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TAKING THE ROAD LESS TRAVELED: WHY PRACTICAL SCHOLARSHIP MAKES SENSE FOR THE LEGAL WRITING PROFESSOR

By
Mitchell Nathanson*

INTRODUCTION

As in many law schools, one of perks that comes with a position in my school's legal writing program is the opportunity to receive a stipend for summer scholarship. Because this stipend represents a substantial percentage of my salary, the decision to accept it was a no-brainer. That was the easy part. The more difficult part came soon after, when I had to sit down and figure out just what it was I was going to write about. Because the legal writing professors at my school, like the legal writing faculty at most law schools, are not required to publish,[1] I had never developed a scholarship "game plan"[2] and had never seriously considered the issue beforehand. Now, with a sizable economic carrot dangling before me, I had to confront something that, the more I thought about it, became stickier and stickier.

Frankly, I doubt topic selection is an issue that many of my doctrinal brethren have given much consideration. After all, it is a relatively simple process for a torts or criminal law professor, for example, to choose their field of scholarship. If they wish, they only need to peruse the docket of the court of their choosing to find a topic. Of

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* Associate Professor of Legal Writing, Villanova University School of Law. He would like to thank Dean Diane Edelman for her insightful comments on earlier drafts of this Article.

[1] *See* Association of Legal Writing Directors, Legal Writing Institute 2004 Survey Results 62 (hereinafter "ALWD Survey") (Question #81) noting that of the schools responding to the 2004 survey, 20 required their legal writing faculties to produce scholarship, 7 expected them to produce scholarship, 29 encouraged their legal writing faculties to produce scholarship and 72 neither required or expected their legal writing faculties to produce scholarship.

[2] *See* William R. Slomanson, *Legal Scholarship Blueprint,* 50 J. Legal. Educ. 431, 433-34 (2000), discussing the need for a scholarship "game plan."

course, given the unfortunate absence of "legal writing" cases on most dockets, this didn't solve my dilemma.

Moreover, there are a plethora of helpful articles that guide the new doctrinal professor in choosing appropriate scholarly topics to write on.[3] Many of these advise the new professor to limit her focus and become an expert in her particular field rather than write on whatever legal issue interests her at the time.[4] Which, once again, didn't help me, since I was still unclear as to what my particular field is. The fact that I teach legal writing was of little help to me in this regard given, as noted above, the absence of "substantive" law on this topic.

Analyzing the scholarly writings of my legal writing colleagues proved to be of little help as well. The vast majority of the legal writing professoriate who choose to write seem to have disregarded the doctrinal advice to specialize in one particular field, choosing instead to write on a myriad of topics.[5] Some of these topics have a legal writing connection but many do not.[6] As a result, a legal writing professor is just as likely (if not more likely) to write on a constitutional law topic as one related to her teaching field.[7] This is true even among professors with a scholarship requirement. Most commonly, the legal writing professor with a scholarship requirement will adopt the

[3] *See, e.g., Id.,* David P. Bryden, *Scholarship About Scholarship,* 63 U. Colo. L. Rev. 641 (1992); Donald J. Weidner, *A Dean's Letter To New Law Faculty About Scholarship,* 44 J. Legal Educ. 440 (1994).
[4] *See* Slomanson, 50 J. Legal Educ. at 434.
[5] *See* Terrill Pollman & Linda Edwards, *Legal Writing Scholarship Survey* (available at //www.legalwritingscholarship.org).
[6] *Id.* The survey found that of the 668 articles placed by legal writing professors in student-edited law reviews that appear in the survey, 134 (or 20%) were on legal writing topics while 534 (or 80%) were on other legal topics.
[7] *Id.*

scattershot approach of his legal writing colleagues when it comes to topic selection, with some proclaiming that they do not intend to write about legal writing at all.[8]

This is good news and bad news all at once. For when it comes to scholarship, it appears as if a legal writing professor "can" write about whatever he wants. Although this is certainly a liberating concept, it doesn't, however, answer the more difficult question (and the one I was seeking an answer to) which is, what *should* a legal writing professor write about? If specialization makes sense for the rest of the faculty, then shouldn't it make just as much sense for the legal writing faculty? And if so, given that legal writing is a "skills" rather than "substantive" law course, what exactly is our area of expertise, at least relative to the rest of the faculty? As mentioned above, the more I explored this area, the more difficult and murky these issues became -- which led to an initial sigh of relief. For "difficult" and "murky" are good. "Difficult" and "murky" are the stuff of law review articles. Alas, I had my topic. With that out of the way, I was now ready to begin.

I started with the assumption that, in general, legal writing professors should engage in scholarship, regardless of its impact on salary or promotion. Even if it plays no formal role in a legal writing professor's career, the value of scholarship is still significant. As other legal writing professors have noted, scholarship heightens the prestige of the legal writing faculty, not only among our colleagues, but among our students, who will be less likely to view us as second-class citizens.[9] Moreover, scholarship enables us to retain the strong writing and research skills needed for our

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[8] *See* Jan M. Levine, *Voices In The Wilderness: Tenured And Tenure-Track Directors And Teachers In Legal Research And Writing Programs,* 45 J. Legal Ed. 530, 545 (1995).
[9] *See* Toni M. Fine, *Legal Writers Writing: Scholarship And The Demarginalization Of Legal Writing Instructors,* 5 Journal of the Legal Writing Institute (hereinafter "Legal Writing") 225, 227-28 (1999).

job.[10] For this reason alone, scholarship makes perhaps more sense to the legal writing faculty than anyone else.

In addition, as legal writing professors become more entrenched in our overall law faculties, scholarship makes sense for the same reasons that it makes sense to the rest of the faculty. It allows our students to recognize us as influential figures in the development of the law and gives us an opportunity to set an example to them; to "give them the confidence they need to assume leadership in the proper development of the law…to demonstrate that helping in the proper development of the law is a great public service that can be an immensely satisfying part of their future."[11] It also serves our institutions by making known the depth and breadth of faculty expertise, which helps to increase the value of a law degree from our school.[12] Finally, and most simply, it allows us to grow and become stronger, more able academics.[13] All of these general ideas apply to everyone on a law faculty. It is only when the legal writing professor gets to the specifics, to try to determine the best way to achieve all of the above goals given his unique role on the faculty, that all of this advice becomes hazy.

The old adage that you should "write what you know" applies universally -- to fiction as well as non-fiction and to scholarship written by the legal writing professor as much as it does to the doctrinal professor.[14] The overarching question, then, that I will attempt to answer in this article is this: just what is it that legal writing professors, at least as compared to our doctrinal counterparts, *know*? If this can be determined, then the question of what our scholarly focus should (as opposed to "can") be becomes a simple

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[10] *See* Liemer, 80 Oregon L. Rev. at 1024-25.
[11] Weidner, 44 J. Legal Educ. at 442.
[12] *Id.*
[13] *Id.*
[14] *See* Fine, 5 Legal Writing at 230.

one. Whatever our relative area of expertise is among our faculty colleagues should be the focus of our scholarship. Given that, as a group, we tend to take a different path to academia than our doctrinal colleagues (as will be discussed in section II), the key to our collective area of expertise may very well be found through an examination of our pre-teaching experience. It turns out that legal writing professors come to teaching with more practical experience than other law professors. It therefore makes sense to capitalize on this knowledge by focusing our articles on legal practice, on the thoughtful analysis and resolution of issues that irk the bar on a daily basis. We should be, in other words, a law school's practitioner-scholars or professors of practice-educators who narrow the widening gap between the cloisters of academic study and the world of legal practice.

In addition, this article will focus not merely on *what* we should publish but *where* we should publish it once it is written. Although at first blush it may appear to be little more than an academic exercise to focus on these issues given that legal writing professors at most law schools are free to write on whatever they choose and then publish it wherever they can, these are, in fact, issues with greater ramifications. Because scholarship is considered by many to be perhaps the most exalted and important of a law professor's academic obligations,[15] it is inexorably tied with the issue of status: an issue close to the hearts of anyone in the legal writing community who has struggled to obtain greater footing in the legal academy for the past several years. Therefore, even if scholarship plays no tangible role in our salary, retention or promotion, what we publish and where we publish it are nevertheless important factors in our ongoing effort to raise

[15] *See* Slomanson, 50 J. Legal Educ. at 439, discussing the three components of a law teacher's academic obligations: teaching, scholarship and service. *See also* Weidner, 44 J. Legal Educ. at 441. ("You will not be a complete person as an academic unless you produce, on a regular basis, scholarship that is read and relied on by people who work *in your area*." Emphasis added.)

our academic profile and achieve equality with our doctrinal peers. In fact, given that scholarship is the single most important status factor on most law faculties,[16] and is done not merely to inform but for prestige,[17] legal writing professors would do well to consider how scholarship can work likewise for us. As part of the legal writing community's effort to obtain equal status on law faculties, an examination of this overriding status factor in the doctrinal community is needed. This article will attempt to undertake this analysis -- to examine the legal writing professor's scholarly role within the legal academic community in an effort to determine where we best fit in. Or, better yet, stand out.

I. WHAT SHOULD WE PUBLISH?: DETERMINING THE LEGAL WRITING PROFESSOR'S FIELD OF EXPERTISE

To some who have written about scholarship and the legal writing professor, the question of content is more or less a non-issue. Some argue that because most legal writing professors have significant experience in some substantive field to draw upon, this field can be a source for scholarship.[18] Others argue that irrespective of personal experience, legal writing professors can simply draw upon current events to identify an interesting legal angle that can form the basis of a law review article.[19] Still others contend that for those who choose to focus on legal writing as a topic, an interdisciplinary approach resolves the "substantive law" dilemma otherwise attached to the issue of

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[16] *Id.*

[17] *See* Bryden, 63 U. Colo. L. Rev. at 643. ("Academic prestige derives almost entirely from one's reputation as a scholar, and the scholarly reputation of one's faculty.")

[18] Liemer, 80 Oregon L. Rev. at 1029.

[19] Fine, 5 Legal Writing at 231.

writing on a skills-based topic.[20] To these commentators, the "law and…" approach gives substantive weight to a non-substantive topic.[21]

The inherent fault contained in each of these approaches stems from the same faulty assumption, however. Each of these approaches assumes that the resulting work of scholarship should look and feel no different than the scholarship produced by doctrinal professors.[22] The legal writing professor, however, is uniquely handicapped in this regard irrespective of the approach she chooses.

For example, those choosing to draw upon their substantive experience in an effort to complete a traditional law review article will most likely draw upon their experience as practitioners. Unfortunately, and as will be discussed more fully in section III, traditional legal academics tend to disparage practitioner's problems and, as a result, law review articles that are practice-based, as opposed to theoretical, are generally less well-regarded and more likely to be relegated to less-prestigious journals.[23] If considering not merely what a legal writing professor *can* write about but what she *should* write about (with an eye on scholarship as status symbol), this approach may not be the most prudent.

In addition, choosing the "current events" approach presents additional problems unique to the legal writing professor, for there is a strong likelihood that the substantive topic chosen, be it practical or, worse, theoretical, will be one in which the legal writing

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[20] *Id.* at 234.
[21] *Id.*
[22] *See* Liemer, 80 Oregon L. Rev. at 1029. Professor Liemer's article attempts to assuage the fears of law school administrators and doctrinal faculty members by stating that law schools "need not worry that (they) will only end up with 'bar journal' type articles to (their) credit." This statement contains the assumption that the scholarship of the legal writing faculty will ultimately resemble that of their doctrinal colleagues.
[23] *See* Fine, 5 Legal Writing at 235. *See also* Slomanson, 50 J. Legal Educ. at 437. ("Traditional wisdom counsels against topics involving the practical aspects of law practice. The leading thou-shalt-not is the production of practice-oriented materials for continuing legal education, bar journals, and practice manuals. This may include digests or summaries of recent opinions or cases being litigated.")

professor is not an expert, at least not compared with his doctrinal colleagues.[24] Choosing to write on the constitutional issues raised in the 2000 Bush-Gore election may be interesting, but the legal writing professor needs to be aware that the "true" experts, the constitutional law scholars in the academic community, will also likely be writing on this area and their work will necessarily exhibit a deeper understanding of the issue than theirs.[25] This is not to suggest that a legal writing professor is incapable of producing valuable scholarship on constitutional issues, but it is more difficult. Again, when the issue of status is taken into account, the determination of what to write about becomes multi-faceted. Choosing a topic that a legal writing professor is likely to produce superior, as opposed to merely good, work becomes paramount. Otherwise, scholarship will not be an effective means toward achieving increased status.

Finally, the interdisciplinary approach merely shifts, rather than resolves, the substantive law dilemma and ultimately presents the same problems as the current events approach. Although those who have had formal academic training in another academic field should use this to their advantage,[26] those who lack such training will be venturing into the same uncharted waters as those attempting to write on constitutional topics for the first time. Applying learning theory to a legal writing issue, for example, can certainly result in useful scholarship, but its usefulness will likely depend on the author's expertise in this interdisciplinary field. One who lacks the thorough understanding that comes with years of study of a discipline and who instead has come about her knowledge

[24] *See* Fine, 5 Legal Writing at 233. The author notes that the most apparent danger of the "current events" approach is "that a writer may be seduced into approaching these topics without having any real expertise in the field." This danger is only highlighted, she concludes, given the likelihood that the true experts, those who teach and specialize in the areas of law relevant to the current event, will also write on the topic, thereby making the differences in knowledge only more obvious.
[25] *Id.*
[26] *Id.* at 234.

by way of study of a few (or even several) articles on the topic will most likely produce scholarship that only scratches the surface of the issue. Regardless of the amount of time spent reading up on the interdisciplinary field, the reader will never become the "true" expert that a pre-eminent scholar is expected to be.[27] Moreover, such research results in wasted time from the author's standpoint as she is forced to reinvent the wheel, so to speak, in order to conduct her research.[28]

A. Professional Background Survey

Having found each of the above-noted scholarly approaches to selecting content lacking when applied to the legal writing professor, I decided to conduct a survey in the hopes of resolving this dilemma. My goal was simple: I wanted to determine what, if anything, the typical legal writing professor brings to the academic table relative to her doctrinal colleagues. I wanted to find out whether we are different in any relevant way, with the assumption that any relevant differences would highlight our area of expertise relative to the rest of our faculties. In order to determine this, I focused on post-law school, pre-initial teaching position experience. This was done based on the assumption that once a professor enters academia, she begins the process of building upon and dispensing the knowledge that she has accumulated up to that point. The post-law school, pre-teaching years are the ones that lay the foundation for the areas of expertise of a particular professor later on. Just as many constitutional law scholars draw upon their experiences as Supreme Court clerks, I wanted to determine what we, as legal writing professors, draw upon once we enter academia.

1. Method

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[27] *See Id.*
[28] *See* Slomanson, 50 J. Legal Educ. at 434.

The 2003-04 AALS Directory of Law Teachers[29] served as the exclusive basis for the information gathered in my survey. I randomly selected 50 doctrinal professors[30] and 50 legal writing professors[31] and compared their post-law school[32], pre-initial teaching position backgrounds. Adjunct professors were not included in the survey. Likewise, nor were any individuals who currently held administrative positions so as to avoid intermingling the potentially differing expertise and backgrounds needed to be a dean or other administrator with those needed to be a pure professor. Finally, because complete biographies were not included by everyone who responded to the 2003-04 AALS Directory, I eliminated from my survey those whose biographies contained more than one unaccounted-for post-law school year.

Pursuant to these guidelines and limitations, my method involved randomly selecting biographies from the Directory. Whenever a biography violated one of the above guidelines, I made another blind selection from the same page. The results of my survey are summarized below.

2. Survey Results

Respondents

	% Men	%Women[33]
Doctrinal Professors (DP)	54	46
Legal Writing Professors (LWP)	30	70

1. Avg. (mean) # years between law school graduation and initial law teaching position

DP	5.42
LWP	8.04

[29] *The AALS Directory of Law Teachers 2003-2004,* Found. Press 2003).
[30] "Doctrinal" being defined as those who listed courses other than legal writing or legal research and writing as courses they currently teach.
[31] "Legal writing" professors being defined as those who listed legal writing or legal research and writing as a course they currently teach.
[32] "Post-law school" being defined as anything subsequent to the award of the initial legal degree. For purposes of the survey, the award of an LLM was considered "post-law school.
[33] The gender breakdown in raw numbers was as follows: doctrinal professors – 27 men, 23 women, legal writing professors – 15 men, 35 women.

2. Avg. (mean) # years law firm experience prior to initial law teaching position[34]

DP	2.12
LWP	4.5

3. Avg. (mean) # years law firm experience of those with some law firm experience

DP	3.53
LWP	7.4

4. % with no law firm experience

DP	40%
LWP	20%

5. % with greater than 1 year of law firm experience

DP	46%
LWP	76%

6. % with 3 or more years of law firm experience

DP	38%
LWP	68%

7. % with public interest law experience[35] prior to initial law teaching position

DP	12%
LWP	8%

8. Avg. (mean) # years public interest law experience prior to initial law teaching position[36]

DP	.52
LWP	.40

9. Avg. (mean) # years public interest law experience of those with some public interest law experience prior to initial law teaching position

DP	4.33
LWP	5.0

10. % with government experience[37] prior to initial law teaching position

DP	24%
LWP	24%

[34] For purposes of clarification, this number includes the 20 doctrinal and 10 legal writing professors with no law firm experience.

[35] "Public interest law experience" is defined in my survey as experience working full time or having as one's primary employment, employment with a not-for-profit organization.

[36] As the result indicates, the vast majority of professors (46 legal writing and 44 doctrinal) indicated no public interest law experience prior to their initial law teaching positions.

[37] "Government experience" is defined in my survey as experience working full time or having as one's primary employment, non-clerkship employment with a branch of the Federal or a state government or public sector organization.

11. Avg. (mean) # years government experience prior to initial law teaching position[38]

DP	1.22
LWP	1.16

12. Avg. (mean) # years government experience of those with some government experience prior to initial law teaching position

DP	5.08
LWP	4.83

13. % with corporate/in-house experience[39] prior to initial law teaching position

DP	0%
LWP	12%

14. Avg. (mean) # years corporate/in-house experience prior to initial law teaching position[40]

DP	0
LWP	.38

15. Avg. (mean) # years corporate/in-house experience of those with some corporate/in-house exp.

DP	0
LWP	3.17

CLERKSHIP BREAKDOWN

16. % with clerkship experience[41]

DP	34%
LWP	38%

17. Type of clerkship:	federal	state
DP	16	1
LWP	13	6

18. DP clerkship court breakdown

	Federal	state
Supreme	4	1

[38] 38 doctrinal and 38 legal writing professors indicated no experience working for either the Federal or a state government prior to their initial law teaching positions.

[39] "Corporate/in-house experience" is defined in my survey as experience working full time or as one's primary employment, employment with a non-law firm, private sector corporate entity.

[40] None of the 50 doctrinal professor subjects in my survey, and only 6 of the 50 legal writing professor subjects in my survey indicated any in-house or other corporate employment prior to their initial law teaching positions.

[41] 17 doctrinal professors and 19 legal writing professors listed some form of clerkship (either Federal or state) in their AALS Directory biographies.

Int. App.	7	0
District/trial	7*	0

*Includes two respondents who had multiple federal clerkships

19. LWP clerkship court breakdown

	Federal	state
Supreme	0	1
Int. App.	4	6**
District/trial	9	0

**Includes one respondent who had both a state and federal clerkship

ACADEMIC PROFILE

20. % receiving initial law degree from top 20 schools***

DP	58%
LWP	42%

*** A "top 20 school" is defined as a law school ranked in the top 20 of the 2005 U.S. News and World Report Law School Rankings.[42] This list includes 22 schools as three schools (George Washington, Notre Dame and Washington University in St. Louis) tied for 20th place in the U.S. News rankings.[43]

21. % receiving initial law degree from Harvard Law School[44]

DP	28%
LWP	6%

3. Survey Summary

While the survey yielded many similarities, there were some striking differences as well. Legal writing professors take on average 33% longer to secure their initial law teaching positions (8.04 years vs. 5.42 years). When this time differential is broken down, we see that although there are no significant differences in public interest,

[42] The "top 20" schools, sorted by rank are as follows: Yale, Harvard, Stanford, Columbia, New York University, University of Chicago, University of Michigan-Ann Arbor, University of Pennsylvania, University of Virginia, Duke, Northwestern, Cornell, U.C. Berkeley, Georgetown, University of Texas-Austin, UCLA, Vanderbilt, University of Southern California, University of Minnesota-Twin Cities, George Washington, Notre Dame, Washington University in St. Louis.

[43] *Id.*

[44] 14 doctrinal professors received their initial law degreed (J.D. or the equivalent) at Harvard Law School, as compared with 3 legal writing professors.

government or corporate experience, the average legal writing professor has more than twice as much (4.5 years vs. 2.1 years) law firm experience as the doctrinal professor (with 40% of doctrinal professors having no law firm experience as compared with 20% of legal writing professors). This discrepancy is highlighted more dramatically when breaking this difference down even more specifically by looking at only those with law firm experience. Here, the difference in law firm experience becomes even more pronounced (7.4 years for the typical legal writing professor vs. 3.5 years for the typical doctrinal professor).[45] Looking at this another way yields similar results: 68% of all legal writing professors surveyed had 3 or more years of law firm experience versus only 38% of doctrinal professors.

These differences in law firm experience, both in kind and in degree, are significant. In many law firms, particularly the larger ones, an associate's initial years are spent mostly in the library or as a background member of a team of attorneys. Although the transformation from a complimentary to a leading role often occurs gradually over time, it is typically around the associate's third year or so that she emerges from the shadows and begins to assume a more proactive role in the handling of files. It is around this point when she begins to take a more active role with clients and in making significant strategic decisions. In short, the attorney with not simply law firm experience

[45] The author acknowledges that the survey results represent merely a randomly selected sampling of law teachers and that more detailed studies may result in slightly varying statistical results. However, these results can be confirmed anecdotally and, moreover, are bolstered by a recent, more extensive survey on the backgrounds of recently-hired doctrinal faculty (*see* Richard Redding, "*Where Did You Go To Law School?" Gatekeeping For the Professoriate and Its Implications for Legal Education,*53 J. Legal Educ. 594 (2004)) which likewise concentrated on the AALS Directory of Law Teachers for its database (the 2000-2001 edition, focusing on new faculty hires between 1996 and 2000)). Professor Redding surveyed 443 teachers and found that 45% had some law firm or corporate experience prior to entering academia and that the average number of years experience of those with some legal practice experience was 3.7 years. *Id.*at 600-01. The statistical results in the professional background survey are meant to serve as a springboard for the discussion that follows.

but *significant* experience is able to obtain a more complete and accurate understanding of the myriad issues confronting a practicing attorney. This attorney, should she decide to enter academia, is also statistically significantly more likely to eventually become a legal writing professor than a doctrinal one.

4. Application of Survey Results

If looking for differences in professional backgrounds for clues as to the legal writing professor's area of expertise, the above-noted distinctions are instructive. For it appears as if legal writing professors bring significantly more practical experience to the academic table than do our doctrinal counterparts. As such, within the law school community, we are the relative experts on the issues that confront the practicing attorney and our scholarship should be directed so as to take advantage of our expertise.

Initially, these results appear to be unfortunate from the standpoint of the legal writing professor. This is because, as noted above, practical (or practice-based) scholarship is traditionally frowned upon by the academy and afforded less prestige than scholarship with a theoretical focus.[46] Accordingly, upon first blush, it appears as if doing the scholarship we are most qualified to do would not be beneficial to us in our quest for increased status. Our dual scholarship and status goals appear to be at odds.

However, the well-chronicled societal need for more practical scholarship from the legal academy may alter this conclusion considerably. As stated by Donald Weidner, Dean of Florida State University Law School, in a 1994 letter to first year faculty at FSU, the "productive scholars are the ones who know how many areas are crying out for analysis and comment. They are the ones who know how many improvements can be

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[46] *See Supra* n. 24. *see also* Bryden, 63 U. Colo. L. Rev. at 643-44.

made to the law, if only people focused on them."[47] Fortunately for the legal writing professor, the cries for practical scholarship -- his field of expertise -- are loud and getting louder.[48] Legal writing professors thus have the opportunity to fulfill our scholarly role by stepping into this breach and focusing our scholarly efforts on analyzing and solving practice-based problems. As will be discussed throughout the remainder of this article, the growing disconnect between the academy and practicing bar appears to be something that can best be solved through the scholarship efforts of the legal writing professoriate.[49] The following section analyzes this disconnect in an attempt to obtain a better understanding of where it originated, why it exists today and how legal writing professors can use their relative area of expertise to effectively fill the gap in such a way that likewise increases our status within the legal academic community.

B. The Divergence Between Traditional Legal Scholarship and the Practicing Bar

1. Judge Edwards' Lightning Rod

In his now famous (or infamous, depending on one's perspective) 1994 article, District of Columbia Circuit Court Judge Harry Edwards took the legal academy to task for failing, in his opinion, to produce enough scholarship relevant to the problems

[47] Weidner, 44 J. Legal Educ. At 442.

[48] *See Generally The MacCrate Report: Building the Educational Continuum* (West 1994) which highlighted, among other things, the absence of significant practical knowledge on many law faculties as a deficiency in modern legal education. According to the report, the root of this deficiency stems from the theory of legal education set forth by Christopher Columbus Langdell of Harvard who believed:

> "What qualifies a person, therefore, to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, of using law, but experience in learning law." *Id.* at 7.

Langdell's theory, along with his model of legal education, took hold and resulted in law school faculties well versed in theory but short on practical knowledge or experience. The gaps in legal education resulting from this traditional faculty model were the focus of the MacCrate Report.

[49] *See* Edwards, *The Growing Disjunction Between Legal Education And The Legal Profession,* 91 U. Mich. L. Rev. 34 (1992), in which Judge Edwards focuses on what he perceives as a widening of the gap between the legal academy and practicing bar.

typically faced by the judiciary and practicing bar.[50] He feared that law schools and law firms were moving "in opposite directions," resulting in a decline in the type of scholarship most needed by the practicing bar – practical scholarship.[51] Judge Edwards defined "practical scholarship" as follows:

> It is prescriptive: it analyzes the law and the legal system with an aim to instruct attorneys in their consideration of legal problems; to guide judges and other decisionmakers in their resolution of legal disputes; and to advise legislators and other policymakers on law reform. It is also doctrinal: it attends to the various sources of law (precedents, statutes, constitutions) that constrain or otherwise guide the practitioner, decisionmaker, and policymaker.[52]

To solve this problem, Judge Edwards called for the hiring of more "practical scholars": scholars familiar with the issues facing the judiciary, legislature and practicing bar and skilled in analyzing and commenting on them; scholars focused less on theory and more on concrete problems.[53] Scholars who make the focus of their work the problems that face the practicing attorney on a daily basis and who seek practical solutions to them; solutions that can be readily reached through the use of the legal tools available to the practitioner in her practice. The absence of such scholars, he argued, has led to the resolution of far too many important issues without the input of academic lawyers, as judges and practitioners currently have little use for much of the scholarship now produced by the legal academy.[54]

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[50] *Id.*
[51] *Id.* at 34.
[52] *Id.* at 42-43.
[53] *Id.* at 50-51. *See also* Redding, 53 J. Legal Educ. at 605 (footnote 25) Professor Redding's statistical analysis confirms many of Judge Edwards' statements. His survey found that there was "a negative relationship between the number of years in practice and the quality of the hiring law school, indicating that few faculty hired at highly ranked schools have extensive practical experience." This finding may explain why Judge Edwards believed that those who normally would be called upon first to comment on the most pressing legal matters of the day increasingly had nothing to add to the debate.
[54] *Id.* at 35.

It is significant that Judge Edwards recognized the importance of academic commentary. His argument was not a mere rehash of the familiar refrain on the irrelevance of the ivory tower. Rather, his article was a cry for *assistance* from the academic community in resolving the problems he faces on the bench on a daily basis. As he stated in his article, he believed that legal academics were obligated to assist the practicing bar in the administration of our system of justice.[55]

Importantly, in calling for an increase in practical scholars and scholarship, Judge Edwards did not discount the importance of theoretical scholarship in the development of the law.[56] He was simply calling for a better balance between the two.[57] Other scholars who have commented on this issue agree that a balance between "practical" and "theoretical" scholarship is what is needed -- not an argument over which is better or more worthy or important.[58] Without such a balancing of interests, the current state of legal scholarship is, as one scholar described it, disheartening, as ever more law review articles are produced that fail to reflect the interests of society at large or those who work in the profession.[59]

Subsequent to the publication of his article, Judge Edwards has come under attack for, among other things, the anecdotal bases for his conclusions.[60] As is evidenced in his article, much of what Judge Edwards concluded was the result of his personal opinion

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[55] *Id.* at 38.
[56] *Id.*
[57] *Id.*
[58] *Id. See also* William J. Turnier, *Tax (And Lots of Other) Scholars Need Not Apply: The Changing Venue For Scholarship,* 50 J. Legal Educ. 189, 203-04 (2000).
[59] Turnier, 50 J. Legal Educ. at 197.
[60] *See e.g.* Michael J. Saks, Howard Larson, Carol J. Hodne, *Is There A Growing Gap Among Law, Law Practice, And Legal Scholarship?: A Systematic Comparison Of Law Review Articles One Generation Apart,* 30 Suffolk U. L. Rev. 353, 355-360 (1996), in which the authors summarize the plethora of academic commentary generated as a result of Edwards' 1992 article, some of it critical of his conclusions, some of it critical of his methods.

and the opinion of his law clerks.[61] Unfortunately, the merit of his conclusions has become lost in a seemingly never-ending dissection of his methods used to reach them,[62] especially since the research that has emerged in the wake of Edwards' article supports many of his opinions, despite protestations to the contrary.

A 1996 study of legal scholarship by University of Iowa professor Michael Saks, et al, undertaken in large part to test the merit of Edwards' conclusions, found that, consistent with Edwards' opinion, legal scholarship is of increasingly greater value to other legal scholars and of lesser value to practitioners.[63] A comparative study of law review articles published in 1960 and 1985 found that their utility increased most significantly among scholars, marginally significantly during this time among judges and legislators and not significantly among practitioners.[64] Dividing the potential readership of law reviews into "consumer groups," consisting of 1) scholars, 2) judges and legislators, and 3) practitioners, the Saks study asked its panel of "reviewers" to determine the relevance of a particular article to each consumer group. Although the reviewers (and hence, the authors of the study) concluded that overall, law review articles were of more utility to the general legal populace in 1985 than in 1960, they nevertheless conceded (albeit in a footnote) that this was not the case with regard to practitioners.[65] As the lack of utility of legal scholarship to the practicing bar was the premise for most of Judge Edwards' conclusions, it is curious that the authors claimed to have nevertheless disproved him.

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[61] *See Supra* n. 45.
[62] *See Supra* n. 54.
[63] *Id.* at 369.
[64] *Id.*
[65] *Id.* note 68. Noting that most of their article raters began their work with the assumption that law review articles were becoming increasingly irrelevant to anyone other than legal scholars. "Except perhaps for utility to practitioners, the data produced contradict those starting assumptions."

2. The Causes of Disjunction Between Academic and Practicing Lawyers

a. Lack of Practical Experience

As Judge Edwards stated and the Saks study showed, much of the traditional legal scholarship is not responsive to the needs of practicing attorneys. Moreover, as my professional background survey indicates, this may be because on average, doctrinal professors lack the expertise to fully appreciate and analyze the issues confronting the practicing bar.[66] Judge Edwards recognized this in his article when he stated disparagingly (and in a statement that no doubt was an open invitation to the academic criticism that inevitably followed) that many law professors see themselves as intellectually superior and disconnected from the rest of the profession.[67] More fairly and accurately, it is probably the simple lack of long-term practical experience and the comparatively quick transition from student to professor that results in the feeling that many doctrinal professors have that they are primarily academics rather than lawyers. This may be why some practitioners believe that, "increasingly, law professors see themselves as colleagues of sociologists, economists and philosophers [rather] than of judges and lawyers."[68] Because many doctrinal professors believe that their most important constituency is not the general public of practicing bar but their fellow

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[66] *See* Redding, 53 J. Legal Educ. at 612. Professor Redding's survey found that this becomes increasingly more the case as the prestige of a law school increases. While he noted that the average length of practice time of doctrinal professors overall was short – less than four years – this number decreased even more as the prestige of the hiring law school increased. "This likely reflects the fact that while law schools prefer to hire those with some professional experience, practical lawyering skills are less important to the elite schools, which tend to emphasize theory more and practice skills less than the lower-ranked schools."

[67] Edwards, 91 U. Mich. L. Rev. at 75.

[68] Seth P. Waxman, *Rebuilding Bridges: The Bar, The Bench, And The Academy,* 150 U. Pa. L. Rev. 1905, 1909 (2002). Those legal academicians who feel a kinship towards their fellow scholars from other disciplines rather than the practitioners in their own field suffer from a displaced loyalty. In many of the humanities and sciences (such as sociology, economics and philosophy, for example) the academics and practitioners are one and the same. Practicing sociologists reside mostly within universities rather than in separate "sociology firms." As a result, the scholarly work produced by these academics is in effect written for the practitioners in their fields as well.

scholars, they write articles that many times speak to each other rather than attorneys outside of the academic realm.[69]

b. The Predominance of Theory and Limitation of Range of Topics in Elite Law Reviews

Of course, even if more doctrinal professors wished their scholarship to speak to the practicing bar, tenure and promotion issues pressure many of them away from this approach. In order to reach this goal, there is great pressure on tenure-track professors to publish in elite law reviews. This once again leads to unfortunate results for the practicing bar because these journals tend to favor theoretical rather than practical approaches to legal issues and are increasingly narrowing the scope of acceptable topics for publication within their pages. As a result, many of the articles that appear in these top journals are on topics that are of little value to the vast majority of practicing lawyers.

Returning to professor Saks' 1996 study, the authors found that, on the whole, the top-quintile journals – the ones most prized for those pursuing tenure – focus more on theory than on practical problems and produce the articles rated the least useful to practitioners.[70] They have increasingly become "the province of legal scholars and the most experimental kind of scholarship, and less a forum for exchanges among legal scholars, practitioners, and judges."[71] As such, those scholars interested in securing tenure are naturally encouraged to avoid practical scholarship in order to increase the likelihood of being published in one of these journals.

The range of topics most likely to be accepted by these top journals also discourages scholars from addressing issues of relevance to the practicing bar. A 2000

[69] *See* Bryden, 63 U. Colo. L. Rev. at 643.
[70] Saks et al, 30 Suffolk L. Rev. at 374.
[71] *Id.*

study conducted by University of North Carolina professor William Turnier on the decrease of tax law scholarship in law reviews found that an inordinate percentage (over 27%) of law review articles published in his survey of 17 top-quintile journals were on the topics of constitutional or criminal law.[72] Comparing the frequency of topics selected by these journals over the past 55 years, Turnier found that these two topics are becoming increasingly more dominant as time moves on.[73] He concluded that the increasing predominance of constitutional law topics during the 1990's was particularly interesting given the relative inactivity of the Supreme Court during this time.[74] Including other topics such as race, civil procedure and civil rights (which often have constitutional components or underpinnings) with constitutional and criminal law results in a whopping 41.12% of all articles published by these top journals in the 1990's on these five topics alone.[75] On the other end of the spectrum, Turnier found that the number of articles on international law decreased dramatically from the 1960's to the 1990's despite increased globalization during this time and the presumed increasing need of the practicing bar for scholarship that addresses this growing field.[76] This increasing reliance on these limited topics by top journals is so well-known that it has become fashionable in some academic circles to advise new law teachers that it is in their interest to add a constitutional angle to their articles in order to increase the likelihood of acceptance by a top 20 law review.[77]

This advice may very well be sound career advice for the budding academic but it ignores the needs and concerns of the practicing bar. In an attempt to quantify the

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[72] Turnier, 50 J. Legal Educ. at 194, table 2.
[73] *Id.* at 195-96.
[74] *Id.*at 195.
[75] *Id.*at 194, table 2.
[76] *Id.* at 195.
[77] *See* Slomanson, 50 J. Legal Educ. at 445-46.

amount of time attorneys spend on various fields of law, the American Bar Foundation undertook a long-term study of the Chicago bar.[78] It found that the members of the Chicago bar's attention to business litigation increased sevenfold from 1975-95 and that as of 1995, 64% of lawyers' time was allocated to the business fields of antitrust, business litigation, real estate, corporate tax, labor and securities.[79] However, business-related fields represented (charitably) only 10.6% of the topics selected in 1991 and 1996 by the 17 top-quintile law reviews discussed above.[80] By contrast, those topics most favored by these law reviews (constitutional law, criminal law, race, civil rights and civil procedure) represented only 8% of total practicing attorneys' time, with constitutional law (the overwhelming favorite topic of these journals) failing to draw enough interest to even register on the American Bar Foundation's survey results.[81] Clearly, there exists a gap between the scholarship in these elite journals and the issues faced by the practicing bar. And because publication in these top journals is a goal of many doctrinal professors, there is a disincentive for them to do the type of scholarship that responds to practical problems.

c. The Inability of the Traditional Legal Scholarship System to Respond to Practical Problems

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[78] John P. Heinz, Robert K. Nelson, Edward O. Laumann, Ethan Michelson, *The Changing Character of Lawyers' Work: Chicago In 1975 And 1995,* 32 Law & Soc. Rev. 751 (1998).
[79] *Id.* at 766-67.
[80] *See* Turnier, 50 J. Legal Educ. at 194, table 2. The 10.6% total is charitable because it includes articles on these topics that most likely were not business-related. Turnier's findings on the number of articles published on business-related topics in 1991 and 1996 were as follows: Securities: 20, corporate: 16, tax: 16, antitrust: 10, labor: 11, commercial/sales: 10, creditor/debtor: 4, business planning: 0, real estate transactions: 0. This totaled 87 articles or roughly 10.6% of all articles published within these journals during this time period. However, there exists the likelihood that some of the tax articles focused on personal rather than business tax issues. Other subjects may similarly have focused on non-business aspects.
[81] Heinz et al, 32 Law & Soc. Rev. at 765, table 3.

Interestingly, this disincentive has not always been present. The most prestigious of all law journals, the Harvard Law Review, began with the goal of serving the practicing bar. In its initial volume, published in 1887, the purpose of the Harvard Law Review was stated as follows:

> Our object, primarily, is to set forth the work done in the school with which we are connected, to furnish news of interest to those who have studied law in Cambridge, and to give, if possible, to all who are interested in the subject of legal education, some idea of what is done under the Harvard system of instruction. Yet we are not without hopes that the Review may be serviceable to the profession at large.[82]

The University of Pennsylvania's law review, founded as the American Law Register in 1852, was conceived as a journal, "published, written and edited by practicing lawyers for practicing lawyers."[83] Even after control of the Register was transferred to the law school and editorial control ceded to student editors in 1895, it remained a publication focused on service to practitioners.[84] In fact, a 1923 statement of the editorial board indicated a desire to form a closer bond with the practicing bar, such that the review, "would be in a position to render to the legal profession a service second to none to that of no other law school publication."[85]

Today, however, as noted above, formal, traditional scholarship largely fails in this mission.[86] Further evidence of the diminishing value of scholarship to the practicing bar comes from a 1998 study which found that judges' citations to legal scholarship has decreased by almost 50% over the last twenty years.[87] Consistent with Judge Edwards'

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[82] 1 Harv. L. Rev. 35 (1887).
[83] *See* Waxman, 150 U. Pa. L. Rev. at 1908.
[84] *Id.*
[85] *Id.*
[86] *See Generally* Richard Posner, *Against the Law Reviews,* Legal Affairs, November/December 2004. http://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.html
[87] *Id.* at 1909.

conclusions, the practicing bar is increasingly turning elsewhere for assistance in solving most of society's problems. This is the area of law crying out for analysis and comment Dean Weidner spoke of in his 1994 speech. This is where current scholarly effort should be directed. However, the traditional legal scholarship system is ill-equipped to adequately respond.

The lack of adequate practical knowledge on both the editorial and author side of the traditional legal scholarship system renders this system incapable of satisfactorily addressing the full range of practical issues calling out for academic scholarship. Because most traditional law reviews are student-run and edited, the student editors understandably are more comfortable selecting articles on topics with which they have some familiarity. This results in the selection of articles based more on theory than on practice (after all, these editors have been exposed as students to theory but have not, by definition, been exposed to practice) as well as articles on topics covered in their favorite classes.[88] While insurance law may be a course offered at practically all law schools, the comparative enrollment between that course and courses on constitutional law or civil rights should quickly explain the differences in frequency that these topics appear in law reviews.

In addition, as stated above, the backgrounds of many doctrinal professors likewise render them uncomfortable with many practical topics. As noted by one doctrinal professor:

> It is difficult, or at least seems difficult, to write intelligently about commodities futures, regulation of an industry, taxation of foreign shareholders' interests in domestic corporations and the like without considerable hands-on experience. Small wonder, then, that we prefer to work on original meaning of the

[88] *See* Turnier, 50 J. Legal Educ. at 194. Concluding that student editors do not appreciate the importance of tax issues and instead consider constitutional and human rights issues more pressing.

> Establishment Clause, or any other topic on which our credentials are equal or superior to those of the most seasoned lawyer.[89]

Given the issues faced by both editors and authors, it is no wonder that law reviews have shied away from practical scholarship. Regardless of the cause, however, it is a problem that is crying for a solution. My professional background survey indicates that legal writing professors are equipped with the skills to step in and help to resolve it. Given that, on average, legal writing professors are the relative experts in the area in which there exists a major gap in scholarship, Dean Weidner would most likely suggest that it is our *duty* as scholars to step in and fill this gap.[90]

When considering the ancillary status question, however, this solution is not as simple. Two important questions are raised that require answers before the appropriate scholarly role of legal writing professors can be answered in full. These are: 1) is it tactically appropriate for legal writing professors to highlight our relative differences from, rather than our similarities to, our doctrinal colleagues when attempting to achieve equivalent status?; and 2) is it wise to focus our scholarly efforts on practitioners' problems given that these topics are traditionally accorded the least amount of scholarly respect? The following section will tackle the first question. The practical scholarship dilemma will be addressed in Section III.

C. <u>The Wisdom of Highlighting Differences in an Effort to Achieve Equality</u>

Although at first blush it may seem counter-intuitive to highlight one's differences from a group in an attempt to achieve similar status, further analysis of this

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[89] Bryden, 63 U. Colo. L. Rev. at 645.

[90] Weidner, 44 J. Legal Educ. at 442. ("The productive scholars are the ones who know how many areas are crying out for analysis and comment. They are the ones who know how many improvements could be made to the law, if only people focused on them.")

issue as it applies to the unique situation of the legal writing professor in the legal academic community shows why it makes sense here.

As anyone who has spent significant time as a member of a legal writing faculty can attest, legal writing is often trivialized either institutionally or by certain members of a school's doctrinal faculty.[91] Although certainly this is not a view shared by all (or even most) members of the doctrinal community today, the fact remains that at many schools, the legal writing faculty remains on the fringes of academia[92]: often paid significantly less than our doctrinal colleagues,[93] most often not on tenure-track,[94] and usually subjected to a series of one-year or short-term contracts.[95] All of this occurs despite the fact that judges and practitioners repeatedly cite legal research and writing as the most important legal skills of a new attorney.[96] Clearly, the vast majority of law schools do not provide equal status to their legal writing faculties.

Although it is tempting for the legal writing community to strive to achieve integration through assimilation -- to proclaim to our doctrinal peers that, in essence, "we deserve equal treatment because we are no different than you," this argument does not work in an environment where even minute differences in the traditional status indicators are significant. In fact, we are similar to our doctrinal peers in many ways, but there exist demonstrable differences between us with regard to several of these indicators that most

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[91] *See* Peter Brandon Bayer, *A Plea For Rationality And Decency: The Disparate Treatment Of Legal Writing Faculties As A Violation Of Both Equal Protection And Professional Ethics,* ___Duq. L. Rev. 329, 353-54 (2001).
[92] *See* Fine, 5 Legal Writing at 227.
[93] *See* ALWD Survey at 55 (question # 75). The average salary for a full-time teacher of legal writing in 2004 was between $49,419 and $59,395.
[94] *Id.* at 5 (question # 10). In 2004, only 6 legal writing programs had in place a staffing model that utilized tenured or tenure-track teachers hired specifically to teach legal writing.
[95] *Id.* at 48 (question # 65). Of those responding in 2004, 24 teachers of legal writing were tenured or on tenure-track, 36 had contracts of three years in length or more, 24 had 2 year contracts and 60 had one year contracts.
[96] *See* Fine, 5 Legal Writing at 227.

likely have prevented legal writing professionals from achieving equal footing with our doctrinal colleagues.

As noted in the professional background survey in section II(A)(2), legal writing professors are less likely to have attended a top 20 law school than doctrinal professors (42% versus 58%). This discrepancy is consistent with the findings of an earlier study which focused solely on tenured or tenure-track legal writing professors versus their doctrinal colleagues (25% versus 60%).[97] More specifically, legal writing professors are far less likely to have attended Harvard Law School (6% versus 28%).[98]

An analysis of clerkship experience likewise highlights some significant differences in status indicators. According to the findings of the professional background survey, although legal writing professors and doctrinal professors were roughly equally likely to have had clerkship experience (38% versus 34%), the type of clerkship experience differed. Doctrinal professors were more likely to have had a federal clerkship than a state court clerkship and were likewise more likely to have had a Supreme Court or intermediate appellate clerkship as opposed to a district court clerkship.[99] The most likely clerkship experience for a legal writing professor would be at an arguably less prestigious state court rather than at a federal one and at the trial level rather than at the appellate.

An additional status indicator that highlights the differences between legal writing and doctrinal professors is the practical experience factor. Historically, practical

[97] Levine, 45 J. Legal Educ. at 542. *See also* Redding, 53 J. Legal Educ. at 600 (table 1) which found that 86% of new faculty hires at all law schools between 1996 and 2000 received their J.D. degree from a top 25 school as ranked by the 1999 U.S. News and World Report law school rankings.
[98] *See also* Redding, 53 J. Legal Educ. at 599 which found that 18% of all new doctrinal faculty hires between 1996 and 2000 received their J.D. degree from Harvard.
[99] *Id* at 600. Professor Redding found that 57% of the doctrinal faculty hires in his survey had completed a clerkship with 46% having a federal clerkship and 10% a U.S. Supreme Court clerkship.

experience has been viewed within the legal academy as a negative when assessing faculty candidates.[100] While some may argue that this viewpoint is antiquated and no longer the norm, the lack of practical scholarship discussed above indicates that practical experience, if not disparaged today, is certainly not embraced.

These, albeit relatively minor, differences between legal writing and doctrinal professors are nonetheless significant. They perhaps explain why the "integration through assimilation"[101] strategy of legal writing professionals in many programs has gotten us closer in status to our doctrinal colleagues but has failed to result in true equality. It has successfully demonstrated that legal writing faculty members are more similar to our doctrinal colleagues than many doctrinal faculty members previously believed and has resulted in great strides in status and security. In many law schools, legal writing professors are no longer considered the "lowly mechanics"[102] of the faculty and have been elevated and compensated in accordance with this revised understanding of our skills. However, perhaps because of the above-noted status indicator differences, we are still considered somewhat beneath our doctrinal colleagues on the status scale. We may be closer to them than they originally believed us to be but we're still somewhat lesser scholars in many of their eyes because of these differences. These differences cannot be easily overcome and illustrate the limitations of the "integration through assimilation" strategy. We may tout our similarities and assert our equality all we want

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[100] *See* Bryden, 63 U. Colo. L. Rev. at 642-43. *See also,* Redding, 53 J. Legal Educ. at 612, noting that the amount of practical experience of new faculty hires decreases with the prestige of the hiring law school. This gives credence to the conclusion that the most desirable faculty candidates are those without significant practical experience.

[101] Pursuant to this strategy, legal writing faculties are encouraged to assert themselves as integrated members of their faculties in the hope that eventually, their doctrinal colleagues will realize that there are essentially no differences between the two groups and will thus accept them as such.

[102] Fine, 5 Legal Writing at 225.

but because we are not truly similar in all relevant ways, these differences ultimately prevent us from crossing the threshold to true equality.

The mindset that legal writing professors are lesser because of these differences is well-ingrained in many law schools and continues to flourish because of the makeup of doctrinal faculty hires. As the professional background survey found, the elite law schools continue to be the most fertile ground for faculty hiring. Some studies have found that as many as 74% of law teachers received either a primary (J.D.) or secondary (LL.M.) legal degree from a top 20 school.[103] Coincidentally (or perhaps not), these top tier schools were also far less likely to hire legal writing professors to tenured or tenure-track positions. In fact, a 1995 study found that the schools typically ranked in the bottom half of the U.S. News and World Report's law school rankings were far more likely to appoint legal writing faculty to these types of positions.[104]

Given the amount of weight in the doctrinal faculty hiring process that apparently is placed on law school attended, it is not surprising that the elite schools hire their doctrinal faculty from similarly elite schools at greater than the 74% national average. One recent study of new faculty hires found that 96.3% of doctrinal faculty hires at top 25 schools received their J.D. degrees from these same top 25 schools.[105] Conversely, the less prestigious schools hire doctrinal faculty members who attended a greater variety of

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[103] Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession,* 1980 Am. B. Found. Res. J. 501, 520 (1980). *See also* Redding, 53 J. Legal Educ. at 600 (table 1) who found that 86.2% of all new doctrinal faculty hires from 1996-2000 came from a top 25 school.
[104] Levine, 45 J. Legal Educ. at 539.
[105] Redding, 45 J. Legal Educ. at 600 (table 1).

law schools and are more than six times as likely to hire new doctrinal faculty members from schools outside of the top 25.[106]

These statistics, which seemingly relate solely to doctrinal professors, are of great importance to legal writing professors -- they demonstrate why the lesser status of legal writing professors continues to propagate. Because doctrinal faculties in all schools continue to replenish themselves with members who attended law schools that were more likely to consider their legal writing faculties as somewhat inferior (perhaps because of the emphasis of these schools on theory over practical skills and experience),[107] it is only natural that these faculties would adopt a similar view of their present legal writing colleagues. This viewpoint is likely more deeply ingrained in the elite schools (which most likely hire a greater percentage of doctrinal faculty members from elite schools) and somewhat less well-established in lesser schools as the faculty pool widens to consider candidates who attended lesser schools – schools that are also more likely to have accorded equal or increased status to their legal writing faculties. This may be why the 1995 study of tenure and the legal writing professoriate concluded that while it is likely that more and more schools will allocate tenure track positions to teachers of legal writing in the future, the schools most likely to do so would likely continue to be those that are lower-ranked.[108]

1. The Legal Writing Professors' Dilemma

This leaves the legal writing faculties at the majority of law schools with a dilemma. Unquestionably, positive changes in the status of legal writing professors have

[106] *Id.* While only 3.7% of doctrinal faculty hires at the top 25 schools received their J.D. degrees from a top 50 or lower-ranked school, 25.3% of doctrinal faculty hires at all other schools came from schools other than the top 25.
[107] *See Supra* n. 63.
[108] Levine, 45 J. Legal Educ. at 548-49.

occurred with great frequency over the past several years (the fact that an ever increasing number of legal writing teachers are officially titled "professors" rather than "instructors"[109] for example, is testament to these changes). However, true equality with our doctrinal peers has not been reached in most law schools and a barrier still exists between our doctrinal colleagues and ourselves. The legal writing community is thus presented with a choice: it can either stay the course and hope for conditions to improve as ever more doctrinal faculty members are hired from lesser schools (schools that gave equal status to their legal writing faculty) by a wider range of law schools, or it can shift the focus of the debate in order to clear the final, and biggest, hurdle to equality. The former option may very well take decades as incrementally, a greater number of viable doctrinal faculty candidates graduating from schools that treated their legal writing faculties as equals emerges. This process, by definition, will be a multi-generational one, leaving many of those currently teaching legal writing to do so without realistic hope of achieving true equality with their doctrinal peers during their professional lifetimes.

Alternatively, as stated above, the legal writing professoriate can decide to shift the focus of the debate in an effort to achieve the same results much more quickly and efficiently. The goal of equality would remain the same but now, the argument for equality would focus not on our similarities with our doctrinal peers but rather on our unique role within our faculties – a role that enables us to fill a void that only we are qualified to fill. It would center on our ability to bring something unique to the academic table, and for which we hold the competitive advantage. By focusing on our strengths (practical knowledge) rather than our relative weaknesses, we stand a greater chance of

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[109] *See* ALWD Survey at 49 (question # 68). In 2001, 57 of the schools responding to the survey indicated that they used the "professor" title in one form or another with regard to their legal research and writing faculty members. By 2004, this number had increased to 84.

ultimate success. As such, practical scholarship makes unique sense for the legal writing community.

Although practical scholarship is not considered as prestigious as traditional scholarship, this mindset ignores the problem as identified by judges and the practicing bar, who are crying out for "thorough, thoughtful, concrete legal advice."[110] In addition, more articles focused on legal practice are needed in order to fully prepare the modern law student for the issues he or she will likely face as a practicing lawyer.[111] As the members of our faculties with, on average, the most significant amount of practical experience, we should focus our scholarship on this area of law.

It is important to remember that our relative strength in this area does not highlight a weakness in the academic makeup of our doctrinal colleagues but is, rather, merely a reflection of our different backgrounds and resulting talents. Because of the greater likelihood that doctrinal professors attended the traditional academic "feeder schools," their federal, appellate clerkships and their comparatively quick transition from student to teacher, they are well-trained in the theoretical aspects of the law. This knowledge is vital to the development of the law.[112] Legal writing professors, because of our differing backgrounds, simply bring a different area of expertise to the academic table. Neither skill is more significant than the other and both are equally integral to the development of the law and service to the legal community.

2. Towards A Law School of "Position Players"

[110] *Id.* at 57.
[111] Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice,* 64 S. Cal. L. Rev. 1231 (1991).
[112] *See* Edwards, 91 U. Mich. L. Rev. at 35-36.

This highlighting of differences is consistent with the viewpoint that law faculties should optimally be places where people of different backgrounds and skills can come together and complement each other. In his article on the role of scholarship among tenure-track faculty, Professor Kenneth Lasson called for faculties to aspire to mold themselves "as position players, not as clones of one another."[113] Although Lasson was speaking on the value of scholarship among doctrinal faculty members, his advice rings true as it applies to scholarship by all members of a law school's faculty. To the extent that a particular member of a faculty has an academic strength relative to the rest of the faculty, that strength should be encouraged and be allowed to flourish.[114] It is detrimental, not merely to the individual faculty member but to the law school and society as well, to force that faculty member to conform to a traditionally accepted role in order for him to achieve recognition and the full range of benefits from his colleagues.

Theoretical and practical scholarship can and should peacefully coexist in a law school community. It is not an issue of "us versus them" for scholarly supremacy, but rather, the entirety of a law school faculty complimenting each other for the ultimate betterment of the greater legal community.[115] If one supposes that the purpose of law is to better society,[116] then lawyers who write about the law should have this goal in mind when choosing their topics.[117] Because the legal academy is the branch of the law charged with the obligation of analyzing and writing about it,[118] it is vital that all aspects

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[113] Lasson, 103 Harv. L. Rev. at 949.
[114] *See Id.*
[115] *Id.*
[116] *See Id.* at 943.
[117] *See* Fred Rodell, *Goodbye To Law Reviews,* 23 U. Va. L. Rev. 38, 42 (1936). "…if any among the lawyers might reasonably be expected to carry a torch or shoot a flashlight in the right direction, it is the lawyers who write about the law."
[118] *See Id.*

of society are considered when making these choices. Working together, doctrinal and legal writing professors can discharge this obligation in its entirety.[119]

3. Practical Knowledge and the "Generation X" Law Student

Similarly, doctrinal and legal writing professors can and should use our differing skills to work together to prepare students for the practice of law. A proper legal education focuses both on the theoretical as well as the practical aspects of the law. Recent legal scholarship has noted an increase in student unease with regard to the completeness of their legal education.[120] Many students are dissatisfied with the skill set they are taking with them from law school into the legal marketplace and feel that they are not prepared to tackle much of what will be thrown at them by their employers after graduation.[121] As these concerns focus on a practical rather than theoretical legal knowledge gap, the practical scholarship of legal writing professors can step in here as well to help fill it.

Research on the topic of educating Generation X students has shown that today's law students differ from their predecessors in several important ways.[122] Unlike their

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[119] *See generally* Edwards, 91 U. Mich. L. Rev. at 38-39, discussing the academicians' obligation to serve the system of justice.

[120] *See* Rogelio Lasso, *From The Paper Chase To The Digital Chase: Technology And The Challenge Of Teaching 21st Century Law Students,* 43 U. Santa Clara L. Rev. 1, 15 (2002). "Law students across the country complain that their legal education leaves much to be desired."

[121] *See* Rodney O. Fong, *Generation X: Students In The 21st Century, The Challenges Of Connecting With 21st Century Students,* Opening Plenary Workshop: Do You Know Where Your Students Are? Langdell Logs On To The 21st Century, AALS 2002 Annual Meeting, New Orleans, January 2, 2002 (available at //www. aals.org/am2002/workshop.html). Professor Fong discussed the "ultra-consumerism" outlook of the modern law student and how many students are dissatisfied with the skill-set they leave law school with after paying thousands of dollars for a legal education. In their opinion, this investment entitles them to concrete knowledge they can apply directly to their careers as practitioners and are frustrated that oftentimes, they do not receive it.

[122] *See Id. See also* Rodney O. Fong, *Retaining Generation X'ers In A Baby Boomer Firm,* 29 Capital U. L. Rev. 911 (2002). The author defines a "Generation X" student as a child of a baby boomer, typically between 19-37 years old. *See also* Tracy L. McGaugh, *Generation X in Law School: The Dying of the*

parents, they take a consumer-oriented approach to their education and see law school not as a purely intellectual experience but an extensive financial investment toward a career as a lawyer.[123] This change in mindset is significant in that they believe that they should receive "value," as *they* define it rather than their professors, in exchange for the payment of tuition.[124] Knowledge for knowledge's sake takes a back seat in the eyes of many of these students.[125] Instead, they seek knowledge that can be applied directly to their careers as practitioners.[126]

While the wisdom of allowing these students to dictate the parameters of the entirety of their legal education is certainly debatable, the practical knowledge of the legal writing professoriate can be utilized to help allay student fears somewhat and respond to some of their concerns. Theory, regardless of its perceived utility in the eyes of the Generation X student, is a prerequisite to even the most basic understanding of the workings of the law. Thus, to a large degree, these students will be compelled to take their medicine regardless of how distasteful they may find it. However, scholarship on practical issues and concerns can help satisfy these students' cravings for knowledge and information directly relevant to the issues they will be facing as practitioners in a few short years.[127] In the eyes of the Generation X student, scholarship that addresses their

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Light or the Dawn of a New Day? 9 Legal Writing 119 (2003), which likewise discusses the differences, both perceived and actual, between the Generation X student and his predecessors.

[123] *See Supra* n. 119.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *See also* ABA Sec. Leg. Educ. & Admis. To the B., *Teaching and Learning Professionalism, Report of the Professionalism Committee* 13-18 (ABA 1996). In order to adequately respond to the call for an increase in training in professionalism in law schools and to better respond to types of issues many students will soon face as practitioners, the committee recommended the hiring of faculty with extensive practical experience and urged law schools to overcome "the apparent reluctance…to hire lawyers with extensive practice experience as tenure track faculty." *Id.* at 17. The committee concluded that such faculty members "would serve as excellent role models for students…they can give a real-world perspective to

concrete needs is merely different than that which they are otherwise exposed to, not lesser.[128]

The current disconnect between many doctrinal faculty members and their Generation X students comes in part from the nature of traditional scholarship. Because doctrinal legal scholars see each other as their constituency,[129] they may have less to say to their students outside of class on the major substantive issues of the day.[130] In a scholarly sense, students are neophytes, and as such, can be made to feel left on the fringes of the debate between scholars.[131] This, in turn, may result in increased angst in students who feel as if their needs and opinions are being ignored. Because practical scholarship speaks directly to practitioners or aspiring practitioners, it brings students back into the fold by focusing on issues that are important to them and their burgeoning careers. The wealth of practical knowledge stored within the combined legal writing professoriate should be tapped so as to enable us to step in and help round out the modern law students' legal education.

4. Professional Education as a Blending of Practical and Theoretical Knowledge

It is interesting to note that, with the possible exception of the clinical programs and faculty, legal education stands out among the professional educational disciplines as

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ethics and professionalism issues, because of their real-world experiences, and can readily integrate those issues into their courses." *Id.* at 18.

[128] *Id.*

[129] *See* Bryden, 63 U. Colo. L. Rev. at 643.

[130] *See* Weidner, 44 J. Legal Educ. at 442.

[131] *Id.* Dean Weidner commented that the biggest pitfall of academia is spending the bulk of one's time interacting with "novices in your area of expertise." "The more years you spend as a legal academic, the less satisfying it will be to have something to say only to your students, who as a group tend to know relatively little about the area you are teaching them."

the only one that frowns upon practical knowledge.[132] Business, medical and architecture schools all embrace practitioners on their faculties.[133] Most, if not all, medical schools count as full fledged faculty members those who are also or have been practicing physicians.[134] As many as two-thirds of the faculty at numerous top-tier schools of architecture are either practitioners or have significant practical experience.[135] There is no inherent theoretical difference between medical and architectural education on the one hand and legal education on the other that would justify an embrace of practical knowledge in the former and a distaste for it in the latter. The difference between them comes down simply to a difference in mindset. In order to change the culture of inequality within legal faculties, the legal writing professoriate must work to change the ingrained, institutional mindset rather than continue to fight a battle that will invariably result in unequal status for the legal writing professor for years to come.

The focus of the debate over equality must be changed to one that highlights the strengths of the legal writing professoriate rather than our perceived "weaknesses." It must address the greater concerns of modern legal education and service to the legal community rather than ignore these important and influential factors. As the legal scholarly market is literally crying out for more practice-based scholarship from the

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[132] Although clinical programs appear to be ever-increasing components of legal education, clinical faculty members often face their own status issues and marginalization by the doctrinal faculty. An analysis of the role of scholarship of clinical faculty members is, however, beyond the scope of this article.

[133] *See Supra* n. 65 (noting, in addition, that the nature of many academic disciplines dictates that many scholars throughout academia are likewise, de facto, practitioners. As a result, many faculties across the academic spectrum include scholars who are also practitioners. *See also* Thomas R. Fisher, Speech, *Models From Other Disciplines: What Can We Learn From Them?* (2001 ALWD Conference, University of Minnesota Law School, July 27, 2001) (copy of transcript contained in 1 *Journal of the Association of Legal Writing Directors,* 165, 168 (October 2002), wherein Fisher, Dean of the University of Minnesota College of Architecture and Landscape Architecture noted: "that there are a number of schools – Minnesota, Columbia and Yale are three noteworthy ones – where as much as two-thirds of the faculty are practitioners."

[134] *See* Waxman, 150 U. Pa. L. Rev. at 1910 (noting that most members of medical faculties are also practicing physicians.)

[135] *See* Fisher, 1 *Journal of the Association of Legal Writing Directors* at 168.

academy – scholarship that responds to the issues that vex the practicing attorney on a daily basis and proposes workable solutions – the legal writing professoriate has not only golden opportunity but a responsibility to step forward into this breech.

This article is not the first to call upon the legal academy to do a better job of imparting practical knowledge to the legal community. In fact, during his keynote address at the University of Pennsylvania's Sesquicentennial Anniversary Banquet in 2002, a partner at Wilmer, Cutler and Pickering addressed this very issue when he said:

> Premier law schools…need to make affirmative efforts to hire gifted people who have been successful in practice, public and private. I'm referring not just to adjunct professors who rush in and out. I'm referring not simply to the need for more clinical faculty. I'm…talking about practitioner-scholars who are fully integrated into the academic faculty.[136]

The call for such scholars has already been made. It is our responsibility as legal writing professors to stand up and let our doctrinal and practitioner colleagues know that we're already here.

III. WHERE SHOULD WE PUBLISH?: DETERMINING THE APPROPRIATE VENUES FOR PRACTICAL SCHOLARSHIP

Once the legal writing professor has completed her practical scholarship, the next question becomes where she should submit it for publication. Traditional status indicators suggest that she should submit it to a number of student-edited law reviews and hope for acceptance from an elite journal. After all, formal law review articles published in these journals are vested with the greatest level of respect from the legal academy.[137] This poses a problem for the legal writing professor, however, because, as stated above,

[136] *Id.* at 1912.
[137] *See* Fine, 5 Legal Writing at 230.

practical scholarship is often relegated to the lower-tiered, less prestigious journals.[138] Moreover, the most appropriate forum for practical scholarship is often in the bar journals and practice manuals that reach her intended audience but which rank at the bottom of the prestige scale, even below the least prestigious law reviews.[139] Therefore, it appears that in order for the legal writing professor to write in her field of expertise, she must sacrifice prestige. This flies in the face of the "integration through assimilation" approach to equality for the legal writing professoriate, which would naturally counsel legal writing professors to seek to publish formal law review articles in the same journals that publish the scholarship of our doctrinal colleagues. However, traditional, student-edited law reviews are uniquely inappropriate venues for the scholarship of the legal writing professoriate for several reasons relating to how they work and who they reach. These reasons will be discussed in turn.

A. Five Reasons Why Student-Edited Law Reviews Are Improper Scholarly Venues For Legal Writing Professors

1. The Predominance of Theory-Based Articles in Top Journals

As stated in section II of this article, law reviews have been criticized, notably by Judge Edwards but by others as well, for abandoning practical legal problems and increasingly choosing instead to focus on theory.[140] Judge Edwards gave voice to the many critics, both within and outside the academy, who believe that practical scholarship

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[138] *See* Slomanson, 50 J. Legal Educ. at 434-35. "One general list of priorities divides legal writing into four broad categories, in ascending order of worthiness: practice-oriented materials (bar journals and manuals); academic short subjects (essays, book reviews, and brief case notes); law review articles; and books."
[139] *Id.*
[140] Edwards, 91 U. Mich. L. Rev. at 35.

has declined in law reviews and that the crucial link between the legal academy and our system of justice has been severed by this rising tide of theory-based scholarship.[141]

In reality, this criticism appears to be somewhat of a generalization. The 1996 Saks et al, study remarked that because there are thousands of law review articles published annually (more than any one person could ever possibly hope to read), Judge Edwards' anecdotal comments are most likely the result of his familiarity with a limited number of journals and articles and cannot possibly cover the entirety of legal scholarship.[142] The Saks study of a range of law reviews across the prestige hierarchy found that only the top quintile journals were guilty of the sins espoused in Judge Edwards' article.[143] They contained the highest proportion of articles focused on theory while lesser journals contained a greater proportion of the practice-based articles Judge Edwards claimed had all but disappeared.[144] In conclusion, the Saks study stated that focusing merely on these top quintile journals results in a misperception regarding the state of legal scholarship overall and suggested that courts look to a wider range of law reviews for advice in an effort to reestablish the link that Judge Edwards claimed was missing.[145]

The Saks study may have effectively discussed the relationship between the law reviews and the judicial system, but it only highlights the problem as these reviews apply to the legal writing community. As the Saks study found, the top quintile journals – those journals which also rank highest on the prestige scale – are far more likely to accept

[141] *Id.* at 42, 57.
[142] Saks et al at 360.
[143] *Id.* at 374.
[144] *Id.* at 374-75.
[145] *Id.*

theory-based articles than practical ones.[146] As a result, those who choose to focus on practical scholarship will be more likely to find their work accepted by the less prestigious journals and ignored by the top ones.

Mere publication of an article in a law review article does little to affect one's academic status because of the sheer number of journals (over 800 at last count) and articles published annually (more than 5000 according to some).[147] Given the likelihood that some editor somewhere is short on submissions and facing a deadline, the bar has been lowered to the point where "reasonably intelligent copy" is all that is needed to ensure publication at least in some lesser law reviews.[148] Because practically everyone in the legal academy is publishing their work somewhere, it is the status of the journal in which one's work is accepted that is the overriding factor in determining the scholarly status of the individual. By repeatedly having our work published in these lesser journals, our "lesser scholar" status will only continue to be perpetuated. Section II of this article concluded that legal writing professors are different, not lesser scholars. Therefore, we need to be conscious to avoid that perception at all costs.

2. The Limited Subject Matter Focus of Student-Edited Law Reviews

As noted above, professor Turnier's 2000 study found that a limited range of closely-related subjects receive an overwhelming amount of attention in the elite law reviews.[149] It should come as no surprise that constitutional and criminal law were the most popular topics with civil procedure, civil rights and race (topics that often have

[146] *Id.* at 374.
[147] Lasson, 103 Harv. L. Rev. at 928.
[148] Slomanson, 50 J. Legal Educ. at 435.
[149] Turnier, 50 J. Legal Educ. at 195-96.

constitutional underpinnings) not far behind.[150] Overall, constitutionally-based topics (constitutional law, civil procedure, civil rights and race) accounted for 31.86% of all articles published by these elite journals in 1991 and 1996.[151] Moreover, the top 5 topics combined (constitutional law, criminal law, race, administrative law and women and the law) accounted for nearly half (42.47%) of all articles published within these journals.[152] The predominance of these topics is neither surprising to anyone who has perused a law review nor unknown to those within the legal academy. As stated above, some professors, in fact, believe it prudent to add a constitutional angle to their scholarship so as to increase their chances of being accepted by one of these journals.[153]

One who makes practical scholarship their focus does not have a similar luxury, however. Because so few practitioners practice constitutional law,[154] or even remotely address constitutional issues in their practices, adding a constitutional angle to a practical subject risks alienating the market we are dedicated to serving. However, ignoring constitutional or other issues popular with the elite journals will lessen our chances of publication with them. Although publication of our work nonetheless will likely be published somewhere,[155] it will likely be with a lesser journal, thus once again perpetuating our "lesser scholar" stigma.

3. The Predominance of Footnotes and Turgid Prose[156]

There are as many theories on why legal scholarship looks and reads the way it does as there are footnotes in the average law review article. Regardless of the reasons

[150] *Id*.
[151] *Id.* at 194 (table 2).
[152] *Id.* at 196.
[153] *See* Slomanson, 50 J. Legal Educ. at 445-46.
[154] *See* Heinz et al, 32 Law & Soc. Rev. at 765 (table 3). In fact, constitutional law was so sparsely practiced that it failed to even register within the Chicago study.
[155] *See Supra* n. 141 and corresponding text.
[156] *See* Lasson, 103 Harv. L. Rev. at 942. "Law review prose is predominantly bleak and turgid."

behind the generally accepted style of law review writing, the style itself presents issues unique to the legal writing community.

Unlike our doctrinal peers, legal writing professors teach, in part, writing style. Some focus on it explicitly, others may focus more overtly on analytical technique in their classes but cannot help but consider the nature of how it is presented when reviewing their students' work. We are teachers of legal *writing,* after all. We counsel our students to write simply and clearly, avoid excess words, legalese, and the passive voice, among other stylistic sins. Our intellectual honesty may justifiably be called into question if we fail to practice in our scholarship what we preach in class.

Even though publication may not be a formal requirement for promotion or retention, scholarship makes sense for the legal writing professoriate simply to enable us to hone our writing skills.[157] In this sense, and unlike our doctrinal peers, scholarship directly impacts the quality of our teaching: the better writers we are, the better teachers of writing we will become. We are not, however, honing these skills if we write in a style that contradicts what we instruct in class. In his now famous article, professor Fred Rodell remarked that there are two things wrong with almost all scholarly legal writing: "One is its style. The other is content."[158] As we teach style, we need to be particularly sensitive to this concern.

Rodell's article goes on to chronicle the most egregious sins, in his eyes, of the typical law review article -- sins that, if anything, have become even more pervasive in the almost 70 years since his article was published in 1936.[159] One such sin is the proliferation of footnotes. "Every legal writer is presumed to be a liar until he proves

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[157] *See* Liemer, 80 Oregon L. Rev. at 124.
[158] Rodell, 23 U. Va. L. Rev. at 38.
[159] *Id.*

himself otherwise with a flock of footnotes", he wrote.[160] He continued, writing that footnotes are the result of sloppy thinking and clumsy writing.[161] Along the same lines, Justice Goldberg noted that they "cause more problems than they solve."[162] It is perhaps for these and many other reasons that the legal writing texts we teach from counsel against the use of footnotes either absolutely or sparingly at best.[163] Regardless of the rationale behind the use of the footnote, few would disagree that they are the antithesis of the simple and clear writing style we attempt to instill in our students each year.

Another sin of particular concern to the legal writing community is the proliferation of passive voice and other stylistic offenses contained in many law review articles. As one commentator noted: "The style of legal scholarship violates every precept in a manual of expository writing: it is abstract, plodding, pompous, and prolix."[164] Rodell highlighted the legal scholar's fascination with the passive voice by pointing out a well-worn phrase, still in (over)use today: " 'It would seem --,' the matriarch of mollycoddle phrases, still revered by the law reviews in the dull name of dignity."[165] Reliance on the passive voice, excess words, awkward syntax, an emphasis on saying things complicatedly rather than simply – all of these things we instruct our students to avoid -- flourish with abundance in the law reviews. Even if we are not aware of it, we teach our students according to Rodell's closing credo: "that the English

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[160] *Id.* at 41.
[161] *Id.*
[162] Arthur Goldberg, *The Rise And Fall (We Hope) Of Footnotes,* 69 A.B.A. J. 255, 255 (1983) (quoted in Lasson, 103 Harv. L. Rev. at 940.
[163] *See e.g.,* Nancy L. Schultz and Louis J. Sirico, *Legal Writing and Other Lawyering Skills,* 312 (3d Ed. , Matthew Bender 1998). In discussing the proper format for the argument section of an appellate brief, the authors advise students to: "(u)se footnotes sparingly. Generally, if the thought is worthy of a footnote, you can fit it into your argument. Footnotes are undesirable because they interrupt the flow of the argument."
[164] Bryden, 63 U. Colo. L. Rev. at 647.
[165] Rodell, 23 U. Va. L. Rev. at 39.

language is most useful when it is used normally and naturally…"[166] Is it then not improper for us to then violate our own teachings in the name of legal scholarship?

Our doctrinal colleagues do not face a similar ethical crisis. Not only do they not teach style, the traditional law review style may very well benefit them in ways that do not inure to us. Because their most important constituency is other scholars,[167] their scholarship is written for each other rather than the general public or practicing bar.[168] As in any profession, there inevitably develops a unique jargon among insiders, impenetrable to those outside of the loop, that enables them to communicate with one another in a specialized manner they can readily understand.[169] By contrast, because practical scholarship is meant to be utilized by the practicing bar, it must be written in a style that is easily accessible to lay attorneys. While doctrinal legal scholars may very well communicate with one another via their specialized jargon, legal writing scholars, as experts in practical knowledge, must communicate with our constituency in the simpler language in which they regularly communicate (if we've taught them well when they were our students).

In addition, to the extent that traditional legal writing style can be considered "bad" writing, it does not handicap doctrinal professors like it does legal writing professors. "Good" writing is considered good mainly because it is easily accessible to the reader.[170] In general, the demands of the marketplace require good writing because if the reader (the consumer) determines a piece of writing to be "plodding, pompous and

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[166] *Id.* at 45,
[167] Bryden, 63 U. Colo. L. Rev. at 643.
[168] *Id.*
[169] *See* Lasson, 103 Harv. L. Rev. at 944.
[170] *See* Bryden, 63 U. Colo. L. Rev. at 647.

prolix,"[171] he can set it aside and choose to read something else.[172] In this marketplace, good writing will be read (and theoretically rewarded) and bad writing ignored.[173] A professional writer must respond to the wishes of his audience if he wants to continue to be a professional writer.[174]

This market does not exist in the world of doctrinal legal scholarship.[175] There is no need to respond to the desires of the marketplace when a doctrinal professor can merely assign his work to his students.[176] Fellow doctrinal scholars are likewise required to read their colleagues' work regardless of its style when making a tenure or promotion decision.[177] Although theoretically, "plodding, pompous and prolix"[178] writing can affect this determination, it appears highly unlikely that someone would be denied tenure based on her writing style.

If legal writing scholars are going to focus on practical scholarship, however, we will be subject to traditional market forces. Given practicing bar member's busy schedules, they will only read that which is easily accessible to them. If we want to effectively and continually reach our intended audience, we must write in a simple, clear style that grabs their attention and makes them want to read what we have to write. In short, in order to effectively communicate with our readers, we must practice in our scholarship what we teach in our classes.

4. The Limited Audience For Law Review Articles

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[171] *Supra* n. 159.
[172] *See* Bryden, 63 U. Colo. L. Rev. at 647.
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *See* Lasson, 103 Harv. L. Rev. at 927.
[178] *Supra* n. 159.

Publication in traditional law reviews does not make sense to legal writing professors if for no other reason than the simple fact that many members of our audience do not read law review articles. Many practitioners have been trained through experience to avoid the law reviews because there typically is not much contained in them that is relevant to their practices.[179] This is evidenced by the fact that the overwhelming majority of law review articles are cited not by courts or legislators but by one another.[180] It is the rare law review article that is cited in case reports or annotated codes.[181] Moreover, as discussed in section II (B)(2)(c), a 1998 study found that the frequency of judges' citations to law review articles is declining rapidly: almost 50 % in the past 20 years with the greatest decline occurring in the past 10.[182] While some complain that many law review articles are made to be written and not read,[183] it is clear that whatever audience exists for them exists within the academic realm.[184] Practitioners, on the other hand, utilize those scholarly resources that are more likely to address their concrete problems: bar journals, practice manuals, and continuing legal education materials. In order for the legal writing professoriate to reach its audience, it is only natural that we focus our scholarly attention on these publications rather than traditional law reviews.

Practitioners utilize these alternative scholarly resources simply because these resources are better equipped to respond more quickly and efficiently to the issues faced in their practices. For example, much of the scholarship that takes place in the field of tax law occurs within the pages of Tax Notes, a weekly journal that is designed to

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[179] S*ee* Edwards, 91 Mich. L. Rev. at 54.
[180] *See* Lasson, 103 Harv. L. Rev. at 932.
[181] *Id.* at 932-33.
[182] *Supra* n. 83.
[183] Lasson, 103 Harv. L. Rev. at 931.
[184] *See* Bryden, 63 U. Colo. L. Rev. at 643.

provide the scholarly debate over a particular issue to practitioners quickly: three weeks lead time between submission and publication is all that is required.[185] By way of contrast, a traditional law review article typically takes at least about two years to go from idea to publication.[186] Because of this, "tax scholars who wish to affect the national legislative agenda find that student-edited law reviews provide a ponderously slow vehicle."[187] Many of the issues confronting practitioners move so quickly that the traditional law reviews, even if the above-noted style and substance issues were resolved, do not provide an effective scholarly vehicle for them.[188]

Of course, the sticking point when it comes to the use of bar journals and the like as conduits for legal scholarship is that, at best, bar journals, practice manuals and continuing legal education materials are considered at the bottom of the prestige scale within the legal academy and, at worst, are not even considered scholarship at all.[189] Publication in the least prestigious law review is considered to be more desirable.[190] However, although there is an unfixable status issue with regard to publication in lesser journals (for publication within them will always be considered lesser than publication in the elite journals that most likely rejected the article), the status issue is a correctable one when publishing in a *different* rather than a *lesser* journal. Because legal writing professors bring different skills, and expertise in a different area, than our doctrinal colleagues, it should naturally follow that we should publish our work in different journals. As our scholarly mission differs, so should our scholarly publications.

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[185] Turnier, 50 J. Legal Educ. at 193.
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] Lasson, 103 Harv. L. Rev. at 936.
[190] *See* Slomanson, 50 J. Legal Educ. at 437.

This is not to suggest that convincing our doctrinal colleagues to accept this change in mindset will be a simple task. However, continuing to publish in lesser journals does nothing but perpetuate the stereotype that legal writing professors are lesser scholars than our doctrinal peers. Ultimately, it is easier to demonstrate that a bar journal article responding to the needs of the practicing bar is worthy scholarship than a traditional article that finds its home in a bottom-tier law review mainly because it had previously been rejected by all of the more prestigious ones.

5. Virtually All Law Reviews are Student-Edited

Legal scholarship is unique among its academic brethren in that it is the only discipline in which the work is primarily dictated and under the control of student-edited journals.[191] Virtually all other disciplines rely most heavily on peer-edited journals.[192] This has led some to comment that this relationship, where students dictate the research parameters of the faculty, stands academia on its head.[193] Once again, this relationship between student and faculty presents unique problems to legal writing scholars.

Regardless of the wisdom of this editorial relationship, doctrinal professors are not unduly affected by it. Scholarship is a requirement for them and publication in elite journals greatly enhances their chances for promotion and tenure,[194] so ultimately, it matters little to them if they have to capitulate somewhat to the whims of their student editors with regard to content or style if doing so means publication in an appropriate journal for their advancement. Ceding control of content and style to their students may

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[191] *Id.* at 444-45. *See also* Richard Posner, *Against the Law Reviews,* Legal Affairs (Nov.- Dec. 2004), wherein Judge Posner offers a detailed critique of the shortcomings of law reviews, starting with the problems inherent in student-edited scholarly journals.
[192] *Id.*
[193] Turnier, 50 J. Legal Educ. at 211-12.
[194] *See* Lasson, 103 Harv. L. Rev. at 927.

not be academically desirable but it is a necessary evil toward achieving their goals of tenure and promotion.[195]

The vast majority of legal writing professors are not tenured or on tenure-track. Indeed, only 24 as of 2004 can claim such status.[196] Accordingly, most legal writing faculty positions do not carry with them a publication requirement.[197] Therefore, as a preliminary matter, there exists no greater goal for the typical legal writing professor that justifies the ceding of this control. More importantly, capitulating to the whims of student editors uniquely frustrates many of the goals of the legal writing scholar.

Because, by definition, students lack practical legal experience, allowing them to determine which articles are accepted and which are not invariably results in an overwhelming focus on topics irrelevant to the practicing bar. As discussed in section II(B)(2)(b), it should come to no one's surprise that constitutional law and constitutionally-based topics dominate the student-edited journals. These are the subjects they are familiar and comfortable with from their classes and ones which do not require practical experience in order to comprehend, at least in theory.[198]

An informal survey I conducted with regard to student note topics in Philadelphia area law reviews confirms the suspicion that student editors are overly enamored of constitutional law-based subjects.[199] My survey of student notes that appeared in the

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[195] *Id.*

[196] *See* ALWD Survey at 48 (question #65). Only 24 teachers in the 176 schools responding to the 2004 ALWD Survey.

[197] *Id.* at 62 (question # 81). 20 of the 128 schools that responded to this question responded that their legal writing faculties were required to produce written scholarship.

[198] *See* Turnier, 50 J. Legal Educ. at 194.

[199] While this informal survey is by no means scientific (after all, it is an "informal survey"), it serves as the springboard for the discussion that follows. This survey was undertaken in order to confirm the anecdotal suspicion that law review students significantly favor constitutional law-based topics over all other topics. Although it is beyond the scope of this article to undertake a more detailed study on this hypothesis, the results of the informal survey overwhelmingly confirmed the anecdotal suspicion. Although it is believed

2001-02 editions of the University of Pennsylvania Law Review, Villanova Law Review and Temple Law Quarterly, revealed that a whopping 58% were constitutional law-based, with the University of Pennsylvania topping the list at nearly 73%.[200] Constitutional law is what the overwhelming majority of student editors are comfortable with as writers so naturally, it should come as no surprise that these same students would select an overabundance of constitutionally-based articles to work on as editors. This results in law review editions that provide little guidance to practitioners and which make for poor venues for the propagation of practical scholarship.

Of larger concern to legal writing scholars are the problems that result from placing students in an editorial role over their work. This shifting of roles between student and professor causes many student-editors to become understandably uncomfortable. Suddenly, they are the teachers and placed in a supervisory role over their professors, despite their awareness that they possess far less knowledge on the subject of the article they are editing than their faculty "students." Reluctant to challenge the substantive assertions and conclusions contained therein, many student-editors focus instead on style and citation issues.[201] Determined to satisfy their editorial obligations and with little else to comfortably focus on, many student editors spend a considerable number of hours "translat(ing) a witty sentence into a tired one, and a sprightly metaphor into tedious, if literal, prose."[202] This may not present a problem to doctrinal scholars, for they do not teach style. Tired sentences may not be what they had envisioned when

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that a more detailed study may produce slightly different results, the overall thesis would likely be similarly proven.

[200] The results were as follows: University of Pennsylvania Law Review (volume 150): 8 of 11 student notes contained a constitutional law element (73%); Temple Law Quarterly (volumes 74 and 75): 7 of 11 (63.6%); Villanova Law Review (volume 47): 6 of 14 (42.9%).

[201] *See* Slomanson, 50 J. Legal Educ. at 445.

[202] *Id.*

sending their drafts off to their student editors but since the substance of their articles is likely to remain relatively untouched, the resulting article effectively serves its purpose and reflects well upon its author.

Because legal writing professors teach style, at least in part, an article replete with tired sentences and tedious prose will reflect negatively on us, regardless of its substantive merit. This concern is heightened when considering that because our practice-based articles are more likely to be published in lower-tiered or specialty journals, our student editors are more likely to be weaker students than those who populate the editorial staffs of the elite journals.[203] This leaves our work in the editorial hands of students who may very well be poor writers. Our reputations as effective teachers of legal writing are thereby endangered by ceding editorial control of our scholarly work to struggling students who will invariably attempt to "fix" what we know best.

B. The Value of Peer-Edited and Practice Journals as Scholarly Outlets For Legal Writing Professors

To the extent that legal writing professors continue to write traditional law review-type articles, the more proper venue would be the peer-edited journals. Although not traditionally as prestigious as the student-edited journals (particularly the top-quintile student journals), they are gaining in prominence, perhaps due to a level of experience and knowledge of their editorial staffs that far exceeds that of even the most prestigious student-edited journals.[204] Hybrid journals that use a combination of student and faculty editors are also beginning to emerge and may prove to be an additionally worthy outlet

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[203] *See Id.* at 446.
[204] *See* Fine, 5 Legal Writing at 245.

for the legal writing scholar.[205] Professional periodicals staffed by practitioners such as bar journals, practice manuals and the like provide similarly attractive alternatives. These professional editors can offer effective criticism on the substance of our scholarship in ways students simply cannot.[206] All of these professionally-edited journals may not make the most sense for the rest of the legal academy, but they respond most effectively to the unique skills and concerns of the legal writing professoriate.

Law schools themselves are just beginning to recognize the value of practical scholarship. Yale Law School recently sponsored a new magazine, Legal Affairs, that contains articles that focus on current legal issues and is written in a style that appeals to a broader audience than the typical law review.[207] More such publications are needed and publication within needs to be recognized as legitimate academic scholarship.

Although this article has focused on the differences between doctrinal and legal writing faculties, we are similar in the most basic sense. We are both comprised of academics who need to stay connected with our field(s) of expertise.[208] It is merely the *means* by which we need to stay connected that differ. Doctrinal scholars do this through traditional law reviews, legal writing scholars need to do this through those journals that speak to practicing lawyers and who do so in a language these readers readily understand.

For our purposes, practical scholarship satisfies the definition of "scholarship" as defined by most law schools.[209] It is "analytical, significant, learned, well-written, and disinterested."[210] Simply because it appears in forums other than traditional law reviews

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[205] *See* Slomanson, 50 J. Legal Educ. at 445.
[206] *See* Fine, 5 Legal Writing at 245.
[207] *See* Waxman, 150 U. Pa. L. Rev. at 1911.
[208] *See* Liemer, 80 Oregon L. Rev. at 1025. *See also* Weidner, 44 J. Legal Educ. at 441-42,
[209] *See* Lasson, 103 Harv. L. Rev. at 935.
[210] *Id.*

is of no matter. In fact, the "significance" of our scholarship would be greatly compromised if it was contained in publications that rarely reach our constituent audience. It is illogical to conclude that scholarship that effectively fills a need voiced by the legal profession for many years is not worthwhile merely because it appears in a bar journal. Good writing is valuable to the legal academy and the greater legal community regardless of where it technically appears in print.[211] To put it succinctly: scholarship is scholarship. The fact that it takes a different form does not justify a classification of it as lesser, particularly when it serves our system of justice by reaching out to fill an acknowledged scholarly void.[212]

III. ACHIEVING INSTITUTIONAL RECOGNITION FOR PRACTICAL SCHOLARSHIP: THE "PROFESSOR OF PRACTICE" MODEL

If the ideal in the academic world is to create an environment where differences in scholarly opinion and focus are not merely tolerated but embraced, those who choose to concentrate on practical scholarship need to be made to feel welcome, both in job security and in compensation. The "professor of practice" title, which is gaining in popularity in some undergraduate departments (as well as in some law school clinical programs)[213] may provide a model for those law schools that understand the value their legal writing professors add to their faculties and who seek to formally recognize it.[214]

A relatively new title, professors of practice are typically full-time, non-tenure-track, faculty members, who are evaluated primarily on their teaching but who are still

[211] *See Id.* at 949. "Let's recognize good writing as valuable, even if it's not in a law review…"
[212] *See* Edwards, 91 U. Mich. L. Rev. at 38.
[213] For example, The University of Pennsylvania Law School maintains a "practice professor" position within its clinical faculty while Quinnipiac has a Distinguished Professor of Dispute Resolution Law from Practice who is a retired insurance industry vice president who heads the law school's arbitration and ADR programs.
[214] *See* Piper Fogg, *For These Professors, 'Practice' Makes Perfect,* The Chronicle of Higher Education (April 16, 2004), http://chronicle.com/free/v50/i32/32a01201.htm.

required to produce scholarship, albeit with a practical bent.[215] Columbia University's School of Social Work describes its "Professors of Professional Practice" as members of its faculty "with a unique blend of practice experience, teaching experience and scholarship."[216] Syracuse University established the Professor of Practice title in 2002 after identifying the need "to bring expert practitioners into the academy (as full-fledged members of the community) to make closer connections and integrations between the world of academic research and teaching and the world of professional practice and decision-making."[217] The desires to integrate theory and practice and to promote a greater integration between academic scholarship and the "public/private sphere" were cited as rationales for proposing this new faculty rank.[218]

Although the parameters of these positions varies among schools (with some universities, such as Syracuse and MIT's Sloan School of Business, reserving the professor of practice title for high-ranking public figures such as CEOs, former ambassadors and the like,[219] with others such as Columbia and Duke opening these positions up to a wider range of practitioners), professors of practice often have renewable contracts lasting from three to ten years, with an average minimum contract of five years.[220] Along with the increased security that comes with these long-term contracts are salaries that typically are comparable to the tenured and tenure-track faculty

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[215] *Id.*
[216] Columbia University School of Social Work, *CUSSW Welcomes New Professors of Professional Practice,* http://www.columbia.edu/cu/ssw/news/dec03/newprof.htm. (accessed May 13, 2004).
[217] Draft for Comments, *Proposal for Professors of Practice (POPs) at Syracuse University,* February 2002.
[218] *Id.*
[219] *Id. See also,* Massachusetts Institute of Technology, *Professors of Practice,* Open Door: Ideas and Voices from MIT (April 2001), http://alumweb.mit.edu/opendoor/200104/practice.shtml. (accessed May 13, 2004).
[220] *See* Fogg

members in their departments.[221] Currently, approximately 10% of Duke University's total faculty are professors of practice, with the largest percentage of them residing in the arts, biology, languages, mathematics and statistics departments.[222]

At Duke (which has had this position in place the longest – more than ten years), professors of practice are evaluated both on their teaching and scholarship, with the teaching evaluation carrying the greatest weight.[223] The scholarship component is evaluated as well, however here, the scholarship of the professor of practice can differ from that of his or her tenure-track colleagues in that it can have an applied focus.[224] While professors of practice at Duke are required to "maintain a national profile in (their) field," just like their tenured and tenure-track colleagues, professors of practice achieve this in part through scholarship that reaches the practitioners in their fields.[225] For example, a professor of practice in Duke's statistics department satisfies her scholarly requirements by editing a magazine that focuses on practical applications of statistics in various fields.[226] Similarly, "a language professor of the practice might be expected to produce a textbook or articles on teaching, while public performances might suffice for a music professor of the practice."[227] These scholarly efforts are not theory-based but rather, practical applications of these professors' expertise, designed to connect them with the practitioners in their fields. Those schools that have adopted the professor of practice position have found them to be critical in their mission to provide a first-rate

[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.*

curriculum for their students.[228] As a corollary, this title recognizes and rewards people who do important work and who help maintain a healthy academic balance between theory and practice.[229]

IV. CONCLUSION

Returning to Judge Edwards' criticism of the decline of practical legal scholarship, one can perhaps challenge his conclusions by focusing on his reliance on anecdotal evidence rather than statistics but his overall conclusion should not be ignored -- that it is not enough to merely hire more practical scholars and then consider the problem solved.[230] Rather,

> [t]he law school must make itself a congenial place for concrete, "practical" analysis – a place where scholars of different approaches and ideologies accord each other the mutual respect they deserve. Otherwise, "practical" scholars will be discouraged in their work and prospective scholars deterred from entering the academy.[231]

Phase one of Judge Edwards' blueprint has already been achieved in virtually every law school in the nation. Through their legal writing faculties, law schools can count numerous practical scholars among their professoriate. That these scholars have not been identified to date is not solely the fault of the law schools or their doctrinal faculties. Legal writing professors first need to recognize our unique area of expertise among our faculties, stand up and be counted. A concerted effort needs to be made to highlight our unique skills to our administrations and doctrinal colleagues and to impress upon them the scholarly importance of these skills. It is crucial that they understand that although our skills may make us different than them, they do not make us lesser scholars

[228] *Id.*
[229] *Id.*
[230] Edwards, 91 U. Mich. L. Rev. at 51.
[231] *Id.*

or our presence on our faculties any less vital to the education of our students and service to the greater legal community.

It is only then that the most important phase -- the achievement of appropriate respect from our colleagues and full integration into our faculties -- can even begin to take place. The professor of practice model may provide an example of how this can be done within law schools. Recognizing and embracing the unique skills brought to the academic table by the legal writing professoriate is crucial to the retention of these gifted practical scholars and to encourage the type of scholarship desperately needed by the practicing bar. In addition, making these scholars feel welcome through increased salaries and job security will encourage additional practical scholars to join the academy, thus helping the legal academic community achieve the healthy balance between practical and theoretical scholars it has long been criticized for lacking.[232] Not until this is accomplished will the academy be able to fully discharge its obligation to serve the system of justice.[233]

[232] *Id. See also* Waxman, 150 U. Pa. L. Rev. at 1912.
[233] *See* Edwards, 91 U. Mich. L. Rev. at 38.