WRITING IN THE LEGAL ACADEMY: A DANGEROUS SUPPLEMENT?

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INTRODUCTION

This Article explores the relationship of writing and speech in the legal academy through the lens of an ancient, embedded hierarchy that favors speech over writing. It focuses specifically upon how this hierarchy has insinuated itself into the law school curriculum and how law faculty, law students, and teachers of writing have become trapped in it, to the overall detriment of the legal academy. In analyzing this hierarchy of speech over writing, I use the notion of the "dangerous supplement," a tool borrowed from the deconstructionist movement. The term "dangerous supplement" stems from Jacques Derrida's analysis of the relationship between speech and writing, which uses several texts of Jean Jacques Rousseau as a starting point.[1] Rousseau believed that writing is merely a "supplement" to speech because writers are less "present" in their texts than speakers are in their spoken words.[2] According to Derrida, Rousseau concluded that writing is therefore deceptive and "dangerous" because it is "an artificial and artful ruse to make speech present when it is actually absent."[3]

Derrida, applying deconstructionist analysis to Rousseau's observation, noted that speech and writing are in fact "dangerous supplements" of each other because neither can truly exist without the other, even though each appears to threaten the other.[4] Like writing, speech is merely an imperfect medium through

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1. JACQUES DERRIDA, OF GRAMMATOLOGY 141–64 (Gayatri Chakravorty Spivak trans., 1976).

2. *Id.* (discussing and deconstructing Jean Jacques Rousseau's view of writing as a "dangerous supplement" to speech).

3. *Id.* at 144 (paraphrasing Rousseau).

4. *Id.* at 143–52. Gerald Frug has seized upon this threatening-yet-necessary quality of the dangerous supplement to analyze the relationship between subjectivity and objectivity in American corporate and administrative law. Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984).

which thoughts are expressed. Like writing, it can communicate (through recordings, for example) long after the communicator has gone. If writing is the representation of thoughts, then speech is merely a form of or supplement to writing, just as writing is a supplement to speech.[5] When one sees the "dangerous supplement" relationship from both sides, it becomes apparent that attempts to separate speech and writing are artificial and futile, that each needs the other.

The legal academy has long seen only one side of this relationship, viewing writing as a "dangerous" curricular supplement, but failing to see why it is necessary to the existence of the remainder of the curriculum.[6] This Article examines this sense of lurking distrust that surrounds writing in the legal academy. It argues that those both inside and outside the legal writing discipline have been controlled by the speech/writing hierarchy, and that this control has not benefitted the legal academy. The Article is divided into four parts. Part I traces the historical roots of the speech/writing hierarchy and its insinuation into the legal curriculum. Part II discusses how deans and faculty in United States law schools have responded to and reinforced this hierarchy in their treatment of legal writing programs. It then uses the notion of the "dangerous supplement" to critique the hierarchy upon which institutional decisions in this area have been based. Part III analyzes the effect of the speech/writing hierarchy on writing pedagogy, specifically addressing common criticisms of legal writing as students experience it in the legal academy. It also uses the "dangerous supplement" theory to address these criticisms. Part IV looks to the future, assessing the possibility and ramifications of breaking out of the hierarchy. Overall, by exposing the deception embedded in the hierarchy, this Article attempts to explain why the legal academy *needs* the dangerous supplement of legal writing.

I. THE SPEECH/WRITING HIERARCHY

A. Development of the Speech/Writing Hierarchy

If one seeks the origins of the speech/writing hierarchy that presently operates in the legal academy, Socrates can serve as a logical starting point. When Christopher Columbus Langdell transformed legal education at Harvard in the 1870s, he instituted a dialogue-driven classroom teaching style that transformed the

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5. J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 757 (1987) (explicating Derrida's theory of the dangerous supplement).

6. The law and literature movement has become an accepted member of the legal academy, with many law schools offering courses taught by tenured professors in the subject. But this discipline does not teach writing per se. Rather, law and literature offers new ways of reading and interpreting literary and legal texts, and not new ways of writing such texts. *See, e.g.*, SANFORD LEVINSON & STEVEN MAILLOUX, INTERPRETING LAW AND LITERATURE at xiii (1988) ("We can only hope that this collection of essays will foster a more general understanding of...contemporary theories of reading cultural texts, whether legal or literary."). Curiously, the study of writing—as opposed to reading—has received little attention from the legal academy, as the second-class citizenship of legal writing programs in the law school curriculum demonstrates.

law professor from a lecturer to a "Langdellian Socrates."[7] Langdell's method differs from classic Socratic dialogue because Socrates used questioning as an end in itself, while Langdell and his followers generally questioned their students in order to draw out limitations or nuances in their interpretations of the law, in a search for quasi-scientific truths.[8] Nevertheless, both teaching methods relied upon oral, rather than written, communication between teacher and student. One can therefore learn something about the place of writing and speaking in law school curricula by studying Socrates' attitudes toward oral and written expression. Socrates left no written legacy. Instead, modern scholars know him through his dialogues, which Plato later described in writing.[9] To Socrates, knowledge and learning occurred through conversation, where participants could question each others' assumptions, formulate refutations, and respond to criticism. Socratic dialogues were a dynamic process that involved incisive questioning and reflective responses.[10] This view of education was consistent with the oral culture in which Socrates lived.

As Plato describes him, Socrates was not only a proponent of conversation but a disparager of the written word, at least in terms of its role as a teaching tool. In *Phaedrus*, Plato has Socrates describe his attitude toward writing:

> You know, Phaedrus, that's the strange thing about writing, which makes it truly analogous to painting. The painter's products stand before us as though they were alive: but if you question them, they maintain a most majestic silence. It is the same with written words: they seem to talk to you as though they were intelligent, but if you ask them anything about what they say, from a desire to be instructed, they go on telling you just the same thing for ever.[11]

Socrates again expresses his doubts about writing in Plato's *Seventh Epistle*, where Socrates claims that the written word is an image of the spoken one.[12] Apparently, the philosopher believed that thought could be more precisely conveyed in speech than in writing. If speech is one step removed from thought, then writing, as the mere image of speech, is two steps removed. Later in *Phaedrus*, Socrates suggests that "planting" thoughts in ink is comparable to planting seeds hastily in poor soil.

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7. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 16 (1995). For a critical discussion of Langdell's innovations, see *id.* at 11–25.

8. Ruta Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 453 n.36 (1996).

9. *See, e.g.*, PLATO, THE COLLECTED DIALOGUES (Edith Hamilton & Huntington Cairnes eds., 1961).

10. KENNETH SEESKIN, DIALOGUE AND DISCOVERY: A STUDY IN SOCRATIC METHOD 1–4 (1987).

11. PLATO, PHAEDRUS 158 (R. Hackforth trans., 1952) (footnote omitted) (discussed in SEESKIN, *supra* note 10, at 4).

12. SEESKIN, *supra* note 10, at 4 (discussing the author's own translation of Plato's *Seventh Epistle*).

Just as the plants will not flourish, the thoughts will not flourish because written words cannot defend themselves.[13]

In a more modern context, Jacques Derrida, as explained in the Introduction, has found evidence of the speech/writing hierarchy in the work of philosophers from Rousseau to Levi-Strauss.[14] Derrida believes this privileging of speech stems from a valuing of "presence" in Western thought.[15] Western thinkers have seen speech as more "present" than writing, according to Derrida, because writing merely represents speech.[16] This idea echoes the thoughts of Socrates, who believed that the physical presence of the communicator was crucial to the success of communication, and that the physical absence of the communicator, inherent in writing, made the activity frivolous.[17] In addition, Derrida further suggests that Western thought has viewed speech as more "present" than writing because it is "connected more closely to the immediate thoughts of the communicator."[18] According to Derrida, Western philosophy has developed from these ideas the notion that writing, as a deceptive substitute for speech, is threatening, and he posits that "the repression of writing" has been the "fundamental operation of the...epoch."[19]

This fear of writing still has a strong hold on Western thought. It can be seen in as recent a text as Justice O'Connor's opinion in *Reno v. ACLU*,[20] the 1997 Supreme Court decision striking down the Communications Decency Act, which had attempted to regulate Internet communication. Concurring in part and dissenting in part, Justice O'Connor noted that "identity" functions differently in cyberspace than it does in the real world because Internet technology allows users to "mask their identities."[21] This notion of "identity" relates directly to the notion of "presence" that has historically driven the speech/writing hierarchy. It seems that the lack of "presence" that Rousseau noted in writing becomes even more pronounced and "dangerous" when that writing appears on the Internet. Justice O'Connor sympathized to an extent with those who worry about children having access to pornography on the Internet, noting that users "can transmit and receive messages on the Internet without revealing anything about their identities or ages."[22] To Justice O'Connor, the prospect of increased "zoning" on the Internet that would prevent minors from gaining access to certain sites is "promising,"[23] apparently because she sees the Internet as a wilderness of potentially dangerous communication, where the presence of parties to the communication is incomplete

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13. PLATO, *supra* note 11, at 159 (discussed in SEESKIN, *supra* note 10, at 18 n.6).
14. Balkin, *supra* note 5, at 755.
15. *Id.* (discussing DERRIDA, *supra* note 1).
16. *Id.* at 756 (discussing DERRIDA, *supra* note 1).
17. *See* PLATO, *supra* note 11, at 159.
18. Balkin, *supra* note 5, at 756 (discussing DERRIDA, *supra* note 1).
19. DERRIDA, *supra* note 1, at 162.
20. 117 S. Ct. 2329 (1997).
21. *Id.* at 2353 (O'Connor, J., concurring in part and dissenting in part).
22. *Id.* (O'Connor, J., concurring in part and dissenting in part).
23. *Id.* at 2354 (O'Connor, J., concurring in part and dissenting in part).

and easily disguised. Devices that could screen users and collect information regarding who is present in discussion groups might tame this dangerous frontier of communication. However, since such screening capabilities are not yet available, Internet users cannot yet know whether their messages are being broadcast to children, and from this fact Justice O'Connor, like the majority, concluded that a statute criminalizing the display of indecent material to minors over the Internet would chill all Internet expression and therefore could not pass constitutional muster.[24]

Even though *Reno v. ACLU* protects expression on the Internet, the fear of the written word, communicated without the true "presence" of the sender, is clear in the opinion. The majority appears to be in awe of the ramifications of "the special attributes of Internet communication"[25] precisely because this new means of expression, which has spanned the universe, does not require its participants to present themselves openly to each other. One could say that Justice O'Connor and the majority see Internet writing as a "dangerous supplement" to spoken expression occurring between two people, face to face. The echoes of Rousseau thus persist to this day, and the speech/writing hierarchy remains firmly established.

B. The Speech/Writing Hierarchy in the Law Curriculum

Christopher Columbus Langdell incorporated this hierarchy of speaking over writing as he revolutionized the curriculum at Harvard Law School in the 1870s.[26] Before that time, law study in the United States consisted of apprenticeships and classroom lectures.[27] Langdell believed that lecture-based teaching did not do justice to the "scientific" nature of law.[28] He therefore created a method of teaching, the case method, which emphasized the legal thought process as well as the content of the law. Langdell asked his students to read cases and extract rules from them, to notice the evolution of rules across cases, and to hypothesize as to how those rules might apply in new situations.[29]

His dialogue-based teaching style was aimed at forcing students to articulate their analyses orally, in the classroom, in front of their peers. This method differed radically from the lecture-based style of teaching that had prevailed before 1870. Langdell hoped that by adopting the case method and the technique of classroom dialogue, his students would acquire legal reasoning skills that would serve them much better than mere knowledge of substantive law.[30] He thought that the law school classroom should resemble the laboratory in the medical school.[31] Thus, law students would dissect cases much in the same way

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24. *Id.* (O'Connor, J., concurring in part and dissenting in part).
25. *Id.* at 2340 (quoting the District Court opinion, 929 F. Supp. 824, 867 (E.D. Pa. 1996)).
26. *See generally* DUXBURY, *supra* note 7, at 11–25.
27. Stropus, *supra* note 8, at 451–52.
28. DUXBURY, *supra* note 7, at 14.
29. *Id.*; *see also* Stropus, *supra* note 8, at 451–55.
30. DUXBURY, *supra* note 7, at 16.
31. *Id.* at 15.

that medical students would dissect a cadaver. In addition, Langdell knew that by recasting the law as a science, he could improve the status of legal education in general.[32] Law was no longer simply a trade, learned through an apprentice system or a series of perfunctory lectures. Instead, it was an intellectual endeavor worthy of respect in the academy.[33]

Langdell's method did nothing, however, to elevate the status of legal writing. Students exhibited their analytical skills orally in class. Perhaps Langdell, like Socrates, believed speech to be a purer medium than writing for the expression of analytic thought, or, as Derrida might say, a more "present" medium. Perhaps Langdell believed it important to train students to accustom themselves to the pressure of public questioning and saw no role for writing in furthering this goal. Certainly, oral (as opposed to written) interaction allowed teacher and students to share thoughts in an efficient manner. It also allowed class sizes to increase, which made law schools cost-effective to the point where they could become self-supporting.[34] Whatever the reason, Langdell thus helped to create a tradition of legal education, which endures to this day, in which oral expression takes precedence on a daily basis over written expression.

The status of legal writing as a skill suffered in Langdell's regime. Prior to Langdell's time, students learned skills such as legal analysis and argumentation, writing, drafting, interviewing, and negotiating not in law school but rather on the job, from practicing attorneys.[35] These were "trade" skills, learned through apprenticeship. By moving the training in legal analysis and argumentation from the apprenticeship to the academy, Langdell and his followers elevated these endeavors, but only in their oral form. Indeed, it was by appropriating these very skills into the legal curriculum that Langdell and others such as James Barr Ames and William Keener, two Harvard colleagues, elevated the entire discipline of law to "scientific" status.[36] The method of legal analysis, they believed, was akin to the scientific method.[37] It was the intellectual heart of the discipline.

This Langdellian conception of academic law simply did not include legal writing. Thus, the rise of some legal subjects to a position of academic status simply reinforced the idea that other subjects such as writing were simplistic and tradelike, not worthy of rigorous study.[38] Writing, to use Rousseau's term, was a

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32. *Id.* at 20.

33. *Id.*

34. *Id.* at 19; *see also* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 63 (1983) (Langdell's method "held a trump card—finance.... [T]he case method combined with the Socratic method enabled classes to expand to the size of the largest lecture hall.").

35. Stropus, *supra* note 8, at 451–52.

36. DUXBURY, *supra* note 7, at 21–22.

37. *Id.* at 14.

38. Saunders and Levine still note a difference between practical skills (including writing) and analytical skills (including case analysis, synthesis, and critical evaluation of issues). "Because analytical skills are generally thought to be more closely tied to the lawyer's cognitive processes, they are more frequently viewed as the components of thinking like a lawyer." Kurt M. Saunders & Linda Levine, *Learning to Think Like a*

mere pragmatic "supplement" to the curriculum.[39] When Langdell's students were reciting their interpretations of a contracts case, they were *thinking* like lawyers. When they later wrote arguments based on such interpretations, they were, apparently, merely *laboring* like lawyers.

Sixty years later, when Karl Llewellyn addressed entering students at Columbia Law School in 1929, Langdell's disregard of writing as an academic subject was very firmly entrenched in American legal education. Llewellyn told students that there were many skills in which they would have to instruct themselves because the law school would not teach them: trial advocacy, counseling, and "drafting" (or "legal composition").[40] Llewellyn chastised the students: "Most of you have not learned to write lay English. You cannot frame a clean-cut argument for beer and ale—or one against them."[41] Yet his only suggestion was for them to "practice" the skill themselves, preferably in groups.[42] Those of us who teach legal writing would characterize this pedagogical method as the blind leading the blind. While small groups and collaborative student learning are ideal tools for the teaching of writing,[43] a qualified teacher is still needed to give the group a mission and focus. It is also interesting that Llewellyn did not directly apologize for the lack of writing instruction in the academy in his day, even though he professed to know of "no art more difficult...no art more fascinating" than drafting.[44] All of this calls into question his earlier explanation that one goal of law school was to make some attempt to equip students with what they would need to know to practice.[45] While Llewellyn admitted that the law school could not teach everything one would need,[46] it is clear that legal writing still had not made the first cut.

Llewellyn did go on, at the University of Chicago, to develop a legal methods course that allowed students to develop practical analytical skills such as case analysis, case synthesis, and legal argumentation.[47] Llewellyn's list will sound

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Lawyer, 29 U.S.F. L. REV. 121, 125 (1994). This distinction is based on Langdell's original division of educational labor between the academy and the bar. Stropus, *supra* note 8, at 455 n.43.

39. To the extent that writing instruction would be labor intensive and would threaten the cost-effective quality of traditional legal education, it was indeed a "dangerous supplement."

40. KARL LLEWELLYN, THE BRAMBLE BUSH 112 (photo. reprint 1985) (1960). *The Bramble Bush* essays "grew out of an attempt in 1929 and 1930 to introduce the students at Columbia Law School to the study of law." *Id.* at vii.

41. *Id.* at 112.

42. *Id.* at 110.

43. *See, e.g.*, KENNETH A. BRUFFEE, COLLABORATIVE LEARNING: HIGHER EDUCATION, INTERDEPENDENCE, AND THE AUTHORITY OF KNOWLEDGE 52–62 (1993).

44. LLEWELLYN, *supra* note 40, at 112.

45. *Id.* at 105.

46. *Id.* at 110–11.

47. For a description of this course by two Llewellyn disciples, see generally Leslie E. Gerwin & Paul M. Shupack, *Karl Llewellyn's Legal Method Course: Elements of Law and Its Teaching Materials*, 33 J. LEGAL EDUC. 64 (1983).

familiar to teachers of legal writing because it prefigures much of the material presently taught in most legal writing courses. The difference, however, was that Llewellyn's course, entitled "Elements of Law," relied upon the Langdellian method of oral questioning rather than upon written exercises.[48] Thus, while Llewellyn did much to further the teaching of legal analysis as a skill, he did not see fit to change the institution's view of writing as a mere corollary to legal analysis.

While many law school faculty and administrators have developed well-structured writing programs in the past two decades and have required all students to participate in them, legal writing is still treated as peripheral to the "science" of law study. A number of myths, inherited from Langdell, and perhaps even Socrates, continue to thrive today: writing is ancillary, it cannot be taught, or, if it can, the teaching of it is anti-intellectual and does not belong in the academy.[49] These myths have continued to hamstring legal writing programs because they still bias the views of the legal academy toward legal writing courses and those who teach them.

II. INSTITUTIONAL PERSPECTIVES THAT REINFORCE THE SPEECH/WRITING HIERARCHY

A. Law Schools' Adoption of Legal Writing Programs

Modern writing programs in American law schools have their roots in research or "legal bibliography" courses that contained some elements of basic writing instruction. At the beginning of this century, law school adminstrators and faculty created these courses so that students might receive remedial writing assistance, and the course content was, indeed, remedial.[50] In the 1940s, some law schools began offering "Legal Method" courses in an attempt to provide students with more skills-based practical instruction.[51] However, even these Legal Method courses failed to provide comprehensive, integrated practice in legal reasoning, research, and writing—the necessary components of legal problem solving.[52] Some progress was made by 1970, when a national survey revealed that legal writing courses had evolved to address these skills more holistically, and remediation was no longer a primary goal.[53] Nevertheless, instructor status and instructor

48. *Id.* at 69–70.

49. J. Christopher Rideout & Jill Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 42–48 (1994).

50. Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 539 (1973).

51. *Id.* at 541. The University of Chicago had implemented an experimental program in the 1940s involving legal research and writing. *Id.* Llewellyn began teaching his Elements of Law course there in 1951. Gerwin & Shupack, *supra* note 47, at 64 n.1.

52. Rombauer, *supra* note 50, at 541. The most popular legal methods course book in the 1940s, N. DOWLING ET AL., MATERIALS FOR LEGAL METHOD (1946), did not fully integrate writing into the course. Instead, the text contained only short writing exercises that tested students' knowledge of legal bibliography. Rombauer, *supra* note 50, at 541 (discussing the Dowling text).

53. Rombauer, *supra* note 50, at 550.

satisfaction were relatively low.[54] Evidently, when legal writing was added to legal methods to create a more comprehensive course, luminaries such as Karl Llewellyn no longer did the teaching.

The addition of writing to the course meant that instructors would have to spend great amounts of time creating writing assignments, reading papers, and giving oral and written feedback to students, so it became much more challenging and less appealing to teach. Faculty with enough clout to choose their courses tended not to volunteer to teach legal writing, yet these faculty agreed that the subject had to be taught. Therefore, a new class of writing teachers had to be recruited.[55] These teachers would carry lower rank[56] and receive less pay.[57] Thus, while legal methods courses had the potential to become respected members of the mainstream curriculum, the addition of legal writing to the traditional legal methods course condemned it to second-class status.

Recently, Jill Ramsfield and Chris Rideout have tracked status issues with respect to legal writing courses across the nation. Their survey research reveals that while teaching methods have become more sophisticated, institutional investment today in terms of funding and administrative support for writing programs remains relatively low.[58] Issues of status, salaries, and course credit still dog the legal writing field and put its practitioners on the defensive.[59]

One can also see this necessary defensiveness in legal writing texts, which must mediate between law school deans and faculty who require legal writing courses but do not invest in them, and students who pick up on the institutional message that the course, although required, is not to be taken seriously. One textbook author, for example, finds himself having to sell legal writing courses in the preface of his textbook to an audience that has already picked up on the institutional bias against such courses. His students can see from the fact that the course is ungraded that the law school does not find it important, and he must therefore address their skepticism:

> The extreme academic pressures of law school may stimulate you to place primary emphasis on your short-term goals of success on final

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54. *Id.* at 543–44, 547.

55. *Id.* at 542 (discussing staffing issues raised by new legal writing programs in the 1940s and 50s).

56. Law schools hired non-tenure-track teachers, students, and adjunct practitioners to teach legal writing. *Id.*

57. The disparity in mean salaries between legal writing teachers and nonlegal writing faculty continues to exist today. A recent national survey indicated that 45 out of 77 schools reported gaps of $25,000 or more. Jill J. Ramsfield & Florence Super Davis, The Legal Writing Institute 1996 Survey Results 12 (1997) (unpublished manuscript on file with author). Thirty-eight of 82 schools reported discrepancies of over $25,000 in the mean *starting* salaries of the two groups. *Id.*

58. *See generally* Rideout & Ramsfield, *supra* note 49.

59. *Id.* at 41–48 (responding to commonly held traditional views of legal writing, including the view that legal writing cannot and should not be taught in the legal academy).

> examinations in graded courses and perhaps to resent an ungraded legal writing course as an inconvenient distraction.
>
> With this book, I hope to reassure you that your work in your first-year legal writing courses will directly contribute to your success with law school exams as well as with legal documents that you draft...in post-graduate employment.[60]

Thus, in the current institutional environment, legal writing textbook authors must promote the course through its relation to other doctrinal courses. Doing well in legal writing may mean nothing in itself, but it will indirectly help students write good exams in Contracts, Property, Torts, and other courses that really matter. This tactic of selling legal writing as a handmaid to doctrinal courses is also reflected in the latest edition of at least one other legal writing text, which now contains an entire chapter, as opposed to a few pages, on how to succeed on doctrinal law school exams.[61]

If law school deans and doctrinal faculty truly valued legal writing programs, the texts would not have to sell themselves in relation to other courses. In fact, they would not have to sell themselves at all. However, at present, those who teach legal writing must remain on the defensive because institutions are failing to invest in their field. Legal writing professionals are thus caught in a double bind: law school deans command them to teach what is hailed as the most fundamental law school course, yet these same administrators undercut the perceived importance of the course by differentiating it from the rest of the curriculum in terms of course credit and teacher status and salaries. This lack of investment seems to be based on an outmoded view of what legal writing programs are about, and on outmoded paradigms, including the skills/substance dichotomy.

B. The Skills/Substance Dichotomy

Although law schools now teach many of the skills that were not a part of the curriculum in Langdell's time, a skills/substance dichotomy continues to frame institutional decisions regarding status. Most faculty members believe they can distinguish "skills" courses from "substantive" courses offered at their schools.[62]

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60. CHARLES CALLEROS, LEGAL METHOD AND WRITING at xxiii (2d ed. 1994). In 1996, only about 20% of 132 schools responding to a national survey reported that they do not grade legal research and writing courses. Ramsfield & Davis, *supra* note 57, at 2. This statistic shows slight improvement since 1994, when 24% of schools offered ungraded courses. Jill Ramsfield, *Legal Writing in the Twenty-First Century: A Sharper Image*, 2 LEGAL WRITING 1, 5 (1996). Nevertheless, in a majority of schools, salary, instructors' titles, office allocation, support staffing, and other differences between legal writing instructors and other faculty still send signals to students that the legal writing course is less important than other courses. *Id.*

61. *Compare* RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 227–33 (2d ed. 1994) [hereinafter NEUMANN (2d ed.)], *with* RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 123–25 (1990).

62. *See, e.g.*, Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 944 (1996) ("[O]ne wonders what attention substance and analysis receive in most

Some schools farm out the teaching of skills to practitioners—echoing the pattern of academy and apprenticeship from Langdell's time.[63] Others are developing "clinical" tenure-tracks that distinguish skills faculty from "regular" faculty.[64] Skills courses and skills teachers, at most schools, thus remain "the other."

This pecking order is consistent with the speech/writing hierarchy, which continues to taint writing programs and writing instructors. While doctrinal classes ask students to exhibit their pure thoughts in Socratic discussions, writing skills courses ask students to "process" those thoughts into writing. (One thinks of "processed" food, which is an unnatural version of the real thing.) Teaching the process, one could argue, distances students from the pure thought that is so nicely and immediately displayed, orally, in the Socratic classroom. Skill has interrupted substance; writing has interrupted speech. Thus, writing courses wrongheadedly detract from the intellectual core of the law school curriculum by focusing on lower-order matters. Institutions thus view them as mere "supplements" to traditional legal education.

Further, law school deans and tenured faculty, caught up in the speech/writing hierarchy, tend to see only the "writing," and not the analysis, in legal writing programs. I think many of my colleagues believe that much class time in my legal writing course is devoted to comma usage and the diagramming of sentences; why else would they direct their comments about unfortunate grammar in upperclass students' papers to me? In fact, law faculty and administrators

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skills courses."); Linda Fitts, *Reconciling Rapture, Representation, and Responsibility: An Argument Against Per Se Bans on Attorney-Client Sex*, 10 GEO. J. LEGAL ETHICS 209, 264 (1997) ("Skills courses are often given second class status in the law school curriculum."); Timothy W. Floyd, *Legal Education and the Vision Thing*, 31 GA. L. REV. 853, 871 (1997) (urging the development of more "skills courses"); Michael K. McChrystal, *Central Planning or Market Controls in Legal Education: How to Decide What Lawyers Should Know*, 80 MARQ. L. REV. 761, 769 (1997) ("[I]n the law school marketplace of courses, skills courses seem to do pretty well."); Deborah Jones Merritt & Barbara F. Reskin, *Sex Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 200 (1997) (noting that women were more likely than men to teach...skills courses," described as "lower status subjects that may diminish a professor's career prospects"); Rodney J. Uphoff et al., *Preparing the New Law Graduate to Practice Law: A View from the Trenches*, 65 U. CIN. L. REV. 381, 420 (1997) ("[T]o prepare students for law practice, most schools will have to drastically alter their curriculums, not just offer a few skills courses.").

63. In a 1996 survey, 48 law schools reported using adjuncts to teach legal research and writing. Ramsfield & Davis, *supra* note 57, at 9.

64. Robert F. Seibel, *Do Deans Discriminate?: An Examination of Lower Salaries Paid to Women Clinical Teachers*, 6 U.C.L.A. WOMEN'S L.J. 541, 544 n.7 (1996); *see also* Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799, 804 (1988) (discussing and criticizing separate "clinical" tenure tracks).

themselves often mistakenly view legal writing programs as remedial courses in junior high school English.[65]

Thus, legal writing programs are still seen as remedial in themselves. They are "skills" courses, and, worse, they are teaching skills that students should have mastered long before law school. This view is particularly dangerous because it implies that if incoming students do not need remediation, they will not need legal writing programs.

Finally, the MacCrate Report[66] notes the importance of "skills" and calls for more resources to be devoted to their teaching, but it has had the unfortunate effect of further embedding the skills/substance dichotomy into institutional discussions of curriculum. The report identified communication skills (including legal writing) as among the skills and values that new lawyers should seek to acquire,[67] and the legal writing community has trumpeted this finding.[68] However, the MacCrate Report itself does not seem to have led to enormous changes in terms of institutional investment in writing programs in the five years since its publication.[69] Five years later, we are still in a market where law school graduates are fighting for teaching jobs,[70] so law school deans have little motivation to upgrade the status (and pay) of skills teachers. Yet we are also in a market where law schools are fighting for students, so cagey administrators can use the existence of a writing program, no matter how understaffed and underpaid, as a selling

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65. For a discussion and refutation of this view, see Rideout & Ramsfield, *supra* note 49, at 41–43.

66. ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

67. *Id.* at 172–76.

68. For example, at the 1994 Legal Writing Institute Biennial Conference, a plenary session was devoted to the MacCrate Report and its effects on the future of legal research and writing as a discipline. Panelists expressed hope that the report would galvanize support for skills teaching in the legal academy. Legal Writing Institute Biennial Conference, Chicago–Kent College of Law, Chicago, Illinois, July 29, 1994.

69. Between 1992 and 1996, the salary gap between legal writing professionals and other law faculty increased. In 1992, only 12% of law schools reported gaps of over $30,000 between legal writing salaries and other faculty salaries. In 1994, 51% of schools reported such gaps. Ramsfield, *supra* note 60, at 17. In 1996, 53% reported such gaps. Ramsfield & Davis, *supra* note 57, at 12. In addition, only a 2% change occurred between 1990 and 1994 in the percentage of overall law school budgets allotted to legal writing programs. Ramsfield, *supra* note 60, at 22.

70. Each year, the Association of American Law Schools (AALS) sponsors a recruitment conference at which law schools can interview candidates for teaching jobs. By comparing the number of registered candidates each year with the subsequent year's *AALS Directory*, which lists faculty members at accredited law schools, AALS has determined that in the five years from 1991–92 to 1995–96, the success rate of job candidates was 10.7%. Richard A. White, *Associate of American Law Schools Statistical Report on Law School Faculty and Candidates for Law Faculty Positions, 1996–97* (visited Feb. 11, 1998) <www.aals.org/stats>. In 1995–96, the latest year for which statistics are available, the success rate was 9.8%. *Id.*

point.[71] Thus, the major impact of the MacCrate Report on legal writing may be that it has encouraged law school administrators to showcase "skills" courses, which is much cheaper than really investing in them. In addition, the report has led the academy back to thinking in terms of skills as something quite separate from the rest of legal academia, which is a dangerous path to pursue.

C. Deconstructing the Dichotomy: Writing Skills as a Dangerous Supplement

Law school decision makers—deans and tenured faculty—have been seeing the curricular world in terms of skills and substance, speech and writing. As a result, the teaching of writing has suffered from embedded hierarchies that rank these ideas, and legal writing has become a second-class citizen of the legal academy, a mere supplement to doctrinal courses. What those in control of the academy conceal, however, is that legal writing is a dangerous supplement, capable of breaking down the dichotomies upon which the legal academy has relied to keep its hierarchical house in order. Law school decision makers feel they must keep legal writing in its place because it is expensive to teach, and its mere presence in the curriculum indicates that doctrinal courses alone cannot constitute a complete legal education. Thus, legal writing threatens the Langdellian tradition in the legal academy, where every professor is a Socrates and every class is brimming with "substance."

Those who hold power in most schools agree that legal writing, while threatening, is necessary.[72] If law students are to benefit from doctrinal courses, they must have some explicit instruction in legal analysis and the conventions of legal writing. Law school accreditation standards reflect this belief by requiring some form of writing instruction,[73] and the MacCrate Report[74] echoes this sentiment.

Law school deans and tenured faculty therefore find themselves needing to put stock in legal writing skills programs, but simultaneously needing to circumscribe them. Thus, these players draw sharp lines between "writing" and

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71. My own law school, for example, uses its web page to tout "a demanding and varied program in legal research and writing" that enables students to master "skills necessary for the study and practice of law." *West Viriginia University College of Law Homepage* (visited Feb. 11, 1998) <http://www.wvu.edu/~law>. While it notes that the course is taught by "three full-time writing instructors," *id.*, it does not mention that the student-faculty ratio in the course is 50 to 1, or that the instructors, unlike the rest of the faculty, are not on the tenure track.

72. In a 1996 survey, only one out of 130 responding law schools reported that it did not require a legal research and writing course. Ramsfield & Davis, *supra* note 57, at 1.

73. The American Bar Association Section on Legal Education and Admission to the Bar is the accrediting body for United States law schools. Its standards require law schools to offer "an educational program designed to provide [their] graduates with basic competence in legal analysis and reasoning, legal research, problem solving, and oral and written communication" and "at least one rigorous writing experience." ABA Standards for Approval of Law Schools, Standard 302(a)(2)–(3) (1997).

74. MACCRATE REPORT, *supra* note 66, at 172–76.

"doctrinal" courses, between "skills" and "substance." These lines dictate the status, power, and compensation awarded to legal writing professionals, and differentiate them from "regular" faculty. And these differentiations become self-fulfilling prophecies. Unlike "regular" faculty, writing faculty, with their heavy courseloads and non-tenure-track contracts, have little motivation or opportunity to build careers as scholars. Further, even when the motivation exists, the writing faculty member can easily burn out when she knows from the outset that her job is only temporary, that she is not valued, that she has no promotion or sabbatical to look forward to, and that she will likely have to spend two of her three years looking for her next job. Legal writing instructors *do* burn out for these reasons,[75] but their experience only serves to justify the institutional cover story that writing faculty should be treated differently. By promoting this story as being inherent in the nature of things, the legal academy can convince even those who teach legal writing that they and their programs are being treated fairly. Further, law school deans can simultaneously comfort this constituency by reminding them that they teach a very important and unique course, one that the school sees as absolutely fundamental and requires all of its students to take. And the story works. Legal writing professionals have internalized the story of the unique importance of legal writing and derive comfort (or consolation) from it.[76]

But the difference between skills and substance is not inherent in the nature of things. The skills of legal analysis are taught in every law school class, and every class uses some form of substantive law as its basis. Students in a legal writing course are writing *about* something, and students in doctrinal courses are *doing* something with substantive law. Further, in the last several years, there has been a move to infuse skills training throughout the curriculum, along with a recognition of the fact that students learn skills best when they learn them in context.[77] Thus, some doctrinal faculty are now advocating more time spent on specific instruction in analysis, writing, and drafting, even if it means one might not get to the end of a casebook in a semester.[78] This cross-pollination of skills and substance reflects the "writing across the curriculum" movement that has been present in undergraduate education for many years.[79] It also has caused at least

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75. "For a variety of reasons, including low salaries, imposed limits on contracts, and being shut out of faculty votes, most legal writing professors stay three or fewer years." Rideout & Ramsfield, *supra* note 49, at 87 n.166.

76. *See, e.g.*, Veda Charrow et al., *The Importance of Legal Writing*, *in* CLEAR AND EFFECTIVE LEGAL WRITING 1 (2d ed. 1995) (explaining why writing is the most crucial skill for success in legal practice and law school); Rideout & Ramsfield, *supra* note 49, at 99 (noting that legal writing is "one of the richest and most complex of the traditional discourses").

77. *See, e.g.*, William D. Underwood, *The Report of the Wisconsin Commission on Legal Education: A Road Map to Needed Reform, or Just Another Report?*, 80 MARQ. L. REV. 773, 783 (1997) (advocating the "integration of substantive courses and skills training").

78. *See, e.g.*, Floyd, *supra* note 62, at 859 (criticizing the fact that the law school curriculum "focuses on coverage of the material" rather than on in-depth skills instruction).

79. Ramsfield, *supra* note 60, at 9.

some in the legal academy to recognize that the skills/substance dichotomy may no longer be workable.[80]

One can further deconstruct the dichotomy by noting the emphasis on legal reasoning and analysis in so many modern legal writing courses. Indeed, "Legal Writing" is a misnomer, since most courses focus more on the analytical process than on the technicalities of writing. Even the names of the new textbooks reflect this emphasis: *Legal Reasoning and Legal Writing*;[81] *Legal Writing: Process, Analysis, and Organization*;[82] *Writing and Analysis in the Law*;[83] *Legal Method and Writing*.[84] By "legal analysis" or "legal reasoning," these textbooks' authors refer to skills involved in rule-based reasoning: reading cases critically, parsing rules—whether common law or statutory—applying rules to facts, making analogies and distinctions, considering how policy and politics might affect a rule's application, and testing arguments for real-world marketability. One of the newest texts also devotes some explicit discussion to "narrative reasoning," which it defines as a method of reaching a conclusion "by telling a story that calls forth that result. It asserts, '*X* is the answer because that is how the story should end.'"[85] Other texts mention the role of this type of fact-based argumentation as well, although they do not explicitly refer to it as narrative reasoning.[86] Overall, the textbooks devote much more space to sophisticated analysis than to the niceties of writing style.[87] Indeed, today's legal writing courses owe more to Llewellyn's *Elements of Law* than to Strunk and White's *Elements of Style*.

Thus, the "legal writing" courses are teaching legal analysis, but they are taking that teaching one step further by requiring students to reduce their reasoning to written form. These courses share the goals of "substantive" classes in the first-year curriculum: teaching students to reason insightfully, intelligently, and intelligibly about the law (the very goals that allowed Langdell to elevate law to the status of a legitimate academic discipline at the turn of the century). The primary

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80. *See, e.g.*, Norman Brand, *Legal Writing, Reasoning & Research: An Introduction*, 44 ALB. L. REV. 292, 295 (1980) (noting that learning legal writing is the same as learning legal analysis, and that this fact removes the distinction between substance and skill); Saunders & Levine, *supra* note 38, at 126 (noting that the dichotomy between substance and skills is "false").

81. NEUMANN (2d ed.), *supra* note 61.

82. LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION (1996).

83. HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW (3d ed. 1995).

84. CALLEROS, *supra* note 60.

85. EDWARDS, *supra* note 82, at 5. The author describes the theoretical and analytical underpinnings of her text in Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7 (1996).

86. *See, e.g.*, NEUMANN (2d ed.), *supra* note 61, at 301 ("Motivating arguments, after all, grow out of the facts."); *see also* CALLEROS, *supra* note 60, at 388–90; NEUMANN (2d ed.), *supra* note 61, at 301–09.

87. Recent scholarship in the field of legal writing has called for even greater, and more sophisticated, emphasis on legal analysis in legal writing courses. *See, e.g.*, Edwards, *supra* note 85, at 44–49; Kate O'Neill, *Formalism and Syllogisms: A Pragmatic Critique of Writing in Law School*, 20 LEGAL STUD. F. 51 (1996).

difference between legal writing and other courses is that legal writing courses and their texts work toward these goals explicitly by discussing tools and methods of legal analysis, while other courses tend to work more implicitly. And another difference, one that implicates the speech/writing hierarchy, is that legal writing courses are structured around the creation of written documents, whereas doctrinal courses are focused on daily classroom discussion. What is truly different, then, about legal writing courses is that the process of "doctrinal" instruction in these courses takes place through written exercises that explore how style and substance work together.

Ironically, this difference, which is not really a difference at all, lies at the root of the status differential. To marginalize and control the dangerous supplement of legal writing, doctrinal faculty take a narrow view of "writing" in law school, seeing it only as a mechanical process that involves little more than the mastery of basic grammar and punctuation.[88] This view in turn leads to the idea that legal writing is remedial, and that those who teach it are not really part of the legal academy. Thus, by not admitting that legal writing programs have broken free of their remedial roots, law school faculty can control the dangerous supplement.

This confinement of legal writing, however, overlooks the fact that legal writing programs have experienced a healthy expansion, from basic research and remedial writing instruction to more sophisticated training in legal analysis. If the mark of a truly "legitimate" discipline is that it serves as a critic of the law and as a source of new law, legal writing fills the bill as well as torts or contracts or any other basic first-year course. By researching and analyzing the law, students quickly learn to be critics of the law. Research assignments can easily be designed to point up inconsistencies or possible problems with statutes, for example. Like any professor throwing out a hypothetical in class, the legal writing instructor designs a problem to allow the student to think deeply about the law in a problematic case. To think *more* deeply, in fact, since the student may spend weeks reading statutes, cases, journal articles, and other commentaries. While it is true that the typical writing assignment asks students to make an objective prediction (how will the law apply?), the subtext of an assignment is always inviting criticism (how should the law apply?). A good legal writing course will demonstrate that the law is more than syllogisms—that sometimes a good prediction rests as much on the politics of the hypothetical as on the black letter law.[89] Thus, sometimes "will" and "should" may coincide. When they do not, the course encourages students to think about why they do not, and what they as future lawyers might do about it.

Law school adminstrators and tenured faculty also marginalize legal writing by promoting the view that the legal writing process is simplistic and restrictive.[90] By forcing students to write using formulas, they argue, legal writing courses constrain the free flow of ideas that is possible in the oral-based Socratic classroom.[91] This view stems from the embedded speech/writing hierarchy, which,

88. Rideout & Ramsfield, *supra* note 49, at 41–43.
89. *See* NEUMANN (2d ed.), *supra* note 61, at 125 (on testing for marketability).
90. Rideout & Ramsfield, *supra* note 49, at 46–47.
91. *Id.*

like the skills/substance dichotomy, can be deconstructed. In the case of speech versus writing, one can say that speech is just as crude a representation of thought as is writing. Speech, like writing, is just a medium through which thoughts can be communicated. Further, "speech can be as unclear and ambiguous as writing, as most persons who have attended a law school lecture can testify."[92] The oral presentations of the Socratic classroom are therefore no more worthy, as intellectual products, than the papers students submit in a writing course.

In addition, the speech/writing hierarchy as applied to the law curriculum does not account for the fact that teaching writing necessarily includes teaching legal analysis, and that a hidden, spoken Socratic dialogue takes place in all legal writing courses during the conferences that instructors hold with their students. In the instructor's office, students and teachers question each other, respond to criticism, and move forward in their understanding of the subject matter of the assignment. The final document is merely the last step in a long analytical process, much of which is conducted orally, both in and out of class. What legal writing instructor, in remembering last semester's student conferences, will not be able to identify modern corollaries of Socrates' students: "Protagoras becomes angry, Polus resorts to cheap rhetorical tricks, Callicles begins to sulk, Critias loses his self-control, Meno wants to quit."[93] I am not claiming that legal writing instructors have the pedagogical genius of Socrates, but merely that they, like their "doctrinal" colleagues, use something resembling his teaching process and have shared some of his experiences. I am also not belittling students, but rather remarking that human nature, to which we are all subject, has not changed much in twenty-five centuries. I could easily prove that the reactions of Socrates' students—sulking, using cheap tricks, wanting to quit—have been my own reactions to the prospect of grading stacks of papers in my legal writing course.[94]

Because this oral aspect of legal writing courses is hidden, the legal academy has viewed writing programs in terms of a mechanical writing process and formulaic documents.[95] As a result, legal writing professionals have had trouble identifying the "legal science" behind legal writing programs and changing the status quo as to what knowledge is taken seriously in the academy.[96] Bryant Garth and Joanne Martin have noted that fields such as negotiation have made the move from an outsider discipline to a field with "a more secure home in the legal academy."[97] This change occurred because negotiation teachers, "professor-entrepreneurs," turned practice into theory, discovering and publishing theoretical

92. Balkin, *supra* note 5, at 757.

93. SEESKIN, *supra* note 10, at 3.

94. For more on the relation of the Socratic method to the teaching of legal writing, see Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 TEMP. L. REV. 885 (1991).

95. Rideout & Ramsfield, *supra* note 49, at 46 (discussing the traditional view of legal writing as nothing more than drafting).

96. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 504 (1993)

97. *Id.* at 505.

literature about negotiation, and teaching that theory in their courses.[98] Now employers are beginning to seek graduates who have had these courses,[99] which offer more than the bare-bones practical training one could receive on the job.

Legal writing, too, has developed a theoretical literature in recent years, and legal employers are certainly aware of the value of graduates who are well trained in written and oral communication.[100] Yet, caught up in the speech/writing hierarchy, legal writing still does not have the status of "legal science." Elite law schools are less likely to have well-developed writing programs than are schools with less prestige.[101] Legal writing instructors are still largely non-tenure track, and a disproportionate number of them are women.[102] Legal writing is thus still an "other" when it comes to the law school curriculum. It remains a supplement.

However, while proponents of the speech/writing (or the skills/substance) hierarchy may see legal writing programs as mere supplements to the curriculum, the fact remains that the curriculum *needs* this supplementation and is incomplete without it. Students simply cannot master the nuances of critical reading, reasoning, and writing without some explicit instruction in these areas, and legal writing courses tend to be the only classes that offer this explicit instruction.[103] Thus, the

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98. *Id.* at 505–06. The respectability of the Harvard Law School name helped to bring about this change, as Harvard professors Roger Fisher and William Ury authored an important early negotiation text, *Getting to Yes: Negotiating Agreement Without Giving In* (1981). Garth & Martin, *supra* note 96, at 505.

99. Garth & Martin, *supra* note 96, at 505.

100. A study sponsored by the American Bar Foundation, published in 1993, revealed that over 90% of Chicago hiring partners surveyed felt that new law graduates should acquire solid oral and written communication skills in school, rather than developing them on the job. *Id.* at 490.

101. According to a search of their World Wide Web sites on the Internet in the summer of 1997, Harvard Law School taught writing through a one-semester pass-fail course, Legal Reasoning and Argument, where students heard faculty lectures but received direct writing instruction from other law students in weekly workshops, Harvard Law School Web Site, (visited July 8, 1997) <www.law.harvard.edu/Administrative-Services/Registrar/catalog/descriptions>, and Yale offered writing instruction through small sections of substantive courses. Yale Law School Web Site, (visited on July 8, 1997) <http://elsinore.cis.yale.edu/lawweb/lawschool/studfp.htm>. Yale's Web site did note that the school offered an advanced legal writing course with limited enrollment, taught by a faculty member with excellent credentials but only "Lecturer" status. *Id.*

Indeed, schools ranked in the top of five tiers by U.S. News and World Report in 1994 were the least likely to have writing programs run by full-time, tenure-track directors. Ramsfield, *supra* note 60, at 76. They were also the most likely to have student-faculty ratios of over 75 to 1 in writing courses, *id.* at 79, and the least likely to require seminar courses that include a writing component in the second or third year, *id.* at 77.

102. Ramsfield, *supra* note 60, at 19.

103. While doctrinal courses attempt to teach students to learn these skills by requiring students to perform them, legal writing courses provide time and space for metadiscussion about these skills. What kinds of things should a lawyer look for when reading a case? Why? What does it mean to synthesize cases? How does synthesis work in different contexts? How are rules structured, and how do they relate to facts? How do people write about the law's application to facts? These are the questions that students

"supplement" of a legal writing program, with its focus on reasoning skills, is necessary to the success of the core curriculum, even though it generally is viewed as unscholarly, anti-intellectual, or "dangerous." The mere need to teach these skills is threatening to the status of the legal academy. Interestingly, however, when teachers of doctrinal courses turn their scholarly interests toward the reasoning skills covered in most legal writing courses, their work appears in the nation's most prestigious law journals.[104] With the appropriate credentials, a legal scholar can thus convert the contents of a legal writing skills course into respected legal science simply by lending his name to the inquiry. Thus, the distinction between skills and substance (and therefore between what is a "supplement" and what is not) breaks down along the lines of status that are predetermined by the academy.

III. EFFECTS OF THE SPEECH/WRITING HIERARCHY ON WRITING PEDAGOGY

Curiously, although much of the practice of law involves writing, law students at most American law schools receive little instruction in the art of writing and few invitations to think deeply about the relation between writing and the law. Their primary exposure to issues of writing is through a one- or two-semester legal writing course in the first year of law study.[105] And, as explained above, those who teach such courses are often constrained by institutionalization of the speech/writing hierarchy and relegated to second-class citizenship in the legal academy. This stratification detrimentally affects legal writing pedagogy, which in turn affects the way in which students learn about issues of writing that cut to the very nature of the law.

This section examines the effect of the speech/writing hierarchy on legal writing pedagogy by analyzing the experiences of law students in legal writing programs. Students are the focus of any legal writing program, and legal writing programs often become the focal point of student anxiety in the first year of law school.[106] Courses in writing become dangerous supplements to a law student's

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discuss, explicitly, in legal writing courses. These issues arise implicitly, of course, in doctrinal courses, but they are presented only in the context of a specific area of law, and there is little or no time for discussion of them in the abstract.

104. *See, e.g.*, Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923 (1996); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

105. Ramsfield, *supra* note 60, at 4.

106. "[T]he [legal writing] course generates student anxiety sooner and often more intensely than other courses because, in this course, the students generally get their first law school feedback—either in the form of critiquing comments or, increasingly, in the form of actual grades." Maureen Arrigo-Ward, *How to Please Most of the People Most of the Time: Directing (or Teaching in) a First-Year Legal Writing Program*, 29 VAL. U. L. REV. 557, 559 (1995); *see also* Jan M. Levine, *"You Can't Please Everyone, So You'd Better Please Yourself": Directing (or Teaching in) a First-Year Legal Writing Program*, 29 VAL. U. L. REV. 611, 615–17 (1995) (discussing extensive feedback, grades,

educational experience because writing is risky and personal. Evaluations of writing touch upon sensitive areas of voice and intellectual style. Speech, on the other hand, is not subject to the same detailed evaluation. A recitation in a Socratic class is rarely critiqued or graded. A professor who is displeased with a student's oral response will often simply call on another student rather than risk criticizing the offending student in the public arena. Thus, much of the criticism a first-year student receives on her work in law school is criticism of her writing. To the extent that this criticism is hard to take or seems invalid, a student is likely to develop a cover story, explaining to herself that her writing is not as representative of her ability as is her speech, which has not met with explicit criticism. A student may therefore believe that she is not really "present" in her legal writing in the same way that she is in her speech. In this way, the speech/writing hierarchy begins to control the student's experience, teaching her that her true identity as a law student does not lie in writing but in speech, and that writing, in fact, is a mere supplement to her education. Once a student learns to dismiss writing, it is easy to develop dismissive attitudes toward the writing program and those who teach in it.

Because legal writing instructors generally have more student contact than other faculty members, and because these instructors' status is more precarious, student attitudes play a critical role regarding the survival and flourishing of legal writing professionals. While an occasional complaint about a long-tenured faculty member may be (and sometimes wisely is) disregarded, complaints about non-tenure-track instructors are usually taken more seriously because the renewal of their contracts is dependent upon their performance each year. Given that many instructors still have short-term contracts[107] and are novice teachers,[108] an instructor receiving some student complaints in her first year may not have time to redeem herself before administrators decide not to renew her one- or two-year contract.

The same is true of legal writing programs. Many law faculties are engaged in evaluating and modifying their programs, and some schools seem to experiment with a new model every few years.[109] Every program will have its problems and will generate some student dissatisfaction during its start-up period. Therefore, if a school does not allow a program time to mature, the program (and its budget) may be summarily cut.

Because student attitudes are so important to the success of legal writing careers and programs, it is worth exploring what lies behind some common student criticisms to determine whether they are inevitable, given the task that legal writing programs are meant to perform. These complaints fall into two broad categories: (1) legal writing programs do not value the voices and analytical styles that new students bring with them to law school; and (2) legal writing programs are not "real" law school courses. I will describe each of these criticisms in turn and then examine how legal writing programs have invited these criticisms by relegating

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requirement of active learning, and relatively low credit weight as sources of student anxieties concerning legal writing programs).

107. Ramsfield & Davis, *supra* note 57, at 2.

108. *Id.* at 11.

109. Rideout & Ramsfield, *supra* note 49, at 88.

important lines of inquiry—that lie at the very heart of the discipline's "substance"—to supplementary status.

A. Student Criticisms of Legal Writing

1. Legal Writing Fails to Value Student Voices

Lawyers, judges, and legal scholars belong to a particular discourse community with its own norms and values. If a student is to enter this community, he or she must develop in writing a voice that the community can hear. "Voice," as the term is used in writing pedagogy, generally refers to an individual style that marks the personal and imaginative presence of a particular writer.[110] As James Boyd White explains, an understanding of voice is critical to an understanding of law: "The central idea is not that of goods, but of voices and relations: what voices does the law allow to be heard, what relations does it establish among them? With what voice, or voices, does the law itself speak?"[111]

The very fact that White uses the word "voice" to describe an important quality in the law (which after all consists of written texts) is another manifestation of the speech/writing hierarchy. We prefer to think of important ideas as being conveyed through a voice rather than through a work of writing. We therefore value writing most when it has a speechlike quality, when the author is vocally present in it. However, when law students receive criticism on their writing, as they inevitably do, they may dismiss their writing and become psychologically absent from it.[112] They may then assume that voice and imagination are, by nature, absent from the law.

In legal writing courses, this scenario plays itself out as soon as students receive comments on their first round of papers. While an instructor may have merely asked a student to clarify his or her use of a term of art (or to correct a grammatical error), the student will sometimes read the instructor's comment as a personal threat: "She doesn't understand the way I write." "She wants us to write her way." "I've always gotten A's on my papers in the past. This legal writing course is going to ruin my good writing skills." "I feel like a robot. I can't express

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110. *See* PETER ELBOW, WRITING WITH POWER 288 (1981).

111. JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 42 (1985).

112. Rideout and Ramsfield note that legal writing courses run the risk of treating students as "'passive writers,' writers who believe that writing lies out of their own control. That mistake emerges when students come to believe that writing is simply a guessing game, with rules known only by the professor." Rideout & Ramsfield, *supra* note 49, at 65. Instead, students should "begin to hear their voices as writers in the law, and to begin constructing the sense of rhetorical role and identity that will mark them as legal writers." *Id.*

myself." "I'm going to have to forget everything I already know about writing to pass this course."[113]

Does entry into the legal discourse community require this kind of ritual pain? Is legal writing pedagogy training people to abandon their voices (and thus their imaginations) when they write about the law, and, if so, what message does this pedagogy send about the nature of law? Why are legal writing professionals so often accused by students of suppressing voices?[114] It appears that the fault is to some extent their own.

As a starting point, texts that legal writing professionals write and assign in their courses may, however unintentionally, downgrade the writing skills and the voices that students have developed before arriving in law school. For example, one legal writing text,[115] an otherwise excellent guide to rule-based reasoning and writing, contains the following information at the head of a checklist designed to help students test their writing for predictiveness:

> **Have you concentrated on solving a problem, rather than on writing a college essay?** A college essay is a forum for academic analysis—analysis to satisfy curiosity—rather than practical problem-solving. In a college essay, you can reason in any logical manner toward any sensible goal you select, even at whim. But legal writing is practical work, and, although curiosity is an extremely valuable asset in problem-solving, it is not an end in itself.[116]

Earlier in the text, the author discusses the need for rewriting in legal drafting, and tells students that "[i]n college, you might have completed assignments 'by turning in what were basically first drafts, lightly edited to fix glaring errors.' As you will see in a moment, that will not work when you are creating a professional product."[117]

Similarly, another legal writing text states that "[a]lthough writing in law practice requires both intellect and creativity, it is never merely an intellectual or

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113. I have heard variations on these themes myself, and colleagues from around the country have told me that they have heard similar criticisms from students. Rideout and Ramsfield have also noted "the common complaint of law students that they feel alienated from their writing in law school." *Id.* at 51.

114. *See, e.g.*, RICHARD H. WEISBERG, WHEN LAWYERS WRITE 203 (1987) (noting that "the blandness of most legal writing courses" prevents students from developing a personal writing style). In addition, in an essay addressed to prospective law students, James Boyd White notes the following fears, which legal writing pedagogy can generate: "Will I become molded to these modes of speech, my mind cast into these ideal forms? Is my life to consist of learning by imitation? You can imagine yourself becoming a caricature of a lawyer,...the proper butt of lawyer jokes, and wonder what you have got yourself into." James Boyd White, *Legal Writing, in* LOOKING AT LAW SCHOOL: A STUDENT GUIDE FROM THE SOCIETY OF LAW SCHOOL TEACHERS 252, 254 (Stephen Gillers ed., 1990).

115. NEUMANN (2d ed.), *supra* note 61.

116. *Id.* at 76.

117. *Id.* at 59 (quoting STEVEN V. ARMSTRONG & TIMOTHY TERRELL, THINKING LIKE A WRITER 9–18 (1992)).

creative exercise [like an undergraduate paper]."[118] It goes on to warn that "[t]hose who indulge in the common undergraduate practice of cranking out an assignment the night before it is due will probably do poorly. The law demands precision and penalizes those whose work is rushed and sloppy."[119]

These passages disparage the writing and thinking that law students may have done as undergraduates. Apparently, students were not doing real "work," but were instead following mere whims in their earlier education. Worse, they were sloppy in doing so. Their documents and their voices were unprofessional. These charges essentially tell students that the imaginative voices they used previously have no connection to the law. Further, because the required text carries the imprimatur of the teacher, students may attribute these charges to their own instructor, believing that she is incapable of seeing the value of their writing experience and of the voices they have developed.

Going one step further, students may assume that this blindness is attributable to legal education or legal writing itself; entrance into the legal discourse community has barred the instructor from the other discourse communities to which students might still belong. Upon reaching this conclusion, most students, if they value the voices they developed as undergraduates, will have second thoughts about joining the legal discourse community and silencing themselves. Only the prospect of a failing grade in legal writing may motivate such students, superficially, to produce whatever the instructor seems to want. My colleague James Elkins once surveyed a number of his appellate advocacy students and found that most of them had adopted the attitude of the good soldier toward writing tasks; they did not enjoy or identify themselves with legal writing, but they would do whatever was necessary to survive the course.[120] Thus, they absented themselves from their legal writing in the hopes of finding their real selves and true voices elsewhere. Legal writing pedagogy had thus encouraged them to suppress their imaginations as they thought and wrote about the law. Therefore, it narrowed the range of creative legal thought and no doubt precluded the generation of original and diverse legal insights.[121]

The way in which some courses focus on writing style may also restrict the diversity of legal discourse. To the extent that students were rewarded as undergraduates for using multisyllabic words, jargon, complex sentences, and sheer quantity of text, the requirement of concise, plain English in law school writing may come as a shock, particularly when legal writing instructors criticize their previously successful, "sophisticated" style. Other students, who may have

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118. JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD 150 (2d ed. 1994).

119. *Id.* at 153.

120. James Elkins, The Things They Carry into Legal Writing 33–34 (1995) (unpublished manuscript on file with author).

121. Shutting down imaginative thinking about the law is, in effect, shutting down the law itself. As James Boyd White explains, "[L]aw is indeed an imaginative activity, its task the constant creation of rhetorical and intellectual resources." JAMES BOYD WHITE, THE LEGAL IMAGINATION 760 (1973).

professional or personal experience in writing journalistic feature stories, fiction, letters, or poetry, may find plain English sterile, simplistic, and dehumanizing. Nevertheless, legal writing courses tend to describe their own vernacular of plain English as the one true style in which any intelligent idea should be expressed.[122] This bias may lead instructors to shut down a student's legal imagination by criticizing a student's thoughts when they are conveyed in some other writing style. That is, instructors may subconsciously equate voice with merit.

Much has been written about the confusion of voice and merit in legal scholarship. Ray Delgado, for example, has noted that because merit criteria are determined by dominant groups, they may be biased in favor of the dominant voice.[123] Similarly, in legal writing courses, the plain English vernacular of the legal writing discourse community may be embedded in its notions of what separates worthy legal analysis from unworthy. As a result, students may find that their ideas are not given recognition because instructors focus on the devaluation of their "outsider" voices. At this point, it is easy for students to buy into the speech/writing hierarchy, deciding that their legal writing does not reflect their real thoughts, that the law will not accept them as writers, and that the better medium for these thoughts is the Socratic discussion of the doctrinal classroom.

This conceptualizing of legal writing as an inadequate vehicle for substantive thought persists among students even after they complete law school, as I recently learned firsthand. The trial lawyers' division of our state bar association had asked me to speak about legal writing at its annual conference. When I accepted the invitation, the conference organizers were thrilled and assured me that the lawyers in the group had voiced a need for writing instruction. When I submitted my materials for the talk, I suggested "Writing in Plain English" as a working—albeit dull—title. A few weeks later I received the glossy schedule for the conference. There I was, listed for the eleven o'clock time slot. The title of my talk appeared as "Plain English: Style over Substance?" No doubt the skepticism inherent in the title originated in the organizers' experiences with legal writing as first-year law students.

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122. Richard Wydick, whose *Plain English for Lawyers* is a phenomenally popular and helpful guide to avoiding legal gobbledygook, nevertheless betrays this bias: "The premise of this book is that good legal writing should not differ, without good reason, from ordinary well-written English." RICHARD WYDICK, PLAIN ENGLISH FOR LAWYERS 3 (3d ed. 1994). The real question, of course, is *who gets to decide* what constitutes "ordinary well-written English?" Wydick implies that this English is the plain English that works so well in most legal writing but may not lend itself so easily to other discourse communities.

This question of whether there is one true style of "well-written" English is much like the question of whether there is one true rule of law, as has at times been proposed by foundationalists like Ronald Dworkin in *Taking Rights Seriously* (1977). Both questions cut to the very meaning of writing and the law.

123. Ray Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 101–02 (1990). Daniel A. Farber and Suzanna Sherry are among those who have questioned the value of recent legal scholarship written in a narrative voice. Daniel A. Farber and Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993). They note that legal storytellers need to "articulate the legal relevance of the stories, and to include an analytical dimension in their work." *Id.* at 809.

2. Legal Writing Fails to Value Students' Intellectual Styles

Legal writing courses must not only coach students as they learn to adapt their voices to the legal discourse community; they must also teach students what counts in that community as rational argument. The legal system has its own ways of reasoning that may be foreign to incoming law students. However, lawyers, judges, and law professors have so internalized this system of reasoning that they may find it unnecessary or impossible to teach. They seem to assume that all humans are born thinking in terms of rules, hypotheticals, and reasoned conclusions.

Legal writing instructors, being on the front lines of evaluating first-year students, are usually the first to witness the disparity in reasoning styles between students and the legal academy. As explained above, these instructors invest a great deal of energy in trying to bridge the analytical gap by teaching explicitly the elements of legal reasoning: understanding the role of precedent; making analogies and distinctions; applying rules to facts. When students fail to master these skills, their problems are apparent in the writing they submit.

Students having problems with legal reasoning may be applying other methods of reasoning to their law school assignments. A recently published legal writing text tells students that many people outside the legal community employ narrative, rather than rule-based, reasoning to the problems they must solve.[124] In law school, however, rule-based reasoning dominates, and students must become adept in it to succeed.

In years past, when Langdell was developing the modern curriculum, it was assumed that students had studied classical rhetoric and logic as undergraduates. These days, few schools even offer these courses, and most students have not taken them. Nevertheless, law school teaching has not adjusted to this change.[125] In terms of their curricular and pedagogical decisions, law school faculty are still assuming that students have had classical training in rule-based reasoning when they walk through the door as first years. Naturally, this ill fit between legal pedagogy and current undergraduate reality leads students to suffer adjustment problems when it comes to rule-based reasoning.

Students may react to this imposition of rule-based reasoning just as they react to the imposition of plain English style. It seems foreign and inimical to other patterns of reasoning they may have developed in other disciplines. Linda Edwards tells students in the introductory pages of her legal writing text that:

> because thought process is so fundamental to identity, law school's emphasis on rule-based thinking can be disturbing. During the first year of law study, many law students wonder whether they are losing vital parts of themselves. It seems as if the ways they have

124. EDWARDS, *supra* note 82, at xxii.
125. Stropus, *supra* note 8, at 472–75.

> always thought and reacted are not valued in the law and indeed that law study is requiring them to become different people.[126]

One student interviewed by Kurt Saunders and Linda Levine exemplified this sentiment:

> [W]hat I'm having difficulty with is an absorption in aspects of the law separating it from the human element. They [the professors] don't see the human aspect in the law frequently enough and they seem to think that...that ability to separate is an important skill. I don't believe that.[127]

This student feels she is being punished for not "thinking like a lawyer." This reaction is natural, given that law school faculty tend to impose a hierarchical structure on various patterns of reasoning, with rule-based reasoning at the top. Students are told, sometimes by their legal writing texts, that one who can read carefully, understand precedent, formulate analogies and distinctions, and develop compelling arguments is "thinking like a lawyer." Such people reap the rewards of good grades and good jobs. Of course, then, thinking like someone other than a lawyer is punished. It is hardly thinking at all. In the classroom, professors hearing nonlawyerly thinking will frown with embarrassment and move on to the next student.

Legal writing programs can easily become complicit, to some extent unwittingly, in the imposition of this hierarchy, which may unnecessarily disable students. Often, students are reminded that their own opinions do not count in legal writing.[128] All that matters is precedent. If students are thinking like themselves and not mimicking precedent, then they are not thinking like lawyers, and their legal writing is invalid. A teaching assistant recently brought this point home to me when she came to visit my legal writing class during the first week of school to offer her own words of advice. "The key to this course is simple," she told the first-year students. "Nobody cares what you think." Her point was well taken, insofar as a memorandum or brief citing no external authority will likely receive a failing grade. But how are students, at the beginning of their law school careers, to respond to such a pronouncement, other than by feeling devalued and looking for validation in disciplines other than legal writing?[129]

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126. EDWARDS, *supra* note 82, at xxiv.

127. Saunders & Levine, *supra* note 38, at 166.

128. Rideout & Ramsfield, *supra* note 49, at 64–65 (criticizing the traditional notion that students arrive in law school as empty vessels waiting to be filled with information, and noting that this view encourages students to suppress their own views in the classroom).

129. James Boyd White has explained that he had little interest in writing as a schoolboy because his assigned papers asked only that he "meet the expectations of others. I would never have dreamed that I was asked in a paper to think or speak for myself, to reflect the processes of my own mind or the nature of my own experience." James Boyd White, *Why I Write*, 53 WASH. & LEE L. REV. 1021, 1028 (1996). This description sounds very much like the experience of first-year law students in a legal writing course.

3. Legal Writing Is Not a Real Law School Course

When I began teaching in 1992, I taught "only" my fifty first-year writing students in a two-semester legal research and writing course. The school's policy has always been to give incoming faculty a light load to allow them time to adjust. The administration contemplated that in my second year I would teach the first-year course and, simultaneously, a second-year course in appellate advocacy with about thirty students. A few months into my first year, I realized that I was not going to be able to do an adequate job the following year of teaching two different writing courses to a total of eighty students. Just as I was beginning to wonder to whom I would give short shrift—the first years or the second years—a tenured colleague proposed that I take over his civil procedure course, which had grown tiresome to him, and substitute it for the appellate advocacy course. We sold the idea to the dean, probably because it would be cheaper and easier to hire an adjunct to teach appellate advocacy to thirty students than civil procedure to seventy students. My colleague was freed up to pursue a new seminar in his true field, international law, and I assumed a one-semester civil procedure course focusing on jurisdiction and the Erie doctrine.

An interesting thing happened the following year as I began my new schedule. Among students, my stock went up. My first-year writing students appeared to take the course more seriously. My second-year students paid me compliments along the lines of "I'm glad to see they're letting you teach a real course." This new level of respect may have stemmed from the fact that I was no longer a first-year teacher, but I suspect that something more was afoot. All of my students uniformly referred to me as "Professor Eichhorn," where some had called me "Ms. Eichhorn" or even "Lisa" the previous year. As I read my evaluations at the end of the semester, my civil procedure students again and again commented on my newfound status as the teacher of a "real" course.

Given that, by my tally, I spend about four times as many hours per week on my writing course as on my civil procedure course, I find it hard to see civil procedure as the more "real" of the two. Nevertheless, the students' use of the word "real" is widespread and uniform, year after year, as they compare legal writing to other courses. Professionals in the legal writing field must recognize that students, for some reason, do not feel they are taking a "real" course when they study legal writing.

In analyzing this criticism, it might be helpful to begin by asking, Real as opposed to what? Are legal writing courses imaginary? Unreal? Surreal? As a five-year veteran (what Phil Meyer, the director of the writing program at Vermont Law School, calls a "recidivist" legal writing instructor), I can testify that "surreal" might actually describe my experiences in the course at times, but I do not think that is the opposition my students are getting at when they talk about legal writing not being a "real" course. Nor do I think they view legal writing as imaginary or unreal given the very real hours they must spend on the assignments.

Instead, the real/unreal distinction must stem from perceived differences between legal writing and other courses. Perhaps the primary difference concerns

the way in which legal reasoning is taught in the two types of courses, as explained in Part II above. Legal writing courses tend to teach legal reasoning explicitly, while doctrinal courses teach it implicitly, through Socratic discussion. As a result, legal writing texts devote chapters to legal analysis, in the abstract, in a way that casebooks do not. My colleague James Elkins has criticized this aspect of legal writing texts, noting that they seem more like "instruction manuals" that provide step-by-step guides to research, analysis, and writing.[130] In micromanaging the writing process, they are "joyless but authoritarian."[131] Elkins contrasts these texts to casebooks, which "are filled with...people who have stories to tell, even if these stories have been severely 'edited' by law.... What kind of invitation do legal writing texts extend to a student, or to any one of us, concerned that law be a humanistic and liberal art?"[132] While he does not conclude that these problems make the discipline less "real," his observations may be shared by students who think so.

A related reason students may perceive legal writing courses as less than real is the degree of artificiality inherent in the production and grading of writing assignments. Usually, legal writing texts, after providing the instruction described by Elkins, ask students to write memoranda or briefs, addressed to hypothetical supervisors or judges. However, students know that their audience is neither a legal employer nor a judge; instead, it is the legal writing instructor who will read and grade the assignment.[133] Although instructors can read student writing from the perspective of a supervisor or judge, they are necessarily performing a bit of playacting when they do so, and students of course recognize the lack of reality here. Peter Elbow sums up this point nicely: "Real readers are different from teachers."[134]

This artificiality implicates the speech/writing hierarchy. Students can see that the intended reader of their writing assignments is fictional, and therefore will never be "present." If that is the case, then students have little reason to see themselves as "present" as communicators in their own writing. The entire communication takes on an unreal quality from the beginning.

This artificial relation, which begins early in legal writing courses, does not appear in doctrinal courses until the final exam, when students must engage in the same exercise of writing for a hypothetically ignorant audience who is in fact the standard-setting grader. Before final exams, class discussion in doctrinal

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130. James R. Elkins, *What Kind of Story Is Legal Writing?*, 20 LEGAL STUD. F. 95, 108 (1996).

131. *Id.* at 109.

132. *Id.*

133. As Peter Elbow insightfully explains to students of writing:

> When you write for a teacher you are usually swimming against the stream of natural communication.... You seldom feel you are writing because *you* want to tell someone something. More often you feel you are being examined as to whether you can say well what *he* wants you to say.

ELBOW, *supra* note 110, at 219.

134. *Id.* at 220.

courses can proceed along less artificial lines, since it is not being graded and since students and professor admit having had access to the same information in the casebook at the beginning of the conversation. Most importantly, in discussions taking place in doctrinal courses, both students and professor are physically present and, in students' minds, therefore somehow more real.

B. How Legal Writing Programs Have Invited the Criticisms by Viewing Their True Substance as a Dangerous Supplement

The criticisms described above are natural consequences of the way in which legal writing as a discipline has defined its substance. Hierarchies concerning speech and writing, skills and substance, have infiltrated not only law school curricula but also legal writing programs themselves. As a result, these programs have circumscribed themselves and have marginalized lines of inquiry that should lie at the heart of the legal writing discipline. Thus, legal writing has viewed these lines of inquiry—its true substance—as supplementary. Because these lines of inquiry question the very nature of law and writing, they are dangerous. They threaten the comfortable way in which legal writing has defined itself and its place in the law. Thus, legal writing as a discipline has its own dangerous supplements to contend with.

1. Issues of Voice as the Substance of Legal Writing

Legal writing pedagogy tends to privilege one type of style and voice and to limit inquiry into the validity of other voices.[135] Yet this very inquiry is central to the nature of law itself, and the legal writing discipline is uniquely positioned to follow it. Pierre Schlag has noted that important questions surround the voice in which American law has been written.[136] He observes that Langdell, and legal scholars ever since Langdell's time, have concealed the "subject" of the law when describing how legal doctrines work.[137] That is to say, scholars have hidden the fact that they themselves are the subjects of these descriptions, which are describing not what the law "is," but rather what the *scholars think* the law is. Because legal scholarship is typically written in an impersonal tone, often in the passive voice, it gives the impression that the law writes itself rather than being written by a specific subject, the legal scholar. This impression allows the law to take on the quality of Langdellian science. Its truths appear to be *discovered* by the scholar and not *created* by him. The writer's identity or ethos is marginalized, playing the role of a supplement to the real focus of the scholarship, the law itself. Yet this identity, again, is a dangerous supplement. It is the writer who has made the law; the law as written consists only of the writer's opinions, and without the writer, the "law" would not exist.

Given these insights, legal writing professionals need to think seriously about the type of voice they prefer to hear in legal writing. Typically, legal writing

135. *See supra* Part III.A.1.
136. Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991).
137. *Id.* at 1634.

courses require students to produce clear, concise, but rather sterile texts. Instructors tell students to shun the first person, contractions, and slang.[138] They ask students to cast themselves as lawyers writing to other lawyers, often before the students have the vaguest notion of what a lawyer does or would want to read.[139] Legal writing as a discipline values cool reason and detachment. Is "real voice," to use Peter Elbow's term,[140] even possible in this type of writing? Has any real human being breathed real air into the text of a typical memorandum, and if not, is it because legal writing instructors, like Langdell and all of the legal scholars following him, have encouraged students to believe that the law writes itself?

Indeed, legal writing professionals have not encouraged students to see themselves as writers, as the "subjects" of their writings, to use Schlag's term, because their new voices threaten what the discipline has come to accept as the law. Like the rest of the legal academy, legal writing has carried on the Langdellian tradition of hiding or denying the subject so as to perpetuate a scientific view of the law. To the extent that students write openly, in their own voices, and show themselves to be the subject of their writings, they threaten this comfortable status quo. Legal writing has thus regarded voice as a dangerous supplement to its teachings.

This fear of the dangerous supplement has also caused legal writing programs to teach the plain English style without investigating its ramifications. A quick study of the sample objective memoranda in the most popular legal writing texts (and they all have them, usually in an appendix) reveals that they all speak in the voice of plain English, sharing a similar tone. Indeed, they could have been written by the same author, the Legal Writer that students are apparently supposed to emulate. If legal employers expect this style, then legal writing programs would be doing students a disservice if they did not teach it. However, the programs can take this teaching one step further.

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138. The first footnote, on page one of *The Legal Writing Handbook*, a fairly new legal writing text, is a two-paragraph caveat regarding the authors' use of the first and second person, contractions, and other informalities in the text of the book itself. LAUREL CURRIE OATES ET AL., THE LEGAL WRITING HANDBOOK: RESEARCH, ANALYSIS, AND WRITING 1 (1993). The authors carefully explain that their tone is not necessarily appropriate for the documents that students will be drafting. My first reaction to this footnote was surprise at its existence. My second was surprise at its length. Why must legal writing authors apologize for their own voices, when they make their way into print so effectively? *The Legal Writing Handbook* later explains the conventions of legal writing in such detail that it would be impossible for any student to believe that he should mimic the authors' informal tone when drafting a brief. Nevertheless, the text begins with this apology, of sorts. Linda Edwards' text contains a similar but less apologetic disclaimer. EDWARDS, *supra* note 82, at xxiii. It is as if, from the outset, legal writing texts are conditioning students to stamp out their own voices. They are teaching students by example. No wonder the students are scared.

139. For example, in a 1996 survey, 129 law schools reported that they require first-year students to draft legal memoranda. Ramsfield & Davis, *supra* note 57, at 5. Because 113 schools noted that students submitted more than four assignments per year, *id.*, many students are presumably drafting these memoranda early in the first semester, when they have little experience regarding professional legal discourse.

140. ELBOW, *supra* note 110, at 291.

Part of the substance of legal writing should involve investigating the role of plain English in the creation and perpetuation of the law itself. James Boyd White, for example, argues that it is indeed impossible on some level to describe the law in plain English, given the constitutive nature of legal language:

> [I]f one replaces a Legal Word with an Ordinary English Word, the sense of increased normalcy will be momentary at best: the legal culture will go immediately to work, and the Ordinary Word will begin to lose its shape, its resiliency, and its familiarity, and become, despite all the efforts of the writer, a Legal Word after all.[141]

Thus, a legal writing course would be more effective if it taught students about this process, what White calls the "invisible discourse of the law,"[142] before it required them to write in any particular voice.

Teaching students about the invisible discourse will also allow legal writing professionals to reject the title of Absolute Arbiters of the Writing Universe, which students sometimes believe their instructors have given themselves. After all, who are legal writing instructors to question the priorities and conventions of nonlegal disciplines? Maybe obfuscation, repetition, and digression have real value in other contexts.[143] To the extent that students and professors using these techniques have succeeded in their fields (and I have seen them do so), they certainly know something that I don't. By investigating the relation of writing and the law (including whether these categories can be separated), legal writing might shed light on the role of writing in other disciplines as well. By ignoring this line of inquiry and relegating it to supplementary status, legal writing will only continue to circumscribe its true substance.

2. Analytical Style as the Substance of Legal Writing

By focusing on formulaic, rule-based reasoning and treating other analytical styles as mere supplements to it, the discipline of legal writing has not only devalued narrative and other reasoning techniques that students bring with them to law school, but has also missed the opportunity to explore broader issues of significance: Why does rule-based reasoning predominate in the law? Who is the "subject" who declares which analytical style will count?

Too often, in a rush to teach elementary, rule-based reasoning, legal writing texts employ formulas that themselves become the subject of the law. IRAC, CIRAC, CRAC, and a host of other acronyms dictate the placement of the issue, the rule, the application of the rule to the facts, and the conclusion, but in doing so, they shut off the use of analytical styles other than rule-based reasoning. Deviations from these formulas are handled as dangerous supplements; legal

141. WHITE, *supra* note 111, at 72.

142. *Id.* at 63.

143. My former science students tell me that the passive voice, a major no-no in legal writing, is a convention in lab reports. And digression, another legal writing sin, can make a novel or a sermon enchanting.

writing would prefer not to go down those paths. Thus, the message to students is clear: legal writing does not care what you think unless you are using the rules and thinking like a lawyer.[144] Legal writing texts are only now beginning to recognize that lawyers think in many ways, and that the many types of legal reasoning—rule-based, analogical, narrative, policy-driven—are interdependent.[145] This area of research enriches the substance of legal writing. If it is a dangerous supplement, it is dangerous only because it demonstrates that rule-based reasoning alone cannot explain the complexity of the law.

Exploration and study of various reasoning styles might also aid students. Those who feel uncomfortable with rule-based reasoning might be encouraged to step back from the rule and see the human motivation for it. The rule probably stems from a story involving people who experienced a dispute, and the rule reflects the resolution of the dispute in accordance with the values reflected in our larger cultural story. The application of a rule to a new set of facts depends upon how the decision maker interprets the human values inherent in that new set of facts. These insights might help students adapt their narrative reasoning skills to the law school context and may encourage students to question why that context has for so long privileged rule-based reasoning.

3. Legal Writing as a "Real" Law School Discipline

The failure of legal writing professionals to define themselves and their discipline in terms of the fundamental inquiries discussed above has led to the perception that legal writing is less than a real member of the legal academy. This failure is no doubt due to the internalizing of the speech/writing and skills/substance hierarchies, which captured the legal academy and have been embedded in it since Langdell's time. Langdell's case method, based on classroom discussion aimed at articulating scientific legal principles, continues to color the perceptions of students (and of tenured and tenure-track faculty) as to what real legal education is all about. While twentieth-century legal scholars have largely abandoned the formalism inherent in Langdell's casting of the law as a science, the hierarchies from his time (substance over skills, Socratic courses over writing courses) remain firmly in place.[146]

Applying these hierarchies, students do not see legal writing courses as "real" because in these courses they do not feel like "real law students," or at least what they imagine "real law students" to be. "Real" law students run the gauntlet of Socratic classes each day, standing to recite arcane legal points in front of an ocean of peers and a tweedy male professor. The "real" law student is a performer who

144. Several legal writing texts refer to this phrase, including DERNBACH, *supra* note 118, at xxi; OATES ET AL., *supra* note 138, at 31 (explaining that the gravamen of thinking like a lawyer is dialectic or argument in addition to more garden-variety critical analysis).

145. See Edwards, *supra* note 85, for a detailed discussion of the interrelation of types of legal reasoning and for suggestions regarding how law teachers can teach narrative skills.

146. *See supra* Part I.B.

speaks in front of an audience, not a writer who toils alone with a computer. "Real" legal education is a public trial by fire, where only the best and brightest survive. *One L*[147] and *The Paper Chase*[148] simply picked up where Langdell left off. Even more recent commercially published guides to law school betray a belief—simply through their titles—that a legal education can be terrifying; *Slaying the Law School Dragon*[149] and *Law School Without Fear*[150] are but two of the new entries in this burgeoning field.

This image of a "real" law school experience—law school as boot camp—runs counter to the reality of most legal writing programs. Typically, legal writing courses are designed to provide a (and sometimes the only) personal educational experience in the first year, with smaller classes and more one-on-one student-teacher interaction than occurs in a typical doctrinal course. The need for this human interaction is consistent with theories of writing pedagogy, which highlight the need for individualized review, critique, and conference.[151]

Thus, legal writing's personalized pedagogical style has reinforced its second-class status in the legal academy, and this style is a dangerous supplement to the curriculum for both students and tenured faculty. As for students, legal writing cuts against the stereotypical boot camp experience of the first year of law school and thus deprives them to some extent of the coveted status of martyr or survivor. As for faculty, legal writing demonstrates that the hallowed Socratic method is not the only means to a legal education. Accepting legal writing instructors into the legal academy would mean rethinking the law-professor-as-Langdellian-Socrates model, which more than a few tenured faculty have come to cherish over the years.[152]

In addition, the nature of legal writing—its reliance on textbooks rather than casebooks, on written exercises rather than classroom discussion—threatens the reality of Langdellian legal science. In legal writing courses, students do not spend time parsing the contents of a casebook but instead use textbook exercises as a springboard to a variety of activities, often designed independently by legal writing teachers.[153] Thus, students may begin class by drafting or editing a section

147. SCOTT TUROW, ONE L (1977).

148. JOHN JAY OSBORN, THE PAPER CHASE (1971).

149. GEORGE J. ROTH, SLAYING THE LAW SCHOOL DRAGON (2d ed. 1991).

150. HELENE SHAPO & MARSHALL SHAPO, LAW SCHOOL WITHOUT FEAR: STRATEGIES FOR SUCCESS (1996).

151. Rideout & Ramsfield, *supra* note 49, at 79–80.

152. The contrast of legal writing instructors, who use a personalized teaching style, and doctrinal faculty, who use the traditional lecture method, parallels a contrast noted by Duncan Kennedy in *Legal Education as Training for Hierarchy, in* THE POLITICS OF LAW 40 (David Kairys ed., 1982). Kennedy explains that law faculty can be divided into "soft" policy-oriented professors and "authoritative," more conservative professors. In the end, the "soft" professors receive less respect from students, who "worry that their niceness is at the expense of a metaphysical quality called rigor, thought to be essential to success on bar exams and in the grownup world of practice." *Id.* at 43.

153. The many presentations of teaching methodologies and materials at biennial Legal Writing Institute conferences attest to the productivity of legal writing teachers in this

of an argument, presenting and judging oral arguments to test analytical skills, critiquing each others' work in small groups, discussing their progress on a research assignment, or communally outlining a complex legal issue on the blackboard. These activities do not resemble the quest for scientific truth that takes place in the Socratic classroom, and for this reason, legal writing courses are dangerous supplements to the traditional curriculum.

They are dangerous because they show what is missing in the "scientific" casebook method: "Though the library was the lawyer's laboratory, and though law was 'discovered' by way of a process vaguely resembling scientific induction, Langdell's method of education omitted one important scientific ingredient: the practical experiment. Langdell's legal scientist lacked clinical experience."[154] It is precisely this type of practical, "clinical" experience that legal writing, and other courses that have been relegated to the "skills" category, can provide. Thus, legal writing shows that the legal science of doctrinal courses is incomplete, and because it reveals this incompleteness, legal writing is threatening. Students who find themselves devalued in legal writing courses, and tenured faculty whose status in some ways derives from the fact that they teach doctrinal courses and not legal writing,[155] therefore have reason to view legal writing as something less than a "real" legal discipline.

IV. THE FUTURE OF LEGAL WRITING: PROSPECTS FOR BREAKING OUT OF THE HIERARCHY?

The speech/writing hierarchy has triggered a stratification in the legal academy that separates writing courses from traditional doctrinal courses. Decision makers in United States law schools—deans and tenured faculty—have viewed legal writing as a dangerous supplement to the law school curriculum, an anti-intellectual skill that detracts attention from the true substance of the law. Legal writing pedagogy reflects this dichotomy, to its detriment, as it circumscribes the legal writing discipline and cuts off important inquiry into the nature of writing and the law.

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vein. For example, the latest conference in June 1996 in Seattle, Washington, featured 75 different presentations on topics ranging from using composition theory in teaching legal writing to establishing student-administered writing clinics to using a "Piagetian Cycle Approach" to composition instruction to legal writing as philosophy. Program Description, Legal Writing Institute Biennial Conference, Seattle University School of Law (July 18–20, 1996) (on file with author).

154. DUXBURY, *supra* note 7, at 17.

155. "[I]n many schools there is a perception that [legal writing] is a 'soft' area of teaching, i.e., it does not require any skill to teach it. Consequently, the status of the course and the people who teach it can vary widely, from tenure-track professors to adjuncts and third-year law students." Verna C. Sanchez, *Legal Methods Teaching Programs*, 1 MICH. J. RACE & L. 573, 573 (1996); *see also* Rideout & Ramsfield, *supra* note 49, at 47 ("[T]hose who teach writing in law schools are regarded as anti-intellectuals who should be excluded from the academy.").

Derridean philosophy would label the separation of speech and writing (and, by extension, of doctrine and writing) as a futile endeavor.[156] Writing poses a "danger" to speech only because it *is* speech, in the same way that speech poses a danger to writing because it *is* writing. To Derrida, "speech, as a signifier of thought, shares all of the properties that we had associated with writing. Speech is merely a special case of a generalized idea of writing."[157] Legal writing and legal doctrine occupy a similar relation to each other. Each is necessary for the existence of the other. Those who argue for the devaluation of legal writing must therefore also argue that the devaluation of writing is consistent with the development of legal thought. Yet the argument for the development of legal thought will always threaten the argument for the devaluation of writing, suggesting that division of the world into writing and doctrine is futile.

Yet even if the division is a false one, it still holds sway as a practical matter in the legal academy, where the speech/writing hierarchy governs the status of individual faculty and the disciplines they teach. Institutional hierarchies have developed from the speech/writing hierarchy (skills over substance, Socratic courses over writing courses) to the detriment of the legal academy as a whole. Given the pernicious effect of such hierarchies, is it possible for law school deans, doctrinal faculty, and the legal writing community to escape from them?

Criticisms of the hierarchy can begin to undermine the status quo and inspire creative thought as to new ways of ordering the legal academy. However, those in power in the legal academy are benefitting from the status quo and therefore have little motivation to criticize it or pay attention to the criticisms of others.[158] Those legal writing professionals who have studied status issues agree that institutions must change their view of legal writing.[159] However, because these professionals do not hold much power at present in the legal academy, their calls for change can easily go unheard. Some have even added a note of resignation to their conclusions.[160] The academy is therefore in danger of remaining a captive of the speech/writing hierarchy as it is presently practiced.

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156. Balkin, *supra* note 5, at 757.

157. *Id.*

158. Even Duncan Kennedy, a noted critic of law school hierarchies, seems to have overlooked the legal writing discipline. While he once suggested that law school professors receive the same salaries as janitors, DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 79 (1983), he has yet to defend legal writing instructors, some of whom *do* receive salaries in the janitorial range. A national survey noted that seven years after Kennedy made his suggestion, some legal writing instructors were making less than $20,000 per year. Ramsfield, *supra* note 60, at 70 (Graph 15). For doctrinal professors, talking about equality with custodial staff may be easier than talking about equality with those who teach legal writing.

159. *See, e.g.*, Rideout & Ramsfield, *supra* note 49.

160. Maureen J. Arrigo frankly warns her readers that "[p]rolonged [t]eaching of [legal research writing] [m]ay [b]e [h]azardous to [y]our [e]motional [h]ealth and [c]areer [p]rospects." Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 172 (1997).

Scholarship offers an opportunity to break this pattern. If the legal academy values writing only in the traditional form of legal scholarship, then those who teach writing should use scholarship as a means both to inform the academy of the substance of legal writing as a discipline and to increase their own status within that academy. Scholars with ready-made reputations can write about writing and have their work published.[161] Surely those who teach in the field have something to add to this scholarly conversation. Unfortunately, those who teach in the field also are likely to have crushing teaching loads[162] and little support for scholarly endeavors.[163] In addition, law journals are less likely to accept articles by writers whose titles are "lecturer" or "instructor" rather than "professor."[164] Nevertheless, recent years have brought a number of insightful articles by legal writing professionals about legal writing and analysis.[165] These articles develop theories of legal analysis, explore linguistic issues, argue for pedagogical innovations, and examine the interplay of narrative theory and legal writing. A recent conference on

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161. *See, e.g.*, Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995); Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936); WEISBERG, *supra* note 114; *see also supra* note 104 and accompanying text.

162. A 1996 survey revealed that at 85 of 132 responding schools, the student-faculty ratio in legal writing courses exceeded 35 to 1. Ramsfield & Davis, *supra* note 57, at 3. This may not seem excessive in comparison to lecture courses, which may consist of one professor teaching over a hundred students. However, legal writing courses are much more labor intensive. Most professors in most legal writing programs personally provided written feedback on students' papers more than four times per year. *Id.* at 5. In addition, most of these professors hold conferences with each individual student at least twice per semester. *Id.* at 6.

163. Sixty-three of 110 schools responding to a 1996 survey reported that legal writing professors, whether tenure-track or not, were ineligible for paid sabbaticals. Forty-six of those schools added that these professors were also ineligible for unpaid sabbaticals. *Id.* at 11–12.

164. From my vantage point, the legal academy has bought into Stanley Fish's view of merit:

> [T]here will always be those whose words are meritorious (that is, important, worth listening to, authoritative, illuminating) simply by virtue of the position they occupy in the institution.... [M]erit is inseparable from the structure of the profession and therefore the fact that someone occupies a certain position in that structure cannot be irrelevant to the assessment of what he or she produces.

STANLEY FISH, DOING WHAT COMES NATURALLY 167 (1989). As I wrote this Article, I could not help but wonder what effect my own institutional status would have on its prospects for publication. Of the forty journals to which I sent this manuscript, only two requested that my name and title appear on a separate cover page so that editors would be blind to my status and identity when deciding whether to publish my work.

165. *See, e.g.*, Edwards, *supra* note 85; O'Neill, *supra* note 87; Teresa Godwin Phelps, *Tradition, Discipline & Creativity: Developing "Strong Poets" in Legal Writing*, 20 LEGAL STUD. F. 89 (1996); Kim Lane Scheppele, *Narrative Resistance and the Struggle for Stories*, 20 LEGAL STUD. F. 83 (1996).

legal writing scholarship bodes well for the continuation of this type of scholarly production.[166]

Law schools are inherently hierarchical institutions. As soon as one school or person or discipline or theory can be differentiated from another, that difference becomes a difference in value. If two items are different, one simply *must* be better than the other, higher up on the hierarchical ladder. And members of the legal academy, steeped in hierarchy, have a tendency to seek out (and sometimes create) these differences. As long as legal writing, as a discipline, is unknown to the more powerful members of legal institutions, those members will make pejorative assumptions about it. Because those in power are unlikely to want to get their hands dirty by learning about or becoming involved in a legal writing program,[167] it is up to legal writing professionals to educate their institutions as to the nature of the discipline. Perhaps then institutions might see more similarities than differences between legal writing courses and other courses, between legal writing faculty and other faculty. And perhaps institutions will learn that the differences are not necessarily value-laden.

CONCLUSION

Writing may indeed be a dangerous supplement in the law school curriculum, but not for the reasons that those in power in the legal academy have imagined. It is not that writing—and especially legal writing programs—represents an absence of thought or intellectual endeavor that is present in the Socratic classroom. Instead, writing is dangerous because it highlights what is *not* present in the traditional doctrinal course: an opportunity to experiment with the hypotheses of doctrinal legal science. In addition, writing is dangerous to the traditions of the legal academy because the law, by its nature, is dependent upon writing. It does not write itself but rather is written by specific authors, who may prefer to conceal their own identities in order to portray law as fixed and inevitable. The study of the way in which law is written therefore threatens to reveal law's fragility. Finally, legal writing is dangerous because it requires an expenditure of resources if it is to be taught and practiced effectively, and it therefore threatens the cost-effectiveness that originally allowed legal study entree into the modern academy.

If writing is a dangerous supplement for these reasons, then it is "dangerous" in the sense of being challenging or threatening rather than destructive. This kind of danger is necessary to keep legal education from

166. On May 30, 1997, Temple University School of Law sponsored and hosted the Atlantic Regional Legal Research and Writing Conference, the theme of which was "Legal Writing Scholarship."

167. One notable exception is Douglas Laycock of the University of Texas Law School, whose *Why the First-Year Legal-Writing Course Cannot Do Much About Bad Legal Writing*, 1 SCRIBES J. LEGAL WRITING 83 (1990), is an insightful guide to legal writing programs for the tenured tourist. Laycock actually taught in his school's legal writing program during the 1988–89 academic year, when he had been commissioned to study the program and recommend changes.

becoming frozen and outmoded. John Stuart Mill once noted that "[b]oth teachers and learners go to sleep at their post, as soon as there is no enemy in the field."[168] Writing, as a dangerous supplement, is precisely the kind of enemy that the legal academy needs.

168. JOHN STUART MILL, ON LIBERTY 42 (Alburey Castell ed., Harlan Davidson, Inc. 1989) (1859).