not an outcast — not quite a stranger, but never an esteemed colleague.<sup>103</sup> The number of law schools willing to tenure qualified legal writing professors, however, is few.<sup>104</sup> According to

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other institutions.

99. Ilhyung Lee, *The Rookie Season*, 39 SANTA CLARA L. REV. 473, 489 (1999) (footnotes and citations omitted). See also, e.g., Arrigo, *supra* note 2, at 143, 148 & n.136.

100. See, e.g., Association of American University Professors Reports, *The Status of Non-Tenure-Track Faculty* (visited Aug. 19, 1999) <<http://www.aaup.org/rbnonten.htm>> [hereinafter *Status*].

101. See *id.*

102. As emphasized by the ABA, “[t]enure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability.” ABA Standards, *Appendix 1* (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/appendix.html>>.

103. See *Status*, *supra* note 100.

104. See J. Christopher Rideout and Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 87 (1994); 2000 SURVEY, *supra* note 97, at questions 10, 11; Legal Writing

the Legal Writing Institute's *Year 2000 Survey*, of 143 law school respondents, 16 (11%) tenure track their writing professors.<sup>105</sup>

Along lines similar to the tenure issue, some law schools continue to limit the number of years any given individual may be employed as a legal writing professor.<sup>106</sup> Although the large majority of schools no longer impose a ceiling on the number of years LRW professors may remain employed,<sup>107</sup> most schools limit writing professors' contracts to renewable 1, 2 or, perhaps, 3 year terms.<sup>108</sup> The denial of explicit job security reinforces the notion that such faculty members are not truly part of the academic community.

Commensurate with the lack of security are the low salaries paid to even the most experienced, effective and credentialed writing professors. The matter of salary has never been a picayune affair in legal education. In fact, until a recent litigation settlement, the ABA made generous salaries for tenure-track professors a necessary but not sufficient standard for law school accreditation.<sup>109</sup> Needless to

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Institute, 1998 Survey Results questions 4, 5 (on file with author) [hereinafter 1998 survey].

105. 2000 Survey, *supra* note 97, at question 65. A few more schools tenure track their legal writing directors. Of 82 schools responding that they employ a director, 34 (42%) are on tenure-track or are tenured. *See id.* at question 45. Other surveys reveal similar results. According to Professor Levine "[it] seems safe to say . . . that approximately 40 of the 180 ABA-accredited law schools have on their faculties tenured or tenure-track legal writing professionals who did not come to legal writing after being tenured as 'doctrinal' law professors." Levine, *supra* note 97, at 1075-76 n.31. Another survey found that of 182 responding schools, roughly 49 (27%) employed tenure-track professors to direct their legal writing programs. *See LRW PROGRAM DESIGN AND FACULTY STATUS* (May 10, 1999) (Program Design Survey) (on file with author). Of those, approximately 17 directors were doctrinal or clinical professors for whom directing LRW was an additional assignment. *Id.*

106. *See* Rideout and Ramsfield, *supra* note 104, at 38 n.8. These contract "caps" are based on the disparaging and misinformed belief that writing "instructors would only wish to teach LRW for a year or two and then would move on since . . . the entrenched viewpoint was that no self-respecting intelligent lawyer would be able to endure the job for long." Arrigo, *supra* note 2, at 145.

107. *See* Jill J. Ramsfield, *Legal Writing in the Twenty-First Century: A Sharper Image*, 2 J. LEGAL WRITING 1, 14 (1996) ("eighteen percent of legal writing professors stay over ten years. Seventy-four percent of the schools responding do not impose a limit on the number of years legal writing faculty can stay."). According to the 2000 Survey, *supra* note 97, at question 66, 11 schools "capped" the number of years it would employ any given writing professor. The 1998 Survey, *supra* note 104, at question 12, reveals similar results. *See also, e.g.,* Rideout and Ramsfield, *supra* note 104, at 145-46.

108. Some schools do allow longer term contracts. *See* 2000 Survey, *supra* note 97, at questions 65 and 66.

109. As the ABA itself explained:

DOJ CONSENT DECREE. In June 1995, the United States Department of Justice filed a civil antitrust suit against the ABA, alleging violations of antitrust laws in the accreditation program . . . . The civil suit was concluded by a final consent decree that was approved in June 1996. It includes a number of requirements concerning the Standards, many of which reflect revisions that the ABA had previously adopted.

say, comparatively low salaries adversely affect the financial security of legal writing professors in addition to stigmatizing them as unworthy of full professional respect and approval. The income for an inexperienced, incoming assistant professor, without consideration of insurance, retirement accounts and other fringe benefits, usually is no less than \$60,000 and may be considerably more. The pay allotted a well experienced and effective legal writing professor, by contrast, often is barely half as much. "Salaries for most legal writing professors average less than \$35,000, much less than for professors and clinicians at the same schools."<sup>110</sup>

More recent data evince little change. The 2000 Survey of the Legal Writing Institute revealed that the average salary for writing professors ranges from \$42,202 to \$49,261.<sup>111</sup> Traditionally, directors of legal writing programs are paid more than legal writing professors because of the administrative work and other responsibilities unique to the director's position.<sup>112</sup> Even so, directors' salaries infrequently surpass those of tenure-track professors. During my fifth and final year as director of St. Thomas' program, my wages were less than those paid to an incoming assistant professor.<sup>113</sup>

In addition to salaries, tenure and job security, legal writing faculty are disparately treated regarding other significant terms of employment. Many writing professors are physically segregated in offices away from the main faculty wing. Offices for LRW teachers often are small, windowless and unattractive, particularly compared

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Among them are that compensation paid to faculty, deans, or staff may not be considered or even collected by the ABA in the accreditation process. An exception is permitted where there is a complaint about discrimination . . . .

ABA Standards, *Forward* (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/Foreword.html>>.

110. Rideout and Ramsfield, *supra* note 104, at 37 n.5. Similarly, analyzing 1994 statistics, Professor Arrigo wrote, "Fifty-one schools among those responding to the 1994 survey pay their LRW teachers at least \$30,000 less per year than they pay their non-LRW/non-clinical faculty." Arrigo, *supra* note 2, at 146.

111. 2000 Survey, *supra* note 97, at question 75. Legal writing salaries ranged from a low of \$26,000 to a high of \$90,000. See *id.* In 1999, the average pay ranged from \$39,689 to \$47,452. See *id.*

112. See Levine, *supra* note 97, at 1107-10; 1998 Survey, *supra* note 104.

113. According to the 2000 Survey, *supra* note 97, at question 49, the average director's salary for a 12 month contract is \$77,053 and for a 9 - 10 month contract, \$74,697, making a combined average of \$75,806. The minimum reported salary was \$20,000 and the maximum was \$130,000. The higher salaries, not surprisingly, were paid to tenure-track directors. Non-tenure-track directors averaged a compensation of \$62,255.

with the facilities provided for other faculty.<sup>114</sup> I recall discussing the office situation with the now former dean at the outset of my second year as director of legal writing. Several offices had opened in the main faculty suite for which there were no takers. I asked the Dean if the legal writing professors could be moved from their downstairs location into the spacious and more pleasant setting of the faculty wing where we could better integrate ourselves with the other teachers. The Dean responded that the faculty did not relish the idea of locating the offices of legal writing teachers near them nor did they want the distraction of a “parade of students” who might frequent the offices of writing professors. Gesturing towards the floor, the Dean opined in a patronizing tone, “You’re better off congregated downstairs in your own offices away from the rest of the faculty.”

The Dean’s meaning was blunt though eloquent: the tenure-track professors did not want to associate with those they considered their inferiors. I drew that conclusion because the Dean’s ostensible nondiscriminatory justification, that the presence of writing faculty would spawn excessive student traffic throughout the faculty suite, is not credible. One reason faculty have offices is to make themselves conveniently available to students. While the number of student visits to the offices of legal writing professors may be more than the number of visits to other faculty, visits are not so excessive, relentless, or disruptive as to shatter the routine and productivity of the faculty suite.<sup>115</sup>

A different but particularly important mode of discrimination is the way that most law schools do not allow writing professors to take part in faculty governance. “[Writing faculty] typically have no

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114. According to the 2000 Survey, *supra* note 97, at question 69, approximately 43% of 76 responding schools segregate their writing professors from other faculty. Sixty-seven respondents stated that their offices are “comparable to most non-writing faculty offices.” Sixty-six responded that their offices were either smaller than or in less desirable locations than other faculty.

115. The number of student conferences may increase just before assignments are due or during designated conference periods. At such times, however, students usually make specific appointments. Therefore, they do not congregate in large numbers outside the writing professor’s door. While waiting, students are expected to conduct themselves quietly. Any students who are loud, rude or disorderly may be compelled to leave.

It is noteworthy that at St. Thomas the clinical faculty have offices in the main faculty wing, as did the Director of Academic Support. Clinicians and the Director of Academic Support are expected to have frequent meetings with students. Indeed, clients and other third parties often visit the clinical faculty yet their presence is not anathema to the faculty as a whole. For these reasons, I believe the Dean’s position amounts to nothing more than disrespect for writing faculty.

vote at faculty meetings. Voting or not, they frequently feel they are denied a real voice because, having little to no power, their views are deemed unworthy of notice by the voting faculty.<sup>116</sup> Even when allowed to attend faculty meetings and, perhaps, express their opinions, the right to participate in governance is withheld from the majority of writing professors just as one might indulge and even be persuaded by the opining of a child, but would never permit that child any genuine authority in family matters.

The power of the faculty to set policy, manage the curriculum and otherwise fashion the law school's educative and scholarly society is integral to professional status and respect among law professors. Moreover, faculty governance helps assure the independence of a law school from domination by its university or some other overarching entity.<sup>117</sup> Just as faculty governance is essential to the autonomy of a law school, so is the right to participate in governance crucial to the professional status of each faculty member.<sup>118</sup>

To be deprived of the right to vote, therefore, is a particularly demeaning snub because the absence of the franchise implies that legal writing professors lack the intelligence, the dedication, the experience and the sagacity of tenure-track faculty. In particular, I

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116. Arrigo, *supra* note 2, at 150. Of 38 schools responding, well over half, 21 schools, do not allow writing professors to vote at faculty meetings. 1998 Survey Results, *supra* note 104, at question 103. More recent data show little improvement. For academic year 1999-2000, of 96 responding schools, 39 (41%) allow writing faculty to vote at faculty meetings, although 23 of these (24%) do not permit writing teachers to vote on hiring, promotion and tenure. Forty-seven (49%) schools allow writing faculty to attend meetings without voting rights. Ten do not permit writing teachers to attend at all. See 2000 Survey, *supra* note 97, at question 84.

117. ABA Standard 404(3) sets as a faculty responsibility the ongoing and meaningful "participation in the governance of the law school . . ." ABA Standards (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/chapter4.html>>. Similarly, the BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC. (visited Aug. 19, 1999) <<http://www.aals.org/bylaws.html>>, at section 6-6(a)-(c), state that "[a] member school shall vest in the faculty primary responsibility for determining institutional policy," including faculty and decanal hiring, promotion, renewal, tenure and termination decisions. Indeed, according to the Supreme Court, faculties that govern their respective law schools by, *inter alia*, setting academic and institutional policies and handling employment decisions, should be classified as supervisors or managerial employees who have no federal statutory right to collectively bargain pursuant to the National Labor Relations Act, 29 U.S.C. § 151 (1994). *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980).

118. Meaningful citizenship for full-time faculty members is accorded, in substantial part, by the franchise at faculty meetings. "It is apodictic that the right to vote is a right that helps preserve all other rights." *Werme v. Merrill*, 84 F.3d 479, 483 (1st Cir. 1996); see also, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). To borrow from the Supreme Court, "[t]he right to vote freely [on matters of faculty governance] is of the essence of a democratic [law school] society." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

have heard some faculty members argue that legal writing professors do not have a substantial commitment or dedication to their law schools.<sup>119</sup> Thus, writing faculty, like students, are considered sojourners as opposed to citizens of the school.

The foregoing sentiment might have minimal validity for those law schools imposing severely restrictive caps on the number of years writing faculty may hold their jobs. For the large majority of schools that properly do not cap contracts,<sup>120</sup> however, it cannot be argued cogently that writing faculty are estranged from the life of the law school and, thus, should be denied the faculty franchise. To the contrary, no less than other faculty, legal writing teachers view the law school as their house, teaching as their calling, the education of students as their primary duty, loyalty to the institution as a trust, and professional demeanor as a fundamental requisite. For full-time writing professors, the law school is the axis of their professional lives. There is no reason to believe that legal writing faculty will take governance responsibilities less seriously or that they will be less wise, just or pragmatic than other full-time professors.<sup>121</sup>

Along similar lines, many schools still do not permit legal writing faculty to sit on law school committees<sup>122</sup> and will not provide legal writing faculty with research stipends, travel allowances or student research assistants.<sup>123</sup> Some schools discourage students from addressing writing teachers with the title of respect, "professor."<sup>124</sup>

119. This is reminiscent of disparaging remarks reported by others, such as, "only 'an incompetent or a borderline crackpot' could have an interest in a long-term commitment to teaching the subject . . . [for] 'no intelligent J.D. with academic aspirations really wants to teach a subject like LRW that is beneath the dignity of a law professor.'" Lee, *supra* note 99, at 490 (quoting Jack Achtenberg, *Legal Writing and Research: The Neglected Orphan of the First Year*, 29 U. MIAMI L. REV. 218, 218 (1975)).

120. See notes 106-08, *supra*, and accompanying text.

121. St. Thomas does not permit legal writing faculty to vote; by contrast, aside from personnel matters, *visiting faculty* are permitted to vote on all issues at St. Thomas Law School faculty meetings. Granted, some visitors are being feted for promotion to full-time, tenure-track positions. Nevertheless, visiting faculty by their nature are "visitors" who very likely will remain for only a year and move on. Surely, visitors' connections with, knowledge of and dedication to the visited law school are significantly more attenuated than the loyalty of full-time writing professors for whom the law school is professional home and hearth.

122. During academic year 1999-2000, roughly one-third of responding schools (34 out of 108) did not allow writing teachers to serve on committees or withheld voting privileges from those who did. 2000 Survey, *supra* note 97, at question 83.

123. According to the 2000 Survey, *supra* note 97, at question 76, of the 88 schools that provide summer research stipends to faculty, 33 (37.5%) include writing teachers as eligible. Of 97 responding schools, fully 89 (92%) provide funding for professional development of writing faculty through such means as attendance at conferences. See *id.* at question 79.

124. Lee, *supra* note 99, at 491; see also Arrigo, *supra* note 2, at 150. Writing faculty



Many law schools do not allow writing faculty to teach outside of that genre although, like tyro assistant professors, most commence their teaching careers with years of experience in practice and many bring the additional benefits of advanced degrees such as LL.M.'s, M.A.'s, and Ph.D's. As one commentator noted,

[Being denied the opportunity to teach outside of legal writing] can retard future academic opportunities. As regular tenure-track faculty, visitors, and even adjuncts who teach non-LRW courses increase their repertoire of course offerings, they increase their human capital value, since they learn more about the pedagogy of teaching various types of courses and learn more about the subject matter they are teaching . . . . They gain exposure to a wider range of topics that might spark their interest in scholarship.<sup>125</sup>

When discussing the employment terms and the attendant prestige of writing professors, it is vital to emphasize that the disparate contractual treatment of legal writing professors occurs with the knowledge and, indeed, the express approval of the American Bar Association, the institution of legal professionals entrusted to set the standards for both minimal excellence and ethical practice that all law schools must maintain to be accredited academies of legal education. Through a series of promulgated "Standards," the ABA announces the criteria necessary for accreditation.<sup>126</sup> The ABA Standards applicable to legal writing faculty merely state:

- (a) A law school shall establish and maintain conditions adequate to attract and retain a competent faculty

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are addressed as "professor" at St. Thomas. Their names, however, are not listed with other professors under the heading "School of Law Faculty." Rather they are enumerated separately under the designation, "Legal Writing Faculty." See ST. THOMAS UNIVERSITY SCHOOL OF LAW CATALOG 61-62 (1999-2000).

125. Arrigo, *supra* note 2, at 146 (footnote omitted). According to the 2000 Survey, *supra* note 97, at question 85, of 124 responding schools, 25 (20%) do not allow writing professors to teach any course but first-year legal writing and 37 (30%) permit writing professors to teach upper level writing, but no "substantive" courses. Thus, about 50% of schools do allow writing teachers to teach outside of that discipline, although 41 limit such teaching to summer sessions. A significant number of schools do not pay writing teachers full-time faculty rates for such additional work.

126. "Since 1952 the [ABA's] Council of the Section of Legal Education and Admissions to the Bar has been approved by the U.S. Department of Education as the recognized national agency for the accreditation of professional schools of law . . . . The Standards describe the requirements a law school must meet to obtain and retain ABA approval." ABA Standards, *Forward* (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/Foreword.html>>.

- .....
- .....
- (d) Under Standard 405(a), law schools employing full-time legal writing instructors or directors shall provide conditions sufficient to attract well-qualified legal writing instructors or directors.<sup>127</sup>

One need not have completed a year of legal writing to immediately recognize that Standard 405(d) provides neither specific benefits nor protections for writing teachers and certainly does not encourage trappings of respect such as tenure, multi-year contracts, professional level salaries or a meaningful voice in the governance of the law school community. Indeed, the plain language of Standard 405(d) requires virtually nothing on the part of law schools. Even under the adverse employment conditions attending most legal writing programs, the joy and fulfillment of teaching, the opportunity to conduct scholarly inquiry, the respect those outside the academy accord to anyone who teaches law and the unrelenting pressure of full-time law practice make positions in legal writing sufficiently attractive to lure not just "well-qualified" but exceptionally well-qualified writing faculty. Law schools, then, may impose the unkind employment conditions above described with complete professional impunity.<sup>128</sup> In this way, the ABA underscores and legitimizes the prevailing institutional prejudice that legal writing faculty are not to be accorded the dignity, respect

127. ABA Standard 405(a), (d) (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/chapter4.html>>.

128. By arresting contrast, Standard 405(c) accords significant security to the clinical faculty, the other class of full-time teachers routinely denied tenure-track status:

A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members . . . .

ABA Standard 405(c) (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/chapter4.html>>.

The ABA has explicated and fortified this provision with Interpretation 405-6 that includes the important admonition that contracts for tenure may only be revoked for "good cause." ABA Interpretation 405-6 (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/chapter4.html>>. Along similar lines, ABA Interpretation 405-8 states, subject to limited exceptions that "[a] law school shall afford to full-time clinical faculty members an opportunity to participate in law school governance in a manner reasonably similar to other full-time faculty members." ABA Interpretation 405-7 (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/chapter4.html>>. *Legal writing, by contrast, receives no similar encouragement from the ABA. No extant provision demands that writing faculty be afforded job security or allowed meaningful participation in governing the law school.*

and opportunities due all other full-time faculty members.<sup>129</sup>

### B. *Ridicule*

In addition to poor terms of employment, writing teachers are subject to ridicule and deprecation. Professor Arrigo caustically observed that law schools justify the poor treatment of writing faculty and the limited resources allotted to writing programs "by denigrating LRW as a field of legitimate academic interest and, by implication, criticizing and belittling anyone [who] finds the field worthy of her full personal attention."<sup>130</sup> One writing professor, preferring anonymity, recounted, "I did not realize that writing instructors are not real people. The dean and faculty seem to go out of their way to denigrate and exclude us . . . . Many of the faculty do not even bother to learn our names."<sup>131</sup>

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129. As of this writing, the ABA has published proposed revisions to Standard 405 which, if adopted, would accord legal writing teachers scarcely more protection. Proposed Standard 405(b) states:

(b) A law school shall have established and announced policies designed to afford full-time faculty members, including clinical and legal writing faculty, whatever security of position and other rights and privileges of faculty membership as may be necessary to (i) attract and retain a competent faculty, (ii) provide students with a program of legal education that satisfies the requirements of Chapter 3 of these Standards, and (iii) safeguard academic freedom. The form and terms of security of position and other rights and privileges of faculty membership may vary with the duties and responsibilities of different faculty members.

Proposed ABA Standard 405 (b) (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/chapter4.html>>.

Significantly, the standard does not prescribe that writing and clinical faculties be treated alike or substantially alike. Indeed, the ABA's Interpretation 405-2, discussing Proposed Standard 405(b), holds that "[a]ttraction and retention of competent *clinical faculty members* presumptively requires a form of security of position, appropriate opportunities to participate in law school governance, and other rights and privileges of faculty membership that are reasonably similar to that provided to full-time non-clinical faculty members." (Emphasis added). Interpretation 405-2 then details the substantial protections afforded by a "separate tenure track" or "renewable long-term contracts." Legal writing faculty are nowhere mentioned in any of the Interpretations and there are no ABA statements requiring, urging or even suggesting that writing programs should include a tenure-track equivalent, rolling, long-term contracts, salaries based upon the work performed or votes at faculty meetings. It may be presumed that even if enacted, the revised Standard 405 will dispense frigid comfort to writing faculty.

130. Arrigo, *supra* note 2, at 143.

131. SECOND DRAFT, LEGAL WRITING INSTITUTE 6 (Mar. 1994); *see also, e.g.,* Mary E. Gale, *Legal Writing: The Impossible Takes a Little Longer*, 44 ALB. L. REV. 298, 317-18 (1980) ("Nearly everyone who writes about legal writing duly records faculty disdain for the subject matter and administrative dislike of the expense."). Even tenure-track faculty who *might* be supportive or who harbor no overt hostility to writing faculty tend to be condescending. "Non-LRW instructors frequently make comments like, 'You know, I have no idea what you people do over in the legal writing department.' When asked, 'Would you like to know,

The derision by faculty and administrators certainly is well known to law students, thereby undermining the authority and respect writing professors bring to their classrooms. Faculty have been known to advise their students that legal writing is relatively unimportant and should not be taken seriously as contrasted with "substantive courses."<sup>132</sup> Disrespect from the faculty and administration, coupled with observable discrepancies of status, send a resolute message that students need not accord their writing professors the same regard as they do other faculty.

This disparagement and low esteem severely limit the likelihood for advancement when writing faculty attempt to seek tenure-track teaching positions within or outside their law schools. Indeed, the experience acquired from teaching legal writing may be detrimental in the greater teaching market. Hiring committees often consider writing professors poor candidates for tenure-track on the fallacious presumption that only lackluster, if not inferior, teachers would consent to be writing instructors.<sup>133</sup> The prejudice attached to teaching legal writing often is a bar too high to hurdle in the job market.<sup>134</sup>

### C. *Undue Criticism*

Because writing programs are held in low esteem and writing faculties are deemed unworthy of respect, programs and teachers are subject to attacks and criticisms by faculty and students, alike, that would never be tolerated if directed at tenured or tenure-track professors.<sup>135</sup> When faculty and administrators denigrate the importance of legal writing as a curriculum and writing professors as professionals, students respond to such indicia of disrespect. They feel free to criticize legal writing for any number of perceived deficiencies.

The propensity for disparagement is intensified because of the singular structure of the legal writing course. Unlike most law school courses that test students *via* one examination at the end of the semester, a sound writing program consists of numerous graded assignments of increasing degrees of complexity. Students

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because I'd be happy to tell you?', a common reaction includes glazed eyes and rapid retreat." Arrigo, *supra* note 2, at 178.

132. Arrigo, *supra* note 2, at 143 & n.117.

133. See, e.g., Elyce Zenoff & Jerome A. Barron, *So You Want to Hire a Law Professor?*, 33 J. LEGAL EDUC. 492, 503 (1983).

134. See Lee, *supra* note 99, at 490; Arrigo, *supra* note 2, at 147, 175.

135. Arrigo, *supra* note 2, at 159.

receive their first law school grades in legal writing — long before facing the rigors of in-class examinations — and for many students those grades are an unpleasant shock. Most students, even those who excelled in college, receive “Cs” or “Bs” in legal writing, possibly the first such grades they have seen in years. For some students, the demands of numerous and difficult assignments coupled with the dismay of receiving less than exemplary grades generates a degree of discontent, even hostility, towards legal writing faculty. Although many students accept grades and accompanying detailed assessments of their work with grace and a professional interest in improvement, others become angry, confused, and even resentful. Rather than accept their own need to improve, they blame the quality of instruction.

Indeed, the entire first year curriculum often confuses and frustrates students. It usually is not until near the end of the first or second semester that students begin to comprehend the difficult concepts included in contracts, torts and other introductory courses. During the weeks before the onset of final examinations, most students are nervous, unsure that they are comprehending any of their course of study. Along with this apprehension comes challenging, time-consuming and utterly unfamiliar types of graded assignments from the legal writing faculty. Wishing for a vulnerable target of authority upon which to vent their anxiety, students often direct the accumulated hostility of the entire semester toward the only teachers from whom they have received grades, and who, by coincidence, are the least prestigious faculty, thereby all the more accessible as scapegoats. Thus, writing professors absorb the brunt of student bewilderment and disorientation that is inherent in introductory legal studies.<sup>136</sup>

As disheartening as a culture of student criticism may be, more dismaying is the propensity of faculty and administration to uncritically accept student grievances about writing programs and professors. Faculty and deans will bring to directors of writing programs students' complaints in a confrontational and accusatory manner indicating their presumption that the students must be right. Tenure-track faculty often are willing to accept students'

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136. This is not to imply that students do not ever have valid complaints about writing programs or those who instruct them. Of course, programs are imperfect and writing professors are hardly flawless, just as one might say for “doctrinal” courses and tenure-track faculty. The point simply is that there is nothing innate about the quality or the import of either writing programs or writing professors to presume that the amount of criticism that often occurs is deserved.

complaints that legal writing is inadequately taught and to express that opinion to other faculty and to administrators.<sup>137</sup> By contrast, tenure-track faculty tend to dismiss or minimize similar grievances when expressed against one of their own.<sup>138</sup>

At most law schools, the formal legal writing program is taught only during the first year after which intense training in research and writing ceases.<sup>139</sup> Writing programs, then, tend to be judged on the rather unrealistic basis that if students are not significantly adept at research and writing by the end of the first year, the writing program and its instructors are at fault. Thus, faculty with scant if any appreciation of legal writing pedagogy and the demands of teaching in that arena will pointedly criticize aspects of legal writing programs on the mistaken presumption that legal writing is a simple skill the teaching of which requires little talent, depth or experience. In sum, unlike “substantive” courses, any weaknesses in writing programs become emblematic that the program is structurally unsound, that the writing professors are inept, or both. Compliments, by contrast, tend to be dismissed as atypical.<sup>140</sup>

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137. Arrigo *supra* note 2, at 159 (“Complaints about LRW teachers were sometimes treated as valid by an administration likely to minimize identical complaints about a doctrinal professor.”). A tenured professor once asked me why citation form is not taught in legal writing. I assured him that we spend plenty of time on that rather technical matter and asked him why he thought we did not. He said that one of his students had written a seminar paper with terrible citation form on simple sources such as judicial opinions. The student told the teacher that he had not been taught how to cite judicial authority during first-year legal writing. I was staggered that the tenured professor would simply accept the student’s obviously unlikely excuse that his carelessness was due to the legal writing program’s failure to instruct on citation form. If within that seminar paper the student had misstated the Parole Evidence Rule, surely the professor would not accept as an explanation — “My contracts teacher never taught that Rule.”

138. See Arrigo, *supra* note 2, at 159. Tenure-track professors might even take complaints as an emblem that they are doing their jobs, opining that students always complain when a course is challenging, the teacher is demanding and the material is unfamiliar. If students were quiet and happy, one might suspect that the teachers were “spoon feeding” the lessons, simplifying the curriculum and otherwise making the first year too easy. Whatever the merits of such arguments, rarely are they used to dispel students’ criticisms of legal writing.

139. Rideout and Ramsfield, *supra* note 110, at 77-78.

140. For instance, one tenured professor came to me with certain complaints she “had heard” about the teaching effectiveness of one of the writing professors. I noted that I happened to have judged all of the moot court arguments performed by that professors’ students. Along with the numerous guest judges, I found the students’ presentations well reasoned and sophisticated. The tenured professor scowled and waived away my point, “Students *always* do well at moot court.” As this professor should have acknowledged, a writing teacher’s class of students can only do well during moot court arguments if they have been properly *trained* in legal analysis and oral advocacy.

*D. Exploitation of Writing Faculty*

Consistent with the foregoing is the fourth form of discrimination, schools often exploit writing professors by assigning them additional work without added compensation, enhanced job security, or even thanks. Professor Maureen Arrigo described the pattern:

Without institutional power available for self-protection, teachers may find themselves assigned by default to undertake special challenges for which they are not specifically qualified, trained, or compensated . . . .

Not only does this work of LRW instructors have an institutional financial payoff [by imposing on writing faculty extra responsibilities that otherwise would have to be assumed by hiring more professional staff], it also has an emotional payoff that enables faculty and administrators to take partial credit for things they are not actually doing . . . . [The] faculty and administration are likely to take credit for the students' sense of contentment — "look what a great job WE are doing for our students."<sup>141</sup>

Professor Arrigo discussed adding to writing faculty duties. Let me add another example. The St. Thomas program consists of three rather than two mandatory semesters of legal writing and analysis. In addition to a traditional first-year curriculum,<sup>142</sup> during their second semester of their second year, St. Thomas students take a required "advanced" course designed both to hone the abilities acquired during the first year and to introduce additional aspects such as client letters, complaints, answers, discovery matters, trial-level motions and settlement negotiations.

Formerly, the second-year class was taught by adjuncts — practitioners from the Miami area. During the Fall 1997 semester, certain senior faculty members objected to having adjuncts teach a required course. The writing professors recognized the sound pedagogy of taking the course out of the hands of adjuncts even though many were quite capable instructors. However, we

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141. Arrigo, *supra* note 2, at 165-66 (quoting Susan J. Adams, *Because They're Otherwise Qualified: Accommodating Learning Disabled Law Student Writers*, 46 J. LEGAL EDUC. 189, 207-08 (1996) (footnotes omitted, capitalization of the word "WE" supplied).

142. The familiar organization of the predominant first-year writing course is set forth at notes 181-85, *infra*, and within the accompanying text.

requested the hiring of one or two more writing professors because of the increased work load.

The Dean agreed that full-time faculty are more appropriate but refused to increase the number of full-time writing teachers. Rather, he sent word to the writing faculty that they would teach the extra course without compensation or their contracts would not be renewed. Thus, prior to the sudden reorganization of April 2000 described at the outset of this article, the writing professors instructed an additional two-credit, required writing course, with no increase in salary, no additional job security and not even a begrudging "Thank you." I cannot imagine the customary workload of tenure-track professors being substantially increased without significant added compensation or other comparable benefits.<sup>143</sup>

#### *E. The Relatively Powerless Legal Writing Director*

The fifth form of disparate treatment affects directors of writing programs. Granted, directors have somewhat more prestige than other writing teachers, are somewhat more likely to be tenure-tracked and receive better salaries than the professors they supervise.<sup>144</sup> However, as Professor Jan Levine cautioned, "Although [one] . . . may think that a program's director has power, this power is often illusory, and power is always relative."<sup>145</sup> A director may be held responsible for the problems emanating from legal writing, but may have no authority to effectuate the pedagogical and administrative changes needed to alleviate the adverse conditions.<sup>146</sup>

#### *F. Sex Discrimination*

The foregoing five modes of discrimination concern the adverse

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143. Indeed, recently a St. Thomas professor had to take an unexpected semester leave. Other tenure-track faculty who had prepared and, in fact, were teaching the very courses during that semester were assigned to conduct the absent teacher's classes. These faculty were paid sizeable bonuses for handling an extra class for which they did not have to engage in any substantial extra preparation. Similarly, during the Spring 1999 semester, along with his usual courses, a tenure-track professor obtained the Dean's permission to teach the First Amendment. Not only did the professor have the pleasure of expanding his teaching experience into a new area of a field that he loves, but he was paid a generous stipend amounting to nearly a third of the salary paid to junior legal writing professors.

144. See Levine, *supra* note 97, at 1106.

145. *Id.*

146. *Id.* at 1062-63; see also, e.g., Arrigo, *supra* note 2, at 181-82 ("The non-tenure-track LRW program director is likely to fit the powerless leader paradigm . . . . Besides being isolated, she can be rendered less effective by her lack of institutional status.")



contractual terms and general derision routinely exacted upon legal writing faculty based on their status as legal writing faculty. Before addressing the merits of the purported justifications for the second class citizenship of writing faculty, one other form of disparate treatment should be mentioned — sex discrimination. In fact, sex discrimination apparently explains much of the initial and, perhaps, continuing motivation for the shameful treatment accorded to legal writing.

As addressed by Professor Arrigo in her alarming and compelling article *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*,<sup>147</sup> from their inception, legal writing programs have been staffed predominately by women — a reflection certainly more of discriminatory stereotyping than respect.<sup>148</sup> Strikingly, the tendency towards sequestering female law professors into legal writing programs is no remnant of a distant past. To the contrary, as Professor Arrigo noted, according to a 1994 survey, the vast majority of law schools' writing programs "were staffed by more than 50% females."<sup>149</sup> Indeed, "the disproportionately high percentage of women in LRW may have increased over time" as evinced by a 1992 survey that "showed that only 58% of the 78 schools responding had programs that were more than 50% staffed by women."<sup>150</sup>

For Professor Arrigo, as well as other commentators,<sup>151</sup> this is evidence of irresponsible typecasting if not blatant *animus*:

It may be that LRW work shares a characteristic common to work generally assigned to women — that is, the work comes

147. See Arrigo, *supra* note 2.

148. See *id.* at 118-21, 149-50, 160-62. See also, e.g., Levine, *supra* note 112, at 1074.

149. Specifically, according to the 1994 survey conducted by the Legal Writing Institute, "75% of the 115 schools that responded were staffed by more than 50% females. Forty-one LRW programs were staffed by between 51% and 75% females; forty-three of the programs were staffed with between 75% and 100% females." Arrigo, *supra* note 2, at 120 (emphasis added) (footnotes omitted).

150. *Id.* at 120-21 (footnotes omitted). These figures are remarkable when contrasted with the low percentage of women in more prestigious, tenure-track law professorships. Although many schools have made sincere efforts to increase the gender diversity of their faculties, a 1996 ABA report "demonstrate[s] that women held 28% of faculty and administrative positions in law schools but only 16% of the tenured law school jobs." Arrigo, *supra* note 2, at 119. It appears that women are disproportionately ushered into legal writing positions as contrasted with their numbers in "substantive" law positions.

151. See, e.g., Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 552 (1988); Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN'S L.J. 75 (1997); Mairi N. Morrison, "May It Please Whose Court": How Moot Court Perpetuates Gender Bias in the "Real World" of Practice, 6 UCLA WOMEN'S L.J. 49 (1995).

to be viewed as a "support" function of the "real work" being done by men; it may even be viewed not as "work" at all, but as "behavior" reflecting essential characteristics of women. Once the work has been thus essentialized, the "work" becomes invisible and either under-compensated or not compensated at all.

. . . An essay by University of California Professor Cynthia Tuell entitled "Teaching as Women's Work," reveals parallels between the treatment of composition teachers and that of LRW teachers. Professor Tuell points out that composition teachers are not considered "normal" or "real" faculty. Rather, the course is a service course; thus, its teachers are tantamount to university "handmaids." As handmaids or housekeepers, the composition teachers clean up the comma splices, organize student discourse, and generally "unclutter" the students' writing so that the literature professors can be provided with papers that are well written and no trouble to read. No authority is needed for the proposition that housework commands neither respect nor high wages.<sup>152</sup>

Prof. Arrigo's eloquent analysis supports the assertion that many legal writing programs have been and perhaps remain bulwarks of sex discrimination through which, by deliberation, tradition or happenstance, law schools continue to effectuate adverse contractual terms and other indices of prejudice.<sup>153</sup>

#### IV. THE PURPORTED JUSTIFICATIONS FOR THE DISPARATE TREATMENT OF LEGAL WRITING FACULTY

To determine if the distinctly discordant terms of employment

152. Arrigo, *supra* note 2, at 160-62 (discussing CYNTHIA TUELL, COMPOSITION TEACHING AS "WOMEN'S WORK": DAUGHTERS, HANDMAIDS, WHORES, AND MOTHERS, *in* WRITING OURSELVES INTO THE STORY: UNHEARD VOICES FROM COMPOSITION STUDIES 123 (Sheryl I. Fontaine & Susan Hunter eds., 1993) (other citations and footnotes omitted).

153. Perusal of the 2000 Survey, *supra* note 97, Appendix A, intimates that sex discrimination may still be endemic among writing programs. For instance, the average 12 month salary of female writing directors (\$73,171) is 86% of the average salary for male directors ( \$84,817). Similarly, the average 9 month salary for female directors is (\$70,480) 77% of the male average ( \$91,182). More specifically, female directors with 0-5 years in their directorships averaged \$66,411, 79% of the \$83,786 average salary made by male directors with 0-5 years in their directorships. Women with 6-10 years in their directorships average \$70,617, 80% of the \$88,250 averaged by similarly situated male directors. The data further indicate that male directors, more than female directors, (1) are likely to be allowed to teach other courses, (2) are substantially better paid for teaching additional courses, (3) are allowed to vote at faculty meetings, and (4) are titled "professor."

exacted on legal writing professors are rational — thus neither arbitrary, nor illegitimate, nor unfair — one must look at both the reasons for and the effects of the treatment to discern if the resultant benefits outstrip the detriments.<sup>154</sup> Law schools raise five alleged justifications for according writing faculty second class citizenship: (1) legal writing is not real teaching; (2) writing professors are not as well credentialed as tenure-track faculty; (3) writing professors need not produce scholarship; (4) writing professors do not need the protections of tenure or similar forms of job security; and (5) law schools cannot fiscally afford to treat writing faculty like tenure-track faculty even if they deserve to be so treated. As detailed below, none of these justifications are meritorious.<sup>155</sup>

#### A. *Purported Justification — Legal Writing Is Not Real Teaching*

The most prominent and persistent excuse for the disparate treatment of legal writing faculty is that, as one commentator ridiculed, teaching legal writing is “donkey work.”<sup>156</sup> Put somewhat more kindly, “writing is writing.”<sup>157</sup> Thus, critics argue, “Legal writing . . . is merely a matter of remedial writing, existing primarily to correct what was not learned in undergraduate writing . . . . Writing instruction then becomes a repetition of what occurred at the junior high level . . . .”<sup>158</sup> Under this crabbed conception, legal writing is nothing more than a technical course fit for paralegals in a law school setting — a simple skill, demanding scant intellectual effort from either the students or the teachers.<sup>159</sup> Critics claim that teaching writing is not intellectual because it consists of imparting set rules, standards and techniques necessitating modest creativity, imagination and thought. Additional

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154. See *supra* notes 37-53 and accompanying text.

155. Among the forms of disparate treatment, I noted that many writing programs have been and may continue to be bastions of sex discrimination. See *supra* notes 147-53 and accompanying text. No elaborate discussion is required to support the proposition that law schools act arbitrarily, indeed unlawfully, if any of the disparate terms and conditions of employment imposed on writing faculty are designed or implemented because a large percentage of writing faculty are female. See Title VII of the Civil Rights Act of 1964 (The Fair Employment Act), 42 U.S.C. § 2000e-2 (prohibiting discrimination on the basis of, *inter alia*, sex in terms of employment).

156. Willard H. Pedrick, *Should Permanent Faculty Teach First-Year Legal Writing?* A Debate, 32 J. LEGAL EDUC. 413, 414 (1982).

157. *Id.* at 413.

158. Rideout and Ramsfield, *supra* note 104, at 41-42 (criticizing “writing is writing” argument, footnote omitted).

159. See *id.* at 44-47.

claims are that writing courses are not intellectually challenging for students because they require little more than the memorization of grammatical rules and structural forms attendant to memoranda, briefs, letters and other species of lawyerly writing.<sup>160</sup> To such critics, instructing the Blue Book — teaching citation form — is the perfect metaphor to describe the meager conceptual demands of the legal writing curriculum as a whole.<sup>161</sup>

If indeed these adverse and degrading impressions of both the pedagogy and those who teach it were apt, writing instructors should be accorded terms and conditions of employment less lucrative and less prestigious than those enjoyed by tenure-track faculty. Disparate treatment for disparate work is not irrational.<sup>162</sup> The academy, however, knows or should know that its perceptions of legal writing programs are wrong. Teaching legal writing is no less demanding and no less difficult than teaching “substantive courses;” thus, the rationality of disparate treatment based on purportedly dissimilar job responsibilities vanishes.

As part of its accrediting standards, the American Bar Association has emphasized unequivocally that:

[I]n order to protect the interests of the public, law students, and the profession, [an approved law school] must provide an education program that ensures that its graduates . . . receive basic education through a curriculum that develops . . . skills of legal analysis, reasoning, and problem solving; oral and written communication; legal research; and other fundamental skills necessary to participate effectively in the legal profession . . . .<sup>163</sup>

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160. “Some go so far as to say that [teaching legal writing] is anti-intellectual because it distracts students from the real business of learning substantive law by competing with the rest of the curriculum for their study time. Lurking within this view is also the fear that the ‘trade-school’ mentality will prevail and that students will learn more about the practical side of their careers and not enough about the theoretical, which they will never revisit.” Rideout and Ramsfield, *supra* note 104, at 47. *See also, e.g.,* Lee, *supra* note 99, at 489; Lorne Sossin, *Discourse Politics: Research and Writing’s Search for a Pedagogy of Its Own*, 29 *NEW ENG. L. REV.* 883, 883 (1995).

161. Some uninformed critics disparagingly believe that “only ‘an incompetent or a borderline crackpot’ could have an interest in a long-term commitment to teaching the subject . . . [for] ‘no intelligent J.D. with academic aspirations really wants to teach a subject like LRW that is beneath the dignity of a law professor.’” Lee, *supra* note 99, at 490 (quoting Jack Achtenberg, *Legal Writing and Research: The Neglected Orphan of the First Year*, 29 *U. MIAMI L. REV.* 218, 218 (1975)).

162. *See supra* notes 16-24 and accompanying text.

163. ABA Standards, Preamble § (2)(ii) (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/preamble.html>>.

Similarly, in its enumerated standards for the minimum curriculum acceptable for accreditation, the ABA states, "A law school *shall* offer to all students: . . . an educational program designed to provide its graduates with basic competence in legal analysis and reasoning, legal research, problem solving, and oral and written communication; . . . at least one rigorous writing experience; and . . . adequate opportunities for instruction in professional skills."<sup>164</sup> Clearly, the ABA recognizes the crucial, overarching importance that legal writing and research play in the education of attorneys. *It is all the more striking and paradoxical, then, that the professors assigned to teach the very courses that consolidate legal writing, research, and analysis are the best respected, least privileged members of the faculty.*

### 1. *Philosophical Approaches to Legal Writing Pedagogy*

As commanded by the above-cited ABA Standards, the goals of the typical first-year program are threefold: to introduce students to legal analysis, legal research and written and oral legal communication. It is a challenging and ambitious agenda requiring no less talent, dedication, professionalism and pure hard work than the most rigorous "substantive courses." Certainly, a good first year legal writing course will help students improve their English, although it cannot be expected to alleviate fully the failings of an inadequate undergraduate education in composition, style and grammar. But a legal writing curriculum must be much more than a recapitulation of undergraduate composition. A proper first year writing program encapsulates the process of lawyering itself.<sup>165</sup> As the Honorable Kenneth F. Ripple recently stressed:

[W]riting [is] a communal tool, a way by which lawyers can reason together to resolve differences . . . . In short, the legal

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164. ABA Standards 302(a)(2)-(4) (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/standards/chapter3.html>> (emphasis added). The ABA Proposed Standards, although amending Standard 302 somewhat, continue to accent the compelling importance of legal writing, research and analysis. The proposed revisions for Standard 302 read in relevant part:

(a) A law school shall offer to all students in its J.D. program: (1) instruction in the substantive law, values and skills (including legal analysis and reasoning, legal research, problem solving and oral and written communication) generally regarded as necessary to effective and responsible participation in the legal profession; (2) at least one rigorous writing experience; and (3) adequate opportunities for instruction in professional skills.

165. See Robert W. Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519 (1985); James C. Raymond, *Legal Writing: An Obstruction to Justice*, 30 ALA. L. REV. 1 (1978); Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1984).

writing program ought to be a prime venture for inculcating the new member of our profession with a sense of responsibility for speaking the truth in a professional world in which, as Justice Douglas once put it, there are few blacks and whites; the greys predominate, and even among the greys the shades are innumerable."<sup>166</sup>

A recent scholarly elaboration on the theme of writing as language explained that "[t]he writing-is-writing position ignores the linguistic definitions of professional register and discourse community . . . . Law relies on a new understanding of rhetoric, schemata, ethics, and language. In law, language is not mere style; it is itself the law."<sup>167</sup> In this way, legal writing is the entrée into the profession and the basic mastery of effective, ethical legal communication is proof of one's worth as a lawyer.

The effective, modern writing professor must fully understand that writing does not simply aid in improving stylistic skills; rather, persuasive communication, both written and oral, is inextricably coupled with and inseparable from sophisticated thinking and forceful analysis.<sup>168</sup> Judge Ripple implored law faculties and administrators to appreciate this basic but important correlation of mind and pen:

[W]e need to spend more time making the students conscious of the intimate relationship between legal reasoning and legal writing. Legal writing cannot be thought of as simply a "skills course," to the extent that the term is used to describe parts of the curriculum less important than "substantive" courses. Indeed, a good writing instructor ought to take the lead in convincing students that, in essence, the law school experience is an education in how to think. Do we emphasize sufficiently that writing is for most legal ventures the primary engine that drives the reasoning process?<sup>169</sup>

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166. Honorable Kenneth F. Ripple, *Legal Writing in the New Millennium: Lessons from a Special Teacher and a Special "Classroom,"* 74 NOTRE DAME L. REV. 925, 929-30 (1999) (citing *Estin v. Estin*, 334 U.S. 541, 545 (1948)).

167. Rideout and Ramsfield, *supra* note 104, at 42-43.

168. *See id.* at 48-61; Arrigo, *supra* note 2, at 139-40; Philip C. Kissam, *Thinking (by Writing) About Legal Writing*, 40 VAND. L. REV. 135, 136-46 (1987); Levine, *supra* note 97, at 1073 n.25.

169. Ripple, *supra* note 166, at 928-29. Indeed, Judge Ripple made the intertwining of legal discourse and legal thought the fulcrum of his article. *See id.* at 926 ("[W]riting [is] not just a means of communication. It [is] a necessary tool for thinking through the most difficult problems.")

The understanding that, "In fact, writing is an integral part of thinking and cognitive development,"<sup>170</sup> enjoys support not simply from pragmatic experience but a wide-ranging body of theory. For example, the noted philosopher Ludwig Wittgenstein observed, "For a large class of cases — though not for all — in which we employ the word 'meaning' it can be defined thus: the meaning of a word is its use in the language."<sup>171</sup> By this Wittgenstein meant "that communication exists on the basis of agreed patterns of word and sentence usage."<sup>172</sup> That communication of ideas is a function of the patterns of language implicates the essential connection between language (spoken and written) and the creation of concepts.

Along similar lines, as one scholar recently observed, the postmodern perspective of Jacques Derrida substantially informs the nature of legal writing and the merit of those who teach it:

Derridean philosophy would label the separation of speech and writing (and, by extension, of doctrine and writing) as a futile endeavor . . . . To Derrida, "speech as a signifier of thought, shares all the properties that we have associated with writing. Speech is merely a special case of the generalized idea of writing." Legal writing and legal doctrine occupy a similar relation to each other. Each is necessary for the existence of the other.<sup>173</sup>

Similarly, in a justifiably praised article on the theory of legal writing, Professors Christopher Rideout and Jill Ramsfield espoused an epistemic-societal perspective to explain the dynamics of legal writing. The epistemic aspect accents that:

[W]riting is used not only to communicate knowledge, but also

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170. Rideout and Ramsfield, *supra* note 104, at 45 (citing Janet Emig, *Writing as a Mode of Learning*, 28 C. COMPOSITION & COMM. 122 (1977)). See also Linda Flower & John R. Hayes, *A Cognitive Process Theory of Writing*, 32 C. COMPOSITION & COMM. 365 (1981); JOHN R. HAYES & LINDA S. FLOWER, UNCOVERING COGNITIVE PROCESSES IN WRITING: AN INTRODUCTION TO PROTOCOL ANALYSIS, IN RESEARCH ON WRITING: PRINCIPLES AND METHODS 207 (Peter Mosenthal et al. eds., 1983).

171. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 43 (G.E.M. Anscombe trans., 3d ed. 1958).

172. Bruce A. Markell, *Truth*, 72 IND. L.J. 1115, 1127 (1997). This led to the well known and oft-cited conclusion by Wittgenstein that "we communicate through a web of interconnected customs and conventions . . . called language games." *Id.*

173. Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 ARIZ. L. REV. 105, 139 (quoting J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 757 (1987)).

to generate knowledge. That is, writing plays a role in thinking . . . . The epistemic view of writing emerges from a view of language as being dynamic rather than static and from a view of knowledge as being dialectical, the product of an interaction between the writer, reader, subject, and text. Knowledge does not exist except within linguistic forms that both construct and constrain it.<sup>174</sup>

Rideout and Ramsfield next enriched the philosophy of legal writing by correcting a significant omission — the lack of a social dynamic. That is, they broadened the focus from just the “individual writer to acknowledge the social contexts within which writing takes place and, thus, to acknowledge the ways in which writing generates meanings that are shaped and constrained by those contexts.”<sup>175</sup> The meaning of words and the forms of communication are not created outside of a social setting. Particular modes of discourse are formed by the ethical, political, economic, psychological and sociological paradigms of given social groups. These discourse conventions, in turn, enhance the paradigms espoused by the applicable groups, permitting those who master the discourse — the language — to clarify, modify, expand and otherwise apply the paradigms. Thus, to acquire membership in a group, large or small, to comprehend the beliefs of the group, to communicate effectively within the group and to critique the paradigms that structure the group, an individual must know both the group’s language — the meaning of its words and terms — and its forms of communication, oral and transcribed.<sup>176</sup>

Discourse conventions of the given group, therefore, help to acclimate the groups’ members and are essential to convert outsiders. To reverse a popular cliché, “If you want to walk the walk, you have to talk the talk.” Indeed, battles for the predominancy of ideas within a given group and society are clashes of competing discourse conventions. Clearly, the route to primacy is through controlling the modes of acceptable argument within given sectors of society.<sup>177</sup>

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174. Rideout and Ramsfield, *supra* note 104, at 54-55 (footnotes omitted).

175. *Id.* at 57. See also, e.g., Arrigo, *supra* note 2, at 139-40.

176. See MARTHA C. NUSSBAUM, POETIC JUSTICE 62 (1995); RONALD DE SOUSA, THE RATIONALITY OF EMOTION 182 (1991); Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. AND MARY L. REV. 741, 744-45 (discussing law as narrative).

177. These principles are exemplified in “narrative theory.” Narrative theory argues that individuals and groups relate and interpret experiences through relating both stories and “narrative,” that is, clusters of stories which, taken as an entirety, impart lessons, define



Those who teach discourse conventions — as do legal writing professors — must understand the epistemic-societal dynamics, limitations and received biases of their discipline as fostered by the discipline's language. In addition and most importantly, they must educate their students to apprehend those dynamics, limitations and biases. Only then can students grasp how properly to comprehend and to utilize legal arguments.<sup>178</sup>

The responsibility of the writing professor, *consistent with the role of the other first year professors*, is to introduce the novice to the various discourse conventions — the languages and modes of communication — that lawyers utilize. Grammar, syntax, sentence structure and citation form are components of but hardly comprise the heart of those discourse conventions. The education imparted by writing teachers would be deficient indeed if they adopted the worn and completely inaccurate approach that “writing-is-writing.” Rather, conceptualizing legal arguments, forming rational modifications and enlargements of existing legal concepts, devising responsible new ideas, coping with multiple, often conflicting, doctrines are all part of the modern legal writing course. Given the epistemic-societal reality, it could hardly be otherwise.

Thus, far from either simple or simplistic, the notion of legal writing as pedagogy is premised on a rich and sophisticated philosophy. Contemporary writing professors fully understand that the process of legal writing is neither metaphysical nor exclusively instrumental.<sup>179</sup> And, indeed, despite their self-serving protestations

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ethics and instruct modes of conduct. See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 383-85 (1996). Correspondingly, narrative jurisprudence argues that the processes of law building and legal decision making, no less than other human enterprises, involves reviewing and choosing among separate stories brought together in a lattice of narrative. “The transformative insight of narrative scholarship is that narrative structure and conventions shape all legal discourse.” *Id.* at 382. See also, e.g., Richard Delgado, *On Telling Stories in School: A Reply To Farber and Sherry*, 46 VAND. L. REV. 665, 670-71 (1993); Delgado, *supra* note 176, at 744-45. Much narrative jurisprudence attacks the status quo, arguing the familiar but critical point that the prevailing law is not based on transcendent truths, but politics and power. Thus, the political agenda of many theorists is unashamedly to change hearts and minds in the hope of replacing one discourse structure — one set of narrative and paradigm languages — with another. See *id.* at 751; Richard Delgado, *Rodrigo's Book of Manners: How to Conduct a Conversation on Race — Standing, Imperial Scholarship, and Beyond*, 86 GEO. L.J. 1051, 1056 (1998).

178. Rideout and Ramsfield, *supra* note 104, at 59 (footnote omitted).

179. “[F]ocus on instrumental writing misses the fundamental point that the writing process itself can serve as an independent source, or critical standard, that alters and enriches the nature of legal thought . . . . [T]he actual writing of the analysis, be it in an appellate brief, law review article, memorandum, or estate plan, will allow the writer as thinker to develop new connections or new ideas about what the law is and how it should

that it is not intellectually exacting, “doctrinal” faculty have always known that teaching legal writing is demanding not simply because of the volume of work, but also because to instruct legal writing, one must teach how to conceptualize law — the intellectual process of lawyering.<sup>180</sup>

## 2. *The Structure of a Curriculum in First Year Legal Writing*

The legal writing curriculum is designed to introduce the three previously mentioned interrelated aspects: finding, analyzing and communicating law.<sup>181</sup> While discrete programs may vary in detail, the following adumbration is typical. The first semester of the first year begins with classes on “briefing” cases. Students read and brief a line of cases, perhaps on relatively simple tort or contract issues or on more complex matters such as police searches or the definition of a “weapon” in criminal law.

Next, students receive a fact pattern related to the line of cases they earlier briefed and are taught how to construct a simple “office style” memorandum.<sup>182</sup> The previously briefed cases constitute the “closed universe” of law applicable to the assigned fact pattern with which students draft their initial office memoranda. In this way, the students’ first legal memos become manageable documents. The briefing and “closed memorandum” exercises comprise students’ introduction to the intricacies of legal thought — isolating discrete legal concepts, harmonizing, to the extent possible, seemingly conflicting standards of law, conceptualizing the interplay of theory and fact, forming discrete legal arguments and their first tentative attempts to communicate legal ideas in writing.

In addition, often while in the process of writing their first

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be applied in particular situations.” Kissam, *supra* note 168, at 140.

180. “[T]he very proponents [favoring the disparate treatment of legal writing faculty], when asked how they think and write, may suggest that the two are interwoven, that their own creative thinking in the law progresses with and through their writing, that the process of writing is in fact the process of problem-solving and thinking.” Rideout and Ramsfield, *supra* note 104, at 45 (footnote omitted).

181. “There is no dearth of literature or experience concerning how to deliver the product of an outstanding writing course, and the institution willing to dedicate resources to a fine program can have one.” Arrigo, *supra* note 2, at 141 (footnote omitted).

182. An office memorandum is a document for the internal use of a law office. If prepared for litigation it is entitled to protection as confidential “work product.” See Fed. R. Civ. P. 26(b)(3). The office memo addresses one or more issues arising from a given case or client file. In essence, it is a strategy document that candidly assesses the strengths and weaknesses of the client’s legal position. See, e.g., LAUREL CURRIE OATES ET AL., *THE LEGAL WRITING HANDBOOK* (2d ed. 1998).

memos, students are familiarized with the process of legal research and the myriad primary and secondary sources through which lawyers find applicable law and policy. Teaching legal research is considerably more complex than it was twenty or even five years ago given the numerous computer assisted modes of research that did not exist until recently. Students are assigned legal research exercises — the vaunted “paper chase” — requiring them to become familiar with the research tools and sources of primary law from which to build legal arguments. It is important to accent that no less than legal writing, legal research is inextricably linked to legal thought. Just as writing is *not* merely writing, neither is research simply learning the names and locations of digests, annotated codes, encyclopedias, treatises, Internet sites and other familiar sources of law, analysis and commentary. Forming a research strategy requires imagination and discipline. One cannot attack a legal problem without conceptualizing — thinking about — the nature of the problem and its probable meanings. One must use legal discourse modes not only to choose among available research tools but also to decide how to use each tool to its best advantage.

After completing and rewriting their “closed memos” and “paper chases,” students receive their first “open” memorandum assignment which is the closest simulation they will experience in the first year to acting on behalf of a client. Students are given a fact pattern, perhaps in the form of a mock judicial opinion or simulated trial transcript, from which they must discern one or more legal issues to research. Based on the facts, students research and draft lengthy office style memoranda without the benefit of either an assigned closed universe of precedents or a book of edited, applicable judicial opinions. Students form appropriate research strategies, find the relevant legal materials and construct (one hopes) terse, clear memoranda. The “open” memorandum assignment is particularly demanding when the legal questions are unresolved. Open memoranda assignments often involve questions that have split the lower courts or raise fact patterns that have not been addressed by the applicable court of last resort. Thus, students do not have the luxury of advising in their memoranda that a clear resolution of the particular legal question exists.

The second semester of first year legal writing commonly consists of “moot court.” Students research an intricate, complex, unresolved issue of law and prepare an appellate level, professional

quality advocacy brief.<sup>183</sup> The semester culminates with oral arguments in which the students argue their legal cases before a panel of “judges,” usually consisting of the legal writing professor, alumni and law professors. Students are challenged by the panel to defend their arguments the way practicing lawyers are questioned by actual appellate benches.

The singular structure of legal writing programs provide further evidence why, from the standpoints of both pedagogy and workload, instructing legal writing, research and analysis is worthy teaching. Standard law courses are taught pursuant to the Langdellian “case book” containing already edited judicial opinions, abridged statutes and heavily excerpted articles, all outlined according to particular topics within the given discipline. Students do not have to scrutinize entire judicial decisions, excessively lengthy essays and turgid paragraphs of legislation to discover the core points germane to the given topic of substantive law assigned for the day’s discussion. The tasks of the substantive law teacher are to assure that students discern the points of the assigned case excerpts and to incite students to critique those points for clarity, logic, utility and consistency with other related aspects of law. Legal writing, by contrast, requires students to research and to analyze law directly from primary and secondary sources, without the benefit of some expert’s editing. The students must be taught how to cull through the cases, commentaries and legislative materials, discovering for themselves the applicable concepts and discarding unrelated information.

While classroom instruction is indispensable in preparing groups of students for the rigors of legal writing, clearly “the heart of our teaching is found in the written critiques of our students’ writing and in the individual conferences we hold with our students to discuss their work and our reactions to their work product.”<sup>184</sup> It is important to reemphasize the exacting demands placed on writing professors in reviewing student-written material. Every aspect of students’ memoranda must be critiqued in detail: the cogency of reasoning; the clarity of sections, paragraphs, sentences and particular words; the organization of both arguments and discrete

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183. Unlike the office memo which serves as an internal document candidly assessing for strategic purposes the strengths and weaknesses of a client’s case, the advocacy memorandum or brief is prepared for a court or similar conflict resolution authority. The advocacy document presents the client’s position in the best possible light within the confines of legal ethics. See OATES, *supra* note 182.

184. Levine, *supra* note 97, at 1072 (footnote omitted).

discussions within arguments; the choice of legal materials and the tone of the prose. These and many other facets must be discussed fully with each student in a series of individual conferences and elucidated through meticulous explanations written by the teacher on the face of each memorandum.<sup>185</sup> Thus, it is fair to say that for the professors as well as the students, the work required during the first semester of a well managed legal writing program — both quantity and quality — is at least as rigorous, conceptual, demanding and difficult as assignments found in any first year course.

*B. Purported Justification — Writing Professors Have Relatively Mediocre Professional Credentials*

Four other bases for disparate treatment need to be addressed to apply the Supreme Court's rationality framework. It has been argued that the credentials of legal writing professors are considerably less impressive than those of tenure-track professors, thus justifying lower pay and generally demeaned status.<sup>186</sup> The

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185. The demands of properly reviewing and assessing student papers were well described by Professor Louise Harmon of Touro Law School. Professor Harmon assigned a 10-page paper to each of her property students to determine whether some students who did poorly on examinations understood the materials but were unable to communicate their knowledge in the pressured setting of an in-class test. Although many of her students did well on the memorandum, Professor Harmon made the following notable and remarkably candid observation:

But for me as a person, and particularly as a writer, it was a resounding failure. The grading almost crushed me. I already had twenty long papers to critique and grade from my Jurisprudence class, and forty short reflection pieces from the same course, plus the ninety blue books from Property. The additional weight of ninety ten-page papers was more than I could bear . . . . *Unlike the mind-numbing, routine, and rhythmic grading of blue books, these papers required my full attention.* Each one represented hours of human effort. I could not approach them with indifference. I did not know how to take their words lightly, and so had to bear them heavily . . . . It was a desperate feeling, to watch the hours of each day slip away, paper by paper. I felt as if I were moving through molasses, and no matter how diligent I intended to be, the time allowed was never enough.

LOUISE HARMON AND DEBORAH W. POST, *CULTIVATED INTELLIGENCE: POWER, LAW, AND THE POLITICS OF TEACHING* 96-97 (1996) (emphasis added). See also Arrigo, *supra* note 2, at 164-65 (discussing Prof. Harmon's experience); Levine, *supra* note 107, at 1081 n.50 ("The hours of direct student contact, and the number of pages of student writing that the legal writing professor must read and critique every year are the two most demanding parts about the job."); Lee, *supra* note 99, at 485.

186. See Arrigo, *supra* note 2, at 155-59. For the purposes of this discussion, the concept of "credentials" is traditional, embracing such criteria as a J.D. from a top law school, high class rank therein including a position on the law review, possibly a post-graduate degree, published scholarly articles, judicial clerkships and impressive law practice experience.

proper response to this claim is two-fold. First, even if that might have been true early in the annals of legal writing, it is not true today for many programs. In fact, many writing professors hold very impressive J.D.s, were ranked high in their classes and served on law review. Second, if "top" credentials are manifestly related to both a propensity for teaching excellence and an enhancement of the employing school's reputation, as most of academia believes, there is no reason why the same minimum standard applied to the most junior and inexperienced assistant professors cannot likewise apply to individuals hired to teach legal research, analysis and writing. As earlier established, legal writing is as difficult, demanding, meaningful and conceptual as any other law school offering. Thus, schools need not lower their standards, if they actually now do so, for writing faculty.

*C. Purported Justification — Writing Professors Need Not Produce Scholarship*

Another prevalent justification for the uneven treatment of writing teachers is that writing professors are neither expected to nor do they actually produce scholarship.<sup>187</sup> As with the critique of credentials, the proper response to this assertion is two-pronged. First, as an empirical matter, legal writing faculty publish and publish well. Second, as a practical matter, law schools reasonably may expect writing faculty to publish as a requisite for promotion and tenure.

In point of fact, legal writing professors have produced considerable scholarship covering both legal writing pedagogy and myriad legal topics in other genres. Extensive bibliographies of articles and books by writing professors are found, *inter alia*, in *Welcome to the Legal Writing Institute* (listing over 160 articles and 120 books); *The Sourcebook on Legal Writing Programs*,<sup>188</sup> and *The Politics of Legal Writing*.<sup>189</sup> These articles demonstrate the intellectual depth and creativity of legal writing faculties rivaling the academic endeavors of tenure-track teachers. Furthermore, there is no reason why schools cannot mandate a reasonable

187. *Id.* at 167-68.

188. RALPH L. BRILL ET AL., *THE SOURCEBOOK ON LEGAL WRITING PROGRAMS* (1997).

189. JAN M. LEVINE ET AL., *THE POLITICS OF LEGAL WRITING: PROCEEDINGS OF A CONFERENCE FOR LEGAL RESEARCH AND WRITING PROGRAM DIRECTORS* (1997). See also, e.g., Arrigo, *supra* note 2, at 123-42 (footnoting numerous articles); Jan M. Levine, *Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs*, 45 J. LEGAL EDUC. 531 (1995).

amount of publication from writing faculty, especially those who wish to attain tenure, to receive higher salaries and to participate fully in faculty governance.

Too many faculties and administrations are content to allow the legal writing faculty to toil in the fields without carrying the academician's burden. Thus, in such cases writing faculty may not deserve compensation equal to those upon whom the responsibility of creating thought rests. Yet, writing professors have not asked for and may not wish the liberty of those from whom little is expected. Indeed, the hundreds of articles, books and other works that have been produced by writing teachers attests to their love of intellectual inquiry and their determination to join the community of scholars even under adverse circumstances.

Furthermore, even assuming *arguendo* that, based on their teaching responsibilities, it is more difficult for writing professors than "doctrinal" professors to find time to publish, in other contexts law schools do calibrate publication requirements with certain teachers' classroom obligations. Most significantly, ABA Standard 405(c) *mandates* that, if not accorded tenure-track status, clinicians must be offered "a form of security of position reasonably similar to tenure, . . . [and may be expected to satisfy] standards and obligations reasonably similar to those of other full-time faculty members."<sup>190</sup> The ABA cautiously clarified in Interpretation 405-7, however, that the standards for teaching and scholarship "should be judged in terms of the responsibilities of clinical faculty."<sup>191</sup> Thus, if it would be unreasonable to do so, law schools cannot impose on clinicians publication responsibilities identical to tenure-track faculty. Rather, any writing requirement must be structured to add a reasonable obligation in exchange for tenure-like job security. The same requirements surely can be applied to legal writing professors.<sup>192</sup>

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190. ABA Standard 405(c) (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/standards/chapter4.html>>.

191. ABA Interpretation 405-7 (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/standards/chapter4.html>>.

192. To illustrate how easily law schools may recast tenure criteria to fit a particular position, St. Thomas recently revised the standards for promotion and tenure of the law librarian. Although a tenure-track member of the faculty with the authority, prestige and compensation attendant thereto, the law librarian is not expected to teach and his publication requisites are significantly less demanding than those required of other tenure-track faculty.

*D. Purported Justification — Writing Professors Do Not Need the Protections of Tenure*

Tenure is a lifetime employment contract that can be rescinded only for gross derelictions. The core effect of tenure is that it prevents a professor from being dismissed because an educational institution considers the teacher's research or writing to be too controversial, anti-establishment, or politically discomfiting. Thus, tenure is essential to assure the flow of imaginative, challenging, and even factious scholarship, free from untoward censorship by the academy.<sup>193</sup>

Certainly these considerations are no less applicable to legal writing professors than to other teachers in American law schools. We have seen that writing professors enjoy and participate avidly in the intellectual stimulation of publishing scholarship.<sup>194</sup> Especially given their debased professional status, writing professors need the protection of job security if they wish to publish critical, controversial commentaries on law, legal practice and legal education. Indeed, many friends have expressed serious concern about whether I might jeopardize my career by writing an essay challenging the professional scruples of law schools that treat legal writing distinctly differently from other disciplines.

As earlier accented, with rare exceptions, writing faculty have no job protection.<sup>195</sup> The motivations to renew writing professors' contracts are not formalized but, rather, comprise largesse — if the law school is so disposed, it may acknowledge teaching excellence, loyalty and professionalism among its writing faculty by extending their contracts. Alternatively, maintaining that writing faculty have no institutional expectation of continuous employment based on merit, law schools may decline to extend contracts on any rational or arbitrary basis not explicitly proscribed by law.

It might be argued that writing professors are covered by the general policies promulgated by the ABA, AALS and AAUP protecting academic freedom to publish contentious scholarship

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193. See ABA Standards, *Appendix 1* (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/standards/appendix.html>>; AALS, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments* (visited Aug. 19, 1999) <<http://www.aaup.org/1940stat.htm>>; see also, e.g., James E. Perley, *Tenure Remains Vital to Academic Freedom*, CHRONICLE OF HIGHER EDUCATION, April 4, 1997; Ernst Benjamin, *Some Implications of Tenure for the Profession and Society* (visited Aug. 19, 1999) <<http://www.aaup.org/ebten2.htm>>; *supra* notes 131-34 and accompanying text.

194. See *supra* notes 187-92 and accompanying text.

195. See *supra* notes 100-08 and accompanying text.



and to criticize their universities.<sup>196</sup> Thus, any writing professor who feels that her academic freedom has been infringed may file a grievance with those professional associations. Possibly, such a grievance might succeed despite the low esteem in which writing faculty are held by the ABA and the AALS. Yet, a law school likely would have no difficulty contriving a facially plausible explanation that a given writing teacher was not fired for controversial research, but, rather, was let go because she was not teaching well.

Considering their demeaned professional status coupled with the fact that, unlike tenure-track teachers, they require numerous difficult written papers and assign students their first (often low) grades in law school, even the best writing professors often are subject to intense student criticism, criticisms that tenure-track faculty are inclined to accept.<sup>197</sup> A school so disposed could collect a variety of seemingly serious, professional complaints and divert attention from any motivation to penalize a writing teacher for challenging the law school's mores. Whether the ABA, the AALS or even sympathetic tenured faculty would expend the time and political capital to protect writing professors (the law school's misbegotten faculty) is questionable indeed. The reasonable writing professor might conclude that it is not worth the risk; thus, she may forego the exhilaration of writing controversial essays or otherwise challenging the *status quo*, instead of exercising cherished academic freedom.<sup>198</sup>

*E. Purported Justification — Law Schools Cannot Afford to Elevate the Status of Writing Professors*

Regarding the assertion that it is too expensive to accord legal writing professors the same salaries, perquisites and benefits as tenure-track faculty, Professor Arrigo encapsulated all the response truly necessary in two biting lines — “Of course, this is nonsense. It is not impossible to pay LRW teachers more money, but doing so requires a reallocation of resources.”<sup>199</sup> Granted, schools may not

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196. See ABA Standards, *Appendix 1* (visited Aug. 19, 1999) <<http://www.abanet.org/legaled/appendix.html>> .

197. See *supra* notes 135-40 and accompanying text.

198. Granted, even if it embraced a new regime of improved status, a law school could try to amass a record of seemingly cogent complaints to undermine a writing professor's claim that adverse employment actions were retaliatory based on her controversial politics. Nevertheless, contriving evidence to enshroud reprisals in a cloak of scrupulousness would be abundantly more difficult if writing faculty were accorded full respect, dignity and professional benefits.

199. Arrigo, *supra* note 2, at 171.

want to redistribute resources, but, as we often instruct our students when they complain that they “cannot do all the work,” not wanting to do something is not equivalent to being unable to do something.<sup>200</sup>

Moreover, many of the indicia of status withheld from writing professors can be bestowed with little, if any, fiscal expenditures. Tenure-tracking or rolling, long-term contracts, votes at faculty meetings, decent offices, respect, professional acknowledgment and collegiality are relatively cost free, at least in terms of dollars. Meanwhile, if given law schools truly are financially strained, they can incrementally, but meaningfully, increase writing professors’ salaries over a course of academic years.

#### V. THE IRRATIONALITY OF THE DISPARATE TREATMENT OF LEGAL WRITING FACULTY

Part III of this work detailed the various forms of disparate treatment that legal writing faculty endure because of their status as legal writing faculty. Writing professors are substantially injured by the disparate treatment — harmed financially through low salaries, hurt professionally by the lack of respect from colleagues, damaged communally through withholding of the franchise at faculty meetings, and denied the peace-of-mind resulting from job security. These disadvantages cannot in any reasonable sense be considered minor, unimportant or trivial. Indeed, salaries, job security, faculty governance and respect are key concerns of the academy as reflected in ABA, AALS and AAUP standards. Law schools *know* that these are important concerns because tenured and tenure-track faculty would be loathe to relinquish to any degree even one. Thus, the denial of the full trappings of professionalism in legal academe is a serious matter and, under the framework of professional ethics and rationality set forth in Parts I and II, the disparate treatment *must* be justified by reasons sufficiently substantial to warrant the impositions they cause.

If the treatment of legal writing faculty is irrational, state law schools implementing the earlier described modes of disparate terms and conditions of employment are arguably violating the

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200. In this regard, Professor Arrigo set forth several interesting and plausible ways that schools can accommodate writing faculty. “For instance, schools could elect to stop hiring any new tenure-track faculty, regardless of legal specialty, choosing instead to fill all new jobs with faculty on short-term, non-renewable contracts. LRW instructors who have been at institutions for some years could be given priority for tenured slots as they became available.” *Id.* at 172.

Constitution. More significantly, all law school faculties and administrations are expected to uphold "the highest standards of ethics and professionalism."<sup>201</sup> In particular, because of their "common membership in the community of scholars, [p]rofessors [should] not discriminate against or harass colleagues."<sup>202</sup> As an informative and appropriate model, law schools should abide by the jurisprudence of constitutional rationality from which this Nation's standards of minimal fairness arise. Indeed, it is particularly fitting that law faculties and administrators, whose singular responsibility it is to teach law, should rely on substantive ethics enforced under law to help define professional-ethical obligations owed to their institutions, their students and their colleagues.

The justifications espoused by American law schools purporting to vindicate their disparate treatment of legal writing faculties have been reviewed and, in each instance, have been shown to be lacking any significant verity.<sup>203</sup> Writing faculty are not, nor need they be, less credentialed,<sup>204</sup> less well published<sup>205</sup> and less in need of tenure<sup>206</sup> than other faculty. Most importantly, the core excuse for the disparate treatment — that teaching "doctrinal courses" is more important, more demanding, more intellectual and more theoretical than legal writing — is simply untrue.<sup>207</sup>

In light of the fact that the five legitimate rationales are without merit, nothing is left but arbitrary reasons such as the assertion by law schools that they discriminate against legal writing faculty because that is the way law schools have and will continue to treat writing faculty. The notion that a categorization may constitute its own justification rightly has been rejected as irrational. Some rational basis, other than the internal consistency of the classification itself, must underlie the legal, indeed moral, viability of the classificatory scheme and its effects, both intended and

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201. See AALS, *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities* (visited Aug. 19, 1999) <<http://www.aals.org/ethic.html>>; see also *supra* notes 3-14 and accompanying text.

202. AAUP, *Statement on Professional Ethics, Part III* (visited Aug. 19, 1999) <<http://www.aaup.org/Rbethics.htm>>.

203. See *supra* Part IV.

204. See *supra* note 186 and accompanying text.

205. See *supra* notes 187-92 and accompanying text.

206. See *supra* notes 193-98 and accompanying text.

207. See *supra* notes 156-85 and accompanying text. Moreover, schools cannot justify the wholesale exclusion of writing faculty from full law school citizenship on the spurious notion that equalization will be too costly. See *supra* notes 199-200 and accompanying text.

latent.<sup>208</sup>

We must look elsewhere for actual reasons supporting the discriminatory treatment of legal writing professors to see whether under a theory of fairness, the harm inflicted is outweighed by the benefits reaped. As a threshold matter, any outright yearning to inflict political, professional or economic harm for harm's sake is irrational, unjust and in clear defiance of the moral precepts underlying the ABA's, AALS's and AAUP's admonitions that law schools must be bastions of ethics. As the Supreme Court firmly stated in this regard, "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."<sup>209</sup> Thus, *Department of Agriculture v. Moreno* held that although welfare programs are neither a fundamental right nor a constitutional imperative, Congress could not withhold food stamps from households in which one person not kin to other household members resided to prevent "hippies" living in communes from obtaining that largesse.<sup>210</sup> Similarly, "animosity towards the class of affected persons," was a constitutionally irrational explanation for a Colorado constitutional amendment mandating that no specific legal proscription of discrimination based on homosexual preference could be enacted except by constitutional amendment.<sup>211</sup> Identically, imposing discordant terms of employment on legal writing teachers simply because of institutional hostility or disdain, unrelated to, indeed contrary to, actual merit, is equally unfair.

Nor can law schools justify the treatment of writing faculty on the somewhat less invidious grounds that the tenure-track faculty and administration *either choose to believe or find it administratively convenient to believe, regardless of countervailing evidence*, that the work of writing faculty is less

208. See *supra* notes 16-24; see generally *Gulf Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 165-66 (1897); see also, e.g., *TRIBE*, *supra* note 11, at 991-1000; *Halfon*, *supra* note 45, at 922-26. As Professor John Hart Ely cogently explained, if no other goal for the classification is constitutionally required other than effectuating thoroughly the classification itself, the classification of necessity "will import its own goal, each goal will count as acceptable, and the requirement of a 'rational' choice-goal relation will be satisfied by the very making of the [classificatory] choice." John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *Yale L.J.* 1205, 1247 (1970).

209. *Romer*, 517 U.S. at 634 (quoting *Moreno*, 413 U.S. at 534).

210. *Moreno*, 413 U.S. at 534. See *supra* notes 63-68 and accompanying text for a more complete discussion of *Moreno*.

211. *Romer*, 517 U.S. at 633. See *supra* notes 73-77 and accompanying text for a more complete discussion of *Romer*.

important and less difficult, and thus, less valuable to the academy, than is the work of "doctrinal" professors. Misconceptions, clichés, banalities, and worn biases are impermissible bases to disadvantage substantially a class of individuals.<sup>212</sup> As the Court admonished over twenty years ago, the Constitution has little patience for official classifications that place distinct impediments on individuals or groups if the classifications "bear[] no relation to the individual's ability to participate in and contribute to society."<sup>213</sup>

In *Cleburne v. Cleburne Living Center, Inc.*,<sup>214</sup> for example, the Court invalidated an ordinance of Cleburne, Texas, requiring group homes for mentally retarded persons to obtain special permits not required of other group homes. The Court found the City's baseless fears, misconceptions and prejudices inadequate reasons to impose a unique and significant civic burden on those mentally retarded persons who seek to establish group homes through which to better integrate themselves into the social mainstream.<sup>215</sup> So, too, baseless degrading of legal writing faculties and the work they perform is a deficient rationale for law schools to vindicate systemic discrimination designed to keep writing professors politically, socially, professionally and economically disadvantaged compared with other full-time teachers. To paraphrase one federal court's splendid summary of constitutional rationality:

[A]n "irrational prejudice" cannot provide [a] rational basis . . . . The "negative reaction" some members of the community may have to [writing professors] is not a proper basis for discriminating against them . . . . If the community's perception is based on nothing more than unsupported assumptions, outdated stereotypes, and animosity, it is necessarily irrational and . . . provides no legitimate support for [law school governance] decisions.<sup>216</sup>

Identically, law schools cannot rationally attempt to carve within their societies a caste of teachers who, although performing equally with tenure-track faculty, are deprived the benefits of full law school citizenship.<sup>217</sup> Even if the school acted without invidious

212. See *supra* notes 62-79 and accompanying text.

213. *Matthews v. Lucas*, 427 U.S. 495, 505 (1976). *Accord* *Reed v. Campbell*, 476 U.S. 852, 854 n.5 (1986).

214. *Cleburne*, 473 U.S. at 450. See *supra* notes 69-72 and accompanying text for a more complete discussion of *Cleburne*.

215. *Cleburne*, 473 U.S. at 448.

216. *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1287-89 (D. Utah 1998).

217. See *supra* notes 80-96 and accompanying text.

intent, or, indeed, even if the school did not so intend at all, the inadvertent creation of a caste system is irrational if the detrimental effects outstrip the benefits. In *Zobel v. Williams*,<sup>218</sup> Alaska sought to express its gratitude for the perseverance and loyalty of long-time residents by distributing monetary “dividends” from State coffers based on duration of residence; it did not intend to create a caste system. Despite the lack of either a vicious motivation or a desire to create a caste, the Court struck the dividend distribution scheme as irrationally linking receipt of state largesse to seniority of residency, thus implying that some citizens were better than and, thus, “more equal than others.”<sup>219</sup>

Similarly, in striking a New Mexico statute awarding a \$2000 property tax exemption to veterans of the Vietnam War who had been residents of the state prior to May 8, 1976, the Court held:

The State may not favor established residents over new residents based on the view that the State may take care of “its own,” if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State’s “own” and may not be discriminated against solely on the basis of their [later] arrival . . . .<sup>220</sup>

In addition, in *Allegheny Pittsburgh Coal*, the Court ruled that government may not create a caste of realty owners forced to pay substantially higher taxes than equivalently situated property holders because the burdened group has done nothing to warrant the imposition of higher taxes.<sup>221</sup> The Court logically held that “the fairness of one’s allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings.”<sup>222</sup>

Applying the rationales of *Zobel* and *Allegheny Pittsburgh Coal*, law schools cannot designate certain faculty as “more equal than others” and, in a discriminatory fashion, “take care of ‘its own’ ” by disadvantaging legal writing professors whose work, in fact, is as demanding and as crucial as the instruction provided by the tenure-track faculty. Paraphrasing *Allegheny Pittsburgh Coal*, such

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218. See *Zobel*, 457 U.S. at 57. *Zobel* is discussed in greater detail in notes 80-84, *supra*, and accompanying text.

219. *Zobel*, 457 U.S. at 71 (Brennan, J., concurring).

220. *Hooper*, 472 U.S. at 623 (1985) (*citing, inter alia, Zobel*). *Hooper* is discussed in greater detail in notes 85-87, *supra*, and accompanying text.

221. See *Allegheny Pittsburgh Coal Co.*, 488 U.S. at 345-46.

222. *Id.* at 346. See *supra* notes 88-93 and accompanying text for a more comprehensive discussion of rationality and property taxation.

discrimination is irrationally unfair because “the fairness of one[] [teacher’s] allocable share of the [resources of a law school] can only be meaningfully evaluated by comparison with the share of other[] similarly situated [teachers] relative to their [contribution to the life of the law school].” It bears repeating that writing faculty and tenure-track professors are *not* dissimilarly situated in regard to their respective contributions to the law school community. Both groups of teachers tend to be equally credentialed, equally loyal to their respective schools and are required to teach equally demanding subjects.

The fact that writing faculty are not compelled to produce scholarship is irrelevant because they are not offered the option of accepting either a tenure-track appointment with requirements commensurate with other tenure-track faculty or a lower paying, non-tenure track position with comparably fewer responsibilities. The mandated denial of the opportunity to satisfy the attendant responsibilities of full faculty citizenship is no benefit at all. Even without germane legislative prohibitions, surely schools would violate standards of professional ethics if they deliberately limited both the workload and the opportunities for professional advancement based on particular teachers’ race, gender, religion, political persuasion, marital status, sexual preference, age or any number of similar bases unrelated to merit and ability. So, too, denial of professional prestige and opportunity predicated on the label “legal writing” offends cardinal concepts of fairness.

Law schools are not vindicated by the spurious argument that because legal writing faculty are informed prior to commencing employment that they will not be treated equally with other faculty, they agree to the disparate terms by signing their contracts. The imposition of the irrational contractual terms *is* the transgression; and the fact that, for whatever reasons, legal writing professors decide to accept those terms is no estoppel from subsequently challenging the *bona fides* of those terms. Were it otherwise, all discriminatees would be disqualified from vindicating their rights if, for economic or professional reasons, it was to their advantage to accept the disclosed disparate conditions of employment rather than to forego the work and sue the employers with the hope that eventually a court would require the employers to hire the individuals on nondiscriminatory terms. If full divulgence was all that was necessary, many, perhaps most, prominent civil rights

challenges would have lacked merit.<sup>223</sup>

Law schools cannot justify their disparate treatment by arguing that for efficiency, economy and convenience, they have determined that one class of full-time faculty with substantial teaching responsibilities will not be tenure tracked. When, “the State’s articulated goal could have been completely served by requiring a coin flip [, the resulting] . . . legislative decisions are inimical to the norm of impartial government.”<sup>224</sup> For instance, *Reed v. Reed*<sup>225</sup> struck as irrational an Idaho statute mandating that among individuals equally entitled to administer intestate estates, men would be chosen over women without providing women the opportunity to establish superior qualifications. The Court accented that the Fourteenth Amendment prohibits “different treatment . . . of persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.”<sup>226</sup> Based on that standard, Idaho could not justify preferring men over women despite any efficiency promoted by such a designation.<sup>227</sup>

Identically, selecting full-time legal writing professors for adverse treatment is no more rational than singling out women as ineligible to administer intestate estates. Because it has been shown that the work of writing professors is not less demanding nor less important than teaching performed by “doctrinal” faculty, law schools might just as well have designated contracts teachers or property teachers or teachers born in the month of January as the class that, for efficiency purposes, will not be tenure-tracked.

Equally unconvincing is the argument that “traditionally” writing professors have not been treated as full faculty in the legal academy. It is simply absurd to aver that the institutional inertia against according legal writing professors appropriate dignity and respect is a sufficient justification for the inertia itself. As Justice Holmes bitinglly asserted:

It is revolting to have no better reason for a rule of law than

223. Cf. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974); 29 U.S.C. § 626(f)(1)(c) (waiver under Age Discrimination in Employment Act). For example, under a theory of full disclosure, the Court would have dismissed *Moreno* on the basis that selfless Ermina Sanchez decided to waive her right to object when, as an act of kindness, she accepted ailing Jacinta Moreno into her home, thereby knowingly forfeiting food stamps for herself and her children.

224. *Lehr*, 463 U.S. at 266 n.24. See generally *supra* notes 55-61 and accompanying text.

225. *Reed*, 404 U.S. at 77.

226. *Id.* at 75-76.

227. See *id.* at 72-74.



that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>228</sup>

Justice Holmes's celebrated quote explains that the persistence of irrational discrimination certainly cannot be the warrant for its continuance. Inasmuch as writing faculties should have been accorded complete law school citizenship in the past, the long overdue nature of that entitlement strengthens rather than weakens the case for redress.

## VI. CONCLUSION

In his final opinion as a Supreme Court Justice, a disheartened Thurgood Marshall caustically concluded, "Power, not reason, is the new currency of this Court's decision-making."<sup>229</sup> The discordant treatment of full-time legal writing faculties likewise has little to do with reason and everything to do with power. The purported rational grounds for the adverse terms of employment and other forms of disaffection have been disproved. All that remains to premise the maltreatment are misconceptions, outmoded stereotypes and prejudice concerning legal writing faculty. Thus, the policies of most American law schools regarding legal writing are irrational. Given the lack of rational bases coupled with the damage inflicted on writing teachers, the irrationality practiced by law schools is unfair as defined by the federal judiciary's standards of minimal justice under the Constitution's Equal Protection Clause. It is urged, therefore, that the discriminatory treatment of full-time writing faculties violates "the highest standards of ethics and professionalism"<sup>230</sup> required of all institutions of legal education and of their faculties and administrations that are the embodiment of those institutions. The ethical standard is blunt but exacting: "Professors do not discriminate against or harass colleagues."<sup>231</sup> The treatment of

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228. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).  
*Accord* United States v. Dege, 364 U.S. 51, 53-54 (1960).

229. *Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

230. See ABA Commission on Professionalism, "In the Spirit of Public Service": A *Blueprint for the Rekindling of Lawyer Professionalism* (visited Aug. 19, 1999) <<http://www.aals.org/ethic.html>>. See also, e.g., AALS, *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities* (visited Aug. 19, 1999) <<http://www.aals.org/ethic.html>>; *supra* notes 6-15 and accompanying text.

231. AAUP, *Statement on Professional Ethics, Part III* (visited Aug. 19, 1999) <<http://www.aaup.org/ethic.html>>.

writing faculty members clearly is irrationally discriminatory; it, therefore, cannot be ethical.

