

# THE CARNEGIE REPORT AND LEGAL WRITING: *DOES THE REPORT GO FAR ENOUGH?*<sup>†</sup>

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## INTRODUCTION

The 2007 release of a comprehensive and innovative report on legal education, known now simply as the “*Carnegie Report*,”<sup>1</sup> has generated widespread enthusiasm throughout the legal academy.<sup>2</sup> Recognizing that law school “forms minds and shapes identities” of nearly all legal professionals,<sup>3</sup> this landmark look at legal education applauds and defends legal pedagogy that integrates “theoretical and practical legal knowledge and professional identity.”<sup>4</sup> Many legal educators have acknowledged the *Carnegie Report*’s

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1. William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (2007) [hereinafter *Carnegie Report*].

2. See e.g. Nelson P. Miller, *An Apprenticeship of Professional Identity: A Paradigm for Educating Lawyers*, 87 Mich. B.J. 20 (Jan. 2008).

3. *Carnegie Report*, supra n. 1, at 2.

4. *Id.* at 13.

importance,<sup>5</sup> and some have begun to propose and develop educational programs that implement the *Report's* recommendations.<sup>6</sup>

Not all responses to the *Carnegie Report* have been positive, however. While heralding the *Report's* broad goal of fostering a law school experience that integrates theory, practice, and professionalism, some legal educators have cautioned that the *Report* does not go far enough because it continues to embrace case dialogue as law school's signature pedagogy,<sup>7</sup> recommends additional forms of pedagogy that replicate the same fundamental problems,<sup>8</sup> or sacrifices traditional subject matter necessary for the development of professional skills.<sup>9</sup>

With respect to legal writing, the *Carnegie Report* praises the work of legal writing faculties, largely in recognizing that these professors grasp that the best law school teaching is interactive and experiential in nature. Much of the *Report's* discussion of legal writing, however, reinforces hierarchies and damaging stereotypes that undermine the *Report's* fundamental lessons about educating thoughtful, engaged, and ethical lawyers. The *Report* also fails to appreciate the significant lessons that legal writing professors can teach their “non-skills’ colleagues.”<sup>10</sup> With expertise in developing techniques for experiential learning,<sup>11</sup> outcomes

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5. See *infra* n. 22.

6. See *infra* nn. 23–32.

7. See e.g. Kris Franklin, *Sim City: Teaching “Thinking Like a Lawyer” in Simulation Based Clinical Courses*, 53 N.Y. L. Sch. L. Rev. 861, 875 (2008–2009) (“Where the Carnegie Report sees practical training as ‘additive’ to the central mission of law schools, re-framed basic clinical courses might be seen as a central locus for the ‘integrative’ teaching that the Carnegie Report authors so fervently desire.”).

8. See e.g. Anthony V. Alfieri, *Against Practice*, 107 Mich. L. Rev. 1073, 1083–1085 (2009) (by substituting clinical, problem based lawyering programs for traditional case dialogue method, the *Report* continues to reinforce stereotypes that might be mitigated through mechanisms including client narratives and community histories).

9. Nelson P. Miller & Heather J. Garretson, *Preserving Law School's Signature Pedagogy and Great Subjects*, 88 Mich. B.J. 46, 46 (May 2009) (“As with any fashionably new theory, the Carnegie Report's integration theme will be taken too far—misconstrued to unduly minimize or ignore law school's great subjects.”).

10. This Article shall refer to professors who teach the traditional doctrinal classes, such as Torts or Property, as “non-skills” faculty, and professors who teach classes that focus on the development of practical “lawyering” abilities as “skills faculty.” Of course, both skills and non-skills faculty members are legal educators who share similar goals for the professional development of their students. We look forward to the day when both skills and non-skills faculty will be united as one faculty working together to complete our students’ professional development as lawyers.

11. See *infra* text and accompanying nn. 23–32.

assessment,<sup>12</sup> and formative assessment,<sup>13</sup> skills faculty have much to share with the rest of the academy.<sup>14</sup>

In an effort to further the already significant strides in legal pedagogy that the *Carnegie Report* has engendered, this Article highlights some of the *Report's* shortcomings in its description of legal writing and the place that legal writing has in traditional legal teaching. Part I of this Article describes the *Carnegie Report's* basic recommendations for legal educators and some of the many responses to those recommendations. Part II examines the *Carnegie Report's* unquestioning acceptance of hierarchies within the legal academy and describes how these attitudes damage law student learning. Part III explains that skills faculty—who know a great deal about formative assessment, the focus of the proposed ABA standards—can both provide guidance on making legal learning more interactive and experiential *and* guide non-skills faculty in implementing the *Report's* fundamental charge to make assessment more meaningful.

In sum, although this Article commends the *Carnegie Report's* recognition that legal education can benefit from an integrated approach to learning, the Article also addresses the *Carnegie Report's* shortcomings in its approach to and commentary on skills faculty. Specifically, the Article criticizes the *Report's* failure to recognize that legal writing professionals routinely use best practices in education, including formative assessments, and notes its missed opportunity to promote this particular expertise throughout the academy.

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12. See *infra* text and accompanying nn. 168–169, 201–216.

13. See *infra* text and accompanying nn. 218–240.

14. See *infra* text and accompanying nn. 241–262; see e.g. Assn. of Am. L. Schs. Sec. on Clin. Leg. Educ.'s Task Force on Status of Clinicians & Leg. Academy, *Report and Recommendations on the Status of Clinical Faculty in the Legal Academy* 39 (Mar. 29, 2010) (Wash. U. in St. Louis, Faculty Research Paper Series No. 10-06-07, available at <http://ssrn.com/abstract=1628117>) [hereinafter *Report and Recommendations*] (“[T]he cultural differences between the academic world of scholarly productivity and the pedagogical goals and methodologies of [skills] education are not insurmountable. To the contrary, the worlds are moving closer together, and there is much to be learned from one another.”); see also *Carnegie Report*, *supra* n. 1, at 40 (“As an instructor in the [NYU lawyering] program pointed out, in order to have students engage in the simulated cases used in the courses, ‘we [faculty] must also teach a lot of substantive law, just so students can do the assignments.’ And, as [the former program director] repeatedly insists, a student’s capacity to understand and interpret doctrine is inevitably deepened as the student attempts to use it in the service of a client or case.”).

### I. What the *Carnegie Report* Says and Critical Responses to Its Recommendations

The *Carnegie Report* begins by recognizing the dilemma of the modern law school. With “secure reputations as well-established members of the academic world,” law schools, like other institutions of higher learning, enjoy “prestige and international visibility” based largely on how and to what extent their faculties produce scholarship and research.<sup>15</sup> One result of this emphasis on scholarship is a tension between “defenders of theoretical legal learning and champions of a legal education that includes introduction to the practice of law.”<sup>16</sup> After all, law schools, like medical, business, and engineering schools, are professional schools, and ultimately law students must master their trade before they can competently serve their clients.<sup>17</sup> Yet, if law schools primarily earn prestige from their professors’ research and publication grounded in legal theory, is it worthwhile for those schools to teach law students about the practice of law?

The landmark conclusions of the *Carnegie Report* call for a holistic and integrated approach to legal education because “[t]he two kinds of legal knowledge—the theoretical and the practical—are complementary.”<sup>18</sup> The most effective legal pedagogy responds “to both the needs of our time and recent knowledge about how learning takes place” and combines “the elements of legal professionalism—conceptual knowledge, skill and moral discernment—into the capacity for judgment guided by a sense of professional responsibility.”<sup>19</sup> Recognizing the “increasingly urgent need” to teach aspiring lawyers what it means to be a “professional,” the *Report* concludes that law schools must expand the “common core of legal education” in order to “bridge the gap between analytical and practical knowledge, and a demand for more robust

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15. *Carnegie Report*, *supra* n. 1, at 7–8.

16. *Id.*; see also Amy Deen Westbrook, *Learning from Wall Street: A Venture in Transactional Legal Education*, 27 *Quinnipiac L. Rev.* 227, 233–234 (2009) (“Legal education has been described as requiring a choice between training lawyers who master certain specialized knowledge and technical skills (‘plumbers’), on one hand, and fostering liberally educated, wise and scholarly lawyers (‘Pericles’), on the other hand.”).

17. Christine Coughlin et al., *See One, Do One, Teach One: Dissecting the Use of Medical Education’s Signature Pedagogy in the Law School Curriculum*, 26 *Ga. St. U. L. Rev.* 361 (2010).

18. *Carnegie Report*, *supra* n. 1, at 13.

19. *Id.* at 8.

professional integrity.”<sup>20</sup> Although “integrating, toward a common formative mission, the long-separated and unequally established forms of law school pedagogy will not be a simple or effortless process,”<sup>21</sup> the *Report* recognizes that cross-fertilization and resulting impact on legal education has great potential and is therefore worth whatever additional effort is required.

For the most part, reactions to the *Report* by legal scholars, administrators, and practitioners have been quite positive.<sup>22</sup> Many scholars, and especially those with skills expertise, have responded to the *Report*'s call for a more integrated and holistic approach to legal education by focusing on practical suggestions for implementing its recommendations.<sup>23</sup> Examples include en-

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20. *Id.* at 6–8.

21. *Id.* at 200.

22. See e.g. Rachel J. Littman, *Training Lawyers for the Real World*, 82 N.Y. St. B.J. 20, 21 (Sept. 2010) (Carnegie and other reports “brought to light some thoughtful examination of the method of legal education and explored and recommended a more experiential learning-based approach geared towards teaching law students how to think and act like lawyers.” (emphasis in original)); Allison D. Martin & Kevin L. Rand, *The Future's So Bright, I Gotta Wear Shades: Law School through the Lens of Hope*, 48 Duq. L. Rev. 203, 220–221 & 225–30 (2010) (relying on the *Report* to suggest ways that legal educators can engender hope in law students); David S. Walker, *Teaching and Learning Professionalism in the First Year with Some Thoughts on the Role of the Dean*, 40 U. Toledo L. Rev. 421, 426 (2009) (describing law school dean's role in developing professionalism program for first-year students that meets goals of the *Report*).

23. See e.g. Kathleen M. Birch & Chara F. Jackson, *Creating the Perfect Storm: How Partnering with the ACLU Integrates the Carnegie Report's Three Apprenticeships*, 3 J. Marshall L.J. 51, 53 (2009) (discussing creation of a civil liberties seminar specifically modeled after the Carnegie Report); Anna P. Hemingway, *Making Effective Use of Practitioners' Briefs in the Law School Curriculum*, 22 St. Thomas L. Rev. 417, 429–431 (2010) (suggesting that use of practitioners' briefs in casebook classes helps incorporate ideals of “the roles of lawyers and the broader intellectual world of law” (quoting Judith Wegner, *Theory, Practice, and the Court of Study—The Problem of the Elephant* 45 (draft 2003))); Keith H. Hirokawa, *Critical Enculturation: Using Problems to Teach Law*, 2 Drexel L. Rev. 1, 12–17 (2009) (exploring how using “problem based learning” incorporates experiential learning principles into doctrinal course design); Harriet N. Katz, *Evaluating the Skills Curriculum: Challenges and Opportunities for Law Schools*, 59 Mercer L. Rev. 909, 930–934 (2008) (describing non-traditional classroom exercises for class on business organizations); Benjamin V. Madison, III, *The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students*, 85 U. Det. Mercy L. Rev. 293, 323–325 (2008) (describing use of “diverse teaching methods” to teach civil procedure concepts); Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education's Signature Pedagogy*, 84 Ind. L.J. 589 (2009) (proposing simulated oral argument exercises to supplement traditional Socratic dialogue); Deborah A. Schmedemann, *Finding a Happy Medium: Teaching Contract Creation in the First Year*, 5 J. ALWD 177, 182–183 (2008) (describing teaching unit in which students negotiate form contract); see also Jerry R. Foxhoven, *Beyond Grading: Assessing Student Readiness to Practice Law*, 16 Clin. L. Rev. 355 (2010) (discussing positively a case study of student grading and self-assessment in style of the *Carnegie Report*); Madeline June Kass, *Educat-*

gaging in oral arguments,<sup>24</sup> negotiating contracts,<sup>25</sup> reading and reviewing case histories,<sup>26</sup> and engaging in problem-based learning.<sup>27</sup> These mechanisms allow students to experience legal problems in ways that go beyond and enhance dialogue over individual cases; in other words, to “practice” being legal professionals. Other articles focus on developing clinical partnerships<sup>28</sup> or specific courses<sup>29</sup> that will teach the “legal skills’ necessary to ‘think like a lawyer’ and ‘lawyering skills’ necessary for the practice of law.”<sup>30</sup> Still others look critically at how professors who teach large, non-skills classes, like Civil Procedure, can use multiple assessments and feedback to improve student performance and experience.<sup>31</sup> Finally, a number of articles highlight how existing clinical, legal writing, and professional responsibility classes already fulfill the *Report’s* admirable goals.<sup>32</sup>

While the *Carnegie Report* has engendered widespread enthusiasm for its general principles, some scholars and legal practitioners have recognized areas where the *Report* falls short. For example, Professor Anthony Alfieri has criticized the *Carnegie Report* for trading one form of legal education (one that is theory-centered and case-dialogue traditions) for another (a curriculum that focuses on problem-based, clinical lawyering programs), rather than embracing a more pluralistic approach to legal educa-

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*ing the Next Generation of Environmental Lawyers*, 25 Nat. Resources & Env't. 52, 53–54 (Summer 2010) (describing efforts by environmental law professors to meet the *Carnegie Report’s* challenge).

24. See McElroy, *supra* n. 23, at 603–635.

25. See Schmedemann, *supra* n. 23, at 182–186.

26. See Hemingway, *supra* n. 23, at 420–424.

27. See Hirokawa, *supra* n. 23, at 2.

28. See Birch & Jackson, *supra* n. 23, at 82–99.

29. See Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. Balt. L. Rev. 173, 176 (2010) (describing legal research as a fundamental problem-solving legal skill and explaining ways to integrate independent legal research courses into the first-year law school curriculum).

30. *Id.* at 177.

31. See Andrea A. Curcio, *Moving In the Direction of Best Practices and the Carnegie Report: Reflections on Using Multiple Assessments in a Large-Section Doctrinal Course*, 19 Widener L.J. 159, 161–162 (2009).

32. See e.g. Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 Harv. L. Rev. 805 (2008); James H. Backman, *Practical Examples for Establishing an Externship Program Available to Every Student*, 14 Clin. L. Rev. 1 (2007); C. Michael Bryce, *ADR Education from a Litigator/Educator Perspective*, 81 St. John's L. Rev. 337 (2007); Susan R. Martyn & Robert S. Salem, *The Integrated Law School Practicum: Synergizing Theory and Practice*, 68 La. L. Rev. 715 (2008) (describing a “hybrid” case-book/clinical class); Westbrook, *supra* n. 16, at 236–244.

tion that would recognize other pedagogies.<sup>33</sup> According to Professor Alfieri, by taking a “neutral” tone grounded in the “classically liberal purpose of client-centered ‘lawyering,’” the *Report* tolerates “difference-based” stereotypes and “perpetuates stigma-induced marginalization in law and society.”<sup>34</sup> A better approach, Professor Alfieri suggests, would be to use techniques like client narratives and community history that are designed to facilitate students’ understanding of differences based in race, class, and gender.<sup>35</sup> Professor Michelle Anderson similarly criticizes the *Report* and indeed the “current legal education reform dialog” for its failure to “grapple with the [legal] profession’s lack of diversity.”<sup>36</sup> The *Report*’s failure to discuss or recognize the interplay between a lack of diversity and rights of the disempowered, Professor Anderson contends, is a missed opportunity for educational transformation.<sup>37</sup>

Other scholars criticize the *Report* for its continued embrace of Socratic questioning about an assigned series of cases as law school’s signature pedagogy.<sup>38</sup> Professor Kris Franklin, for exam-

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33. Alfieri, *supra* n. 8, at 1075 (“In highlighting law school curricular deficiencies, the Report overlooks the relevance of critical pedagogies in teaching students how to deal with difference-based identity. . . . [T]he Foundation’s remedial call for the curricular integration of clinical-lawyer practices . . . overlooks the utility of critical pedagogies in teaching students not only how to understand difference, but also how to represent difference-based clients and communities here and abroad.”).

34. *Id.* at 1084.

35. *Id.* at 1083–1085.

36. Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 Rutgers L. Rev. 1011, 1018–1019 (2009); *but see* Antoinette Sedillo Lopez, *Leading Change in Legal Education—Educating Lawyers and Best Practices: Good News for Diversity*, 31 Seattle U. L. Rev. 775, 779 (2008) (“An additional benefit of [the *Report*’s] suggestion to incorporate experiential learning opportunities will be the potential opportunity for students of color and other unrepresented groups to learn more concretely about the practice of law and to connect with their communities.”).

37. Anderson, *supra* n. 36, at 1018 (“[I]f we reform legal education without reconsidering who law schools educate and who our graduates serve, we will have missed an opportunity to transform the academy and to make legal education and the legal profession more relevant and its practices more just.”).

38. *See* Franklin, *supra* n. 7, at 875. Michael Hunter Schwartz also discussed this criticism at the YES WE CArNegie! symposium. *See supra* n. †; *see also* James R. Maxeiner, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method*, 35 Intl. J. Legal Info. 1, 19–20 (2007). For a general critique on the continued use of the Socratic dialogue, *see* June Cicero, *Piercing the Socratic Veil: Adding an Active Learning Alternative in Legal Education*, 15 Wm. Mitchell L. Rev. 1011 (1989); Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public and the Legal Profession*, 44 Cal. W. L. Rev. 219, 222 (2007); Lani Guinier et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. Pa. L. Rev. 1, 99 (1995); Madison, *supra* n. 23, at 304; Deborah L. Rhodes, *Kicking the Socratic*

ple, argues that clinical courses can emphasize “both content and a rigorous training in process” and so, like more traditional law school doctrinal courses, can effectively “teach about basic topics of law” and “hone students’ habits of mind.”<sup>39</sup> Allowing students to obtain client facts through “a series of live or transcribed interviews, depositions, and other (simulated) artifacts of legal or factual research”<sup>40</sup> builds stronger legal understanding, “more likely developed through [an] individual student/lawyer’s own definition of the legal question and subsequent topical research.”<sup>41</sup>

Other critical responses to the *Carnegie Report* caution about the dangers of abandoning traditional foundational subject matter that is essential to develop professional skills<sup>42</sup> or suggest ways to enhance the *Report’s* effectiveness.<sup>43</sup> Finally, at least one commentator has observed the limited practical effect of the *Report’s* recommendations, attributing stasis to a combination of inertia and lack of market incentive to change.<sup>44</sup>

One other flaw of the *Carnegie Report*—one not recognized and not yet discussed—is the subtle, perhaps even unconscious, use of traditional rather than progressive nomenclature when referring to skills educators and their roles within the academy. These word choices serve to perpetuate existing hierarchies in legal education. As Part II details, although the *Report* purports to support the integration of skills and practice instruction into the traditional law school curriculum (and undoubtedly goes a

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*Method and Other Reforms for Law Schools*, Chron. of Higher Educ. B15 (Jan. 26, 2001).

39. Franklin, *supra* n. 7, at 862.

40. *Id.* at 874.

41. *Id.*

42. Miller & Garretson, *supra* n. 9, at 46.

43. See Emily Zimmerman, *An Interdisciplinary Framework for Understanding and Cultivating Law Student Enthusiasm*, 58 DePaul L. Rev. 851, 878 (2009) (recognizing the *Report’s* primary focus in preparing law students to practice law and explaining how law students’ enthusiasm contributes to it).

44. Littman, *supra* n. 22, at 21 (“Even schools that are on the cutting edge of legal education curricular reform have no corollary emphasis or reward for faculty to expand the methods of their teaching styles beyond the traditional. Washington and Lee, for example, has adopted a new third-year experiential and professional development-based curriculum and has adjusted teaching loads, but has not correspondingly adjusted tenure scholarship production requirements. Of course, many professors teach very hands-on, innovative problem-solving—based courses, but as “there’s no market pressure to change,” they could drop the course or their time-consuming teaching methods with no ramifications to reputation or compensation.” (quoting a comment from Professor Gillian Hadfield, Richard L. and Antoinette S. Kirtland Professor of Law and Professor of Economics, N.Y. Law School, Apr. 9, 2010)).

long way towards doing so),<sup>45</sup> law schools will not succeed in integrating pedagogies until faculty themselves are integrated and until both aspects of legal education—skills and non-skills—are given equal credit and value.

## II. The *Carnegie Report's* Unquestioning Acceptance of Hierarchies within the Legal Academy

### A. *The Report Recognizes the Marginalization of Skills Faculty*

According to the *Carnegie Report*, “Professional schools are not only where expert knowledge and judgment are communicated from advanced practitioner to beginner; they are also the place where the profession puts its defining values and exemplars on display, where future practitioners can begin both to assume and critically examine their future identities.”<sup>46</sup> Indeed, professional identity—and the respect that lawyers command—are important reasons why many students choose law as a profession. And the *Report's* authors note, perceptively, that

[o]n any law school campus, the faculty is influential in conveying what the profession stands for and what qualities are important for a member of that profession. They do this, often inadvertently, not only through explicit and implicit messages in their teaching but also by the values and standards they personally represent, as perceived by their students.<sup>47</sup>

But in the legal academy, not all law teachers are created—or at least treated—equally. The law school hierarchy is apparent to administrators, faculty, and students alike.<sup>48</sup> As the *Report* correctly notes,

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45. See e.g. *Carnegie Report*, *supra* n. 1, at 108 (“Many students with whom [the Carnegie authors] spoke noted the ways in which their writing courses accelerated their progress in legal reasoning in their doctrinal courses, especially seminars beyond the first year; some wanted more such linkage. In these examples, legal writing is already coming to play an important role in helping students to cement basic patterns of legal thinking and the mastery of the skills demanded in order to practice law.”).

46. *Id.* at 4.

47. *Id.* at 156 (discussing how students learn about careers in the law through their role model professors).

48. See e.g. *id.* at 88; *Report and Recommendations*, *supra* n. 14, at 33.

[P]roponents of a more balanced legal education have noted that efforts to bring lawyering fully into the law school experience face a number of . . . “strategic defects”: clinicians operate from a devalued position institutionally; clinical legal education takes place within legal training that lasts just three short years, as opposed to the medical model of a longer training period; and no worthy pedagogical theory of legal practice on which skills training might be founded has been produced. . . . These strategic defects are still in evidence fifteen years later [after the publication of the *MacCrate Report*], and skills training will continue to face an uphill battle unless it is linked with an accepted theory of lawyering that could provide a bridge between theory and practice . . . .”<sup>49</sup>

Legal writing professors recognize that marginalization (of skills teachers in relation to those teaching non-skills courses) has been a key issue in the field for at least thirty years. In fact, legal writing is often referenced to as the “pink ghetto” because more women teach in the profession and because skills professors are often considerably underpaid when compared to their non-skills counterparts.<sup>50</sup> And marginalization may take many forms, among them different titles than non-skills professors, different tracking, a lack of job security, lack of inclusion in faculty governance, distant and/or inferior office space, and different (often heavier) teaching loads.<sup>51</sup> The *Report’s* authors acknowledge that this difference is felt by law teachers and students alike.<sup>52</sup> Moreover, to its credit, the *Report* begins to “consider the question of what could be done to move education for practice into the more

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49. *Carnegie Report*, *supra* n. 1, at 94 (referring to “lawyering” but emphasizing clinical courses).

50. See Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 *J. Leg. Educ.* 562, 562–563 (2000).

51. In fact, the *Report’s* authors note (although do not criticize) the fact that “[t]he students’ second apprenticeship is to the forms of expert practice shared by competent practitioners. Students encounter this practice-based kind of learning through quite different pedagogies from the way they learn the theory. They are often taught by faculty members other than those from whom they learned about the first, conceptual apprenticeship.” *Carnegie Report*, *supra* n. 1, at 28.

52. *Id.* at 87–88. “[Lawyering courses] are most often taught by faculty other than those teaching the so-called substantive or doctrinal courses of the curriculum—a faculty that is not typically tenured and that has lower academic status. In many of the schools we visited, students commented that faculty view courses directly oriented to practice as of secondary intellectual value and importance.” *Id.* at 88. Note the use of “faculty” apparently to refer to non-skills faculty rather than the law faculty as a whole.

central position it deserves to hold within the legal academy. . . and specifically recognizes the promising pedagogies in the important area of legal writing and communication.”<sup>53</sup>

Although the *Carnegie Report* makes abundantly clear that it intends to support and praise legal writing professors,<sup>54</sup> the *Report* falls into many of the same traps that it recognizes and criticizes. And, as the *Report* recognizes, “[t]here is much more being taught and learned in any pedagogical situation than can be consciously abstracted in the form of procedures or techniques.”<sup>55</sup> The *Report* states emphatically that “[t]he two kinds of legal knowledge—the theoretical and the practical—are complementary. Each must have a respected place in legal education.”<sup>56</sup> It also recognizes that law school plays a role in shaping professional identity, noting that

[w]ithin legal education, too, recent and influential critical analyses of the unintended effects of law school on students, especially women and minorities, have opened up a new discourse about the formation of future lawyers. As these studies document, all forms of education exert socializing pressures on the students—and faculty—who take part in them. This is the formative dimension of professional education.<sup>57</sup>

Yet the *Carnegie Report* signals that legal writing is not a “traditional” first-year course:<sup>58</sup> when in fact at least 181 North American law schools require legal writing and grant students credit for the course.<sup>59</sup>

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53. *Id.* at 89.

54. The *Report* also intends to support clinicians, and many of the observations in this section derive from parts of the *Report* talking about clinicians.

55. *Id.* at 11.

56. *Id.* at 13. This quote is only one instance of this assertion, which recurs throughout the *Report*.

57. *Id.* at 85.

58. *Id.* at 38–39 (“Students [at NYU] take required courses in the usual first-year doctrinal subjects, *but they also must do work in the area of lawyering* . . . Doctrinal and lawyering courses are mandatory for all students.” (emphasis added)).

59. ALWD & Leg. Writing Inst., *2010 Survey Results* 7, [http://www.alwd.org/surveys/survey\\_results/2010\\_Survey\\_Results.pdf](http://www.alwd.org/surveys/survey_results/2010_Survey_Results.pdf) [hereinafter *2010 Survey Results*].

*B. The Report Accepts Job Security and Status Limits for Skills Faculty.*

Consider, for example, the *Report's* discussion of job security.<sup>60</sup> When praising NYU Law School's first-year lawyering program,<sup>61</sup> the *Report* comments that the program is "typically taught by special faculty employed on the basis of three-year contracts."<sup>62</sup> In fact, NYU's first-year lawyering program is taught, not by professional and experienced legal writing faculty, but by "acting lawyering professors" who are at NYU for two to three years—but no more than three years<sup>63</sup>—primarily to gain teaching experience and write scholarship to prepare them for the *doctrinal* and *clinical* teaching market, not to teach lawyering or legal writing as a career. This is not to say that the lawyering professors do a poor or even inadequate job; as the *Carnegie Report* notes, the program is highly effective, in no small part because it is run by a director who is both experienced and knowledgeable. Still, because the lawyering professors teach for a maximum of three years,<sup>64</sup> because they generally do not intend to become professional legal writing professors, and because they are largely focused on scholarship unrelated to the teaching or practice of lawyering, we might question whether they can possibly be as

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60. See *e.g. id.* at 88.

61. Interestingly, the *Report's* discussion of the first-year lawyering class focuses on two programs, NYU and CUNY, which are not ranked in the top ten *U.S. News & World Report* legal writing programs. Although many question the accuracy or value of such rankings, the specialty legal writing rankings are generated through a survey of leaders in the field. See U.S. News & World Rpt., *Best Law Schools Specialty Rankings: Legal Writing*, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/legal-writing-rankings> (2011). One might wonder whether geography contributed to the selection of these two programs, or whether the Report "validate[d]" its recommendations by using a top-tier law school as a model.

62. *Carnegie Report*, *supra* n. 1, at 39.

63. NYU's program is exceptional, just as the *Report* characterizes it to be. Much of this excellence, however, derives from the law school's support of the program. Interview with Andrew Williams, Dir., Lawyering Program, New York University Law, in N.Y., N.Y., by Lisa McElroy, (Sept. 28, 2010) [hereinafter *Williams Interview*]. Were legal writing programs at other schools to operate under similar parameters (pass/fail grading, capped faculty positions, and so on), it is likely that they would not be as successful, a hypothesis that is supported at least anecdotally by frequent conversations on the LWI listserv.

64. See NYU Law, "Job Announcement", *Lawyering Program*, <http://www.law.nyu.edu/academics/lawyeringprogram/teachingpositions/index.htm> (accessed Sept. 28, 2010) (job posting describing Lawyering teaching positions).

effective as professors who have made their careers teaching legal writing and whose scholarship focuses on the discipline.<sup>65</sup>

In fact, the *Report* fails to mention the effect that job security and status within the law school's hierarchy have on teaching excellence or student perception. Scholars have observed that even when schools adopt clinical tenure track or long term contract models for skills faculty, those models "ultimately accord to [skills] faculty a separate and diminished status that denies their full inclusion in the academy, especially with regard to governance and security of position. For that reason, these models are not optimal."<sup>66</sup> Observing that "traditional tenure represents the legal academy's strongest expression of protection and support for its faculty,"<sup>67</sup> many skills educators have urged law schools to adopt unitary tracks for all legal educators so as to extend that support and protection to all,<sup>68</sup> and so as to avoid "the creation of a class of permanently unequal [skills] faculty members."<sup>69</sup> Some advantages of extending job security to skills faculty include: promoting true debate within the academy, thanks to academic freedom for all legal educators;<sup>70</sup> ensuring salary equity and security;<sup>71</sup> allowing skills faculty to contribute to a "law school's mission, curricular development, faculty development, and academic standards"<sup>72</sup> through full participation in faculty governance; "enhanc[ing] the overall quality of collective decisions";<sup>73</sup> achiev-

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65. Andy Williams, the current director of NYU's Lawyering Program, agrees that more experience may lead to better teaching. However, he praises the Lawyering faculty highly, saying that, by the time they move on, the program has "gotten some really good stuff out of them." He explains that the biggest leap in teaching expertise occurs between the first and second year, when a professor has been through the program once and understands its overall structure and goals. He also emphasizes the extensive training in the form of day-long teaching workshops that the program provides for new faculty. *Williams Interview*, *supra* n. 63.

66. *Report and Recommendations*, *supra* n. 14, at vii (acknowledging that such models may be a positive interim, although not permanent, step toward faculty equality).

67. *Id.* at 2.

68. *Id.*

69. *Id.* at 22.

70. *Id.* at 5; *see also id.* at 40–41; *id.* at 29 (citing AAUP, *Statement of Principles on Academic Freedom and Tenure*, <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1904statement.html>, for the principle that tenure leads to "freedom of teaching and research and of extramural activities").

71. *Report and Recommendations*, *supra* n. 14, at 29 (citing AAUP, *Statement of Principles on Academic Freedom and Tenure*, <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1904statement.html>.)

72. *Id.* at 24

73. *Id.*

ing higher faculty retention and commitment rates;<sup>74</sup> increasing the ability to attract excellent faculty candidates;<sup>75</sup> increasing the ability to “give voice to the concerns of the legal profession, the bench, and surrounding communities;”<sup>76</sup> fostering a shared “mission to educate law students as competent and ethical members of the legal profession;”<sup>77</sup> and gaining an expert perspective on curricular reform.<sup>78</sup>

What is more, job security enhances teaching. As scholars have noted, tenure frees educators to “transmit[ ], evaluat[e], and extend[ ] knowledge.”<sup>79</sup> It communicates to students that faculty—and the courses they teach—are equally valuable.<sup>80</sup>

### C. *The Report Accepts Space and Location Restrictions for Skills Faculty.*

Other casual references within the *Report* display a similar lack of awareness for law school hierarchical cues. For example, the *Report* notes that

[a]lthough NYU does not require clinical experience, it does offer an exceptionally large number of clinical courses and has tried to link clinical experiences with doctrinal courses—an effort to ensure that students hear, as one of the clinical faculty put it, “echoes across the street.” The clinical program is indeed housed “across the street,” tucked away it seems, behind the main building that faces Washington Square.<sup>81</sup>

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74. *Id.* at 30.

75. *Id.*; see also William G. Tierney & Estela Mara Bensimon, *Promotion and Tenure: Community and Socialization in Academe* 44 (St. U. of N.Y. Press 1996) (including statement from candidate implying that nature of offer as “tenure-track” was an important consideration in accepting job offer); Kristin Lane, *Annual Report on the Academic Job Market 2009*, <http://www.awpwriter.org/careers/klane01.htm> (2009) (commenting that “the percentage of available tenured jobs is the lowest it has been in years, forcing many candidates to accept jobs they might have balked at in a different economic climate”).

76. *Report and Recommendations*, *supra* n. 14, at 24.

77. *Id.* at 26 (noting that delineating among faculty makes a common mission more difficult to achieve).

78. *Id.* at 25.

79. *Id.* at 30 (citing AAUP, *Recommended Institutional Regulations on Academic Freedom and Tenure* 21, <http://aaup.org/AAUP/pubsres/policydocs/contents/RIR.htm1> (accessed June 1, 2011)); see also e.g. Matthew W. Finkin, *The Case for Tenure* 21 (ILR Press 1996); Tierney & Bensimon, *supra* n. 75, at 25.

80. *Id.* at 33 (citing the *Carnegie Report*, *supra* n. 1, at 87–88).

81. *Carnegie Report*, *supra* n. 1, at 41.

Although NYU has built a new building for its clinic since the *Report* was published,<sup>82</sup> the offhand reference to the one-time separation of the clinics from the “main building” is significant beyond NYU.

As is common in most professions, office space assignments are an important indicator of status among a law school faculty.<sup>83</sup> Many law schools place clinical and legal writing faculty in office spaces apart from those occupied by non-skills faculty<sup>84</sup>—and the location of these offices sends a message to everyone in the law school community about the value the school places on the courses that these professors teach. In fact, according to the 2010 ALWD/LWI survey, more than one-fifth of responding law schools reported that legal writing faculty occupy smaller offices than their non-legal writing colleagues, about the same number reported that their offices were in a less desirable location than most non-legal writing faculty offices, and a slightly larger number indicated that their offices were segregated from most non-legal writing faculty offices.<sup>85</sup>

Researchers studying office spaces have found that such spaces convey hierarchical messages. As one such researcher has noted, “[o]ffices in particular reveal the values of those who build them and work in them.”<sup>86</sup> For example, in interchangeable spaces, or spaces that are not designated for individual use, “workers lose the ability to personalize and mark the boundaries of their surroundings. Anecdotal accounts and case studies of such depersonalized settings show that many workers perceive these environments as threatening to a sense of distinctiveness and status at work . . . .”<sup>87</sup> Even where space is assigned, the amount of space and its location matters,<sup>88</sup> as do the quality and nature of

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82. Perhaps displaying the value that NYU places on clinics.

83. Mitchell Nathanson, *Dismantling the “Other”*: *Understanding the Nature and Malleability of Groups in the Legal Writing Professorate’s Quest for Equality*, 13 *Leg. Writing* 79, 108–111 (2007).

84. *2010 Survey Results*, *supra* n. 59, at 63.

85. *Id.*

86. Francis Duffy, *Office Buildings and Organisational Change*, in *Buildings and Society in Essays on the Social Development of the Built Environment* 255 (Anthony D. King ed., Routledge & Kegan Paul 1980).

87. Kimberly D. Elsbach, *Relating Physical Environment to Self-Categorizations: Identity Threat and Affirmation in a Non-Territorial Office Space*, 48 *Admin. Sci. Q.* 622, 623 (2003).

88. Christopher Baldry, *The Social Construction of Office Space*, 136 *Intl. Labour Rev.* 365, 367 (1997) (“It is a commonplace observation in workplaces of all sorts that the higher

the space.<sup>89</sup> Finally, office spaces send messages to consumers about the value and expertise of a company or enterprise.<sup>90</sup>

By assigning skills professors less desirable offices, or by keeping them relegated to a separate area altogether, the school may send a strong message that these professors, and the subjects they teach, are of lesser importance.<sup>91</sup> Students pick up on this message and tend to show their legal writing professors less respect than their non-skills professors.<sup>92</sup> More importantly, any second-class treatment of writing professors may lead students to feel that legal writing is not even a “real law school course,”<sup>93</sup> and to devote less time and effort to it than they devote to other classes.<sup>94</sup>

*D. The Carnegie Report Misses an Opportunity to Reject Traditional Institutional Limits, Such as Salary Discrepancies.*

The *Report* notes with concern the difference in compensation for skills faculty and non-skills faculty, as well as the high cost of legal education. The *Report* observes that

CUNY students spend much of their first year in seminar settings that are focused on linking legal theory to practice and in which contact between students and faculty is close and frequent. Asked how CUNY, hardly a well-endowed, affluent institution, can afford to provide such an introduction to legal study when their more affluent competitor institutions obviously seek the economy of scale afforded by large

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your position in the hierarchy, the larger the work space you will have.”)

89. *Id.* (citing Michael Crozier, *The Bureaucratic Phenomenon* 33 (U. Chi. Press 1964), and noting that shabby office furnishings made employees feel that employers did not care about them).

90. *Id.* (citing *Office Space Design: A Study of Environment* 81 (Peter Manning ed., U. of Liverpool 1965), and noting that most such signals “emanate from the visual appearance of the external structure of the building”).

91. Lisa Eichhorn, *The Legal Writing Relay: Preparing Supervising Attorneys to Pick-Up the Pedagogical Baton*, 5 *Leg. Writing* 143, 147–148 (1999).

92. 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*, 9 *Duq. L. Rev.* 329, 363 (2001).

93. Lisa Eichhorn, *Writing in the Legal Academy: A Dangerous Supplement?*, 40 *Ariz. L. Rev.* 105, 131 (Spring 1998).

94. Kathleen Elliot Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 *Touro L. Rev.* 507, 529–530 (2005).

first-year classes, CUNY administrators answered, “We cannot afford not to.”<sup>95</sup>

Indeed, if law schools wish to improve their skills curriculum and integrate it with theoretical teaching, they will have to spend money. Some of that money must be used to hire more skills teachers so as to give students the close attention the *Report* recommends,<sup>96</sup> and some should be used to achieve pay parity among all legal educators.<sup>97</sup> By means of example, in the existing pay disparity in one metropolitan area, an entry level lawyering (skills) professor at NYU earns about \$60,000, whereas an entry level non-skills professor at CUNY earns almost \$98,000.<sup>98</sup> The disparity is just as pronounced, if not more so, all across the country; legal writing professors earn, on average, \$71,294 each year,<sup>99</sup> while non-skills professors (even those at the entry level) earn \$10,000 to \$175,000 more, not including research stipends and other support.<sup>100</sup> Although the pay disparity is stark, the *Report* misses another opportunity to promote practice-based education when it fails to encourage law schools to demonstrate the value

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95. *Carnegie Report*, *supra* n. 1 at 36; *cf. id.* at 175–176 (“Compared to the efficiency of the large case-dialogue classroom, the formats that lend themselves to clinical and lawyering activities, including legal writing, are highly labor-intensive. Giving major value to students’ performance in these areas through summative evaluations, as well as useful formative measures of learning, would substantially raise the per-student cost of law school. However, it is hard to see how serious efforts to integrate the skills of practice with legal knowledge can go forward without willingness to incur higher [sic] student-faculty ratios and, with these, higher unit costs. It is clear that the public and the profession want to see movement in the direction of more serious attention to training-for-practice. For a variety of reasons, movement toward more intensive (and expensive) forms of instruction will post major challenges to many law schools. However, the pedagogical gains are likely to be significant on both the level of learning and of student motivation.”).

96. *See id.* at 175–176.

97. *See e.g.* Jan M. Levine & Kathryn M. Stanchi, *Women, Writing, and Wages: Breaking the Last Taboo*, 7 *Wm. & Mary J. Women & L.* 551, 575–578 (2001) (discussing the relative wages of skills and non-skills faculty); *see also* NYU Law, *Lawyering Program: Job Announcement*, <http://www.law.nyu.edu/academics/lawyeringprogram/teachingpositions/index.htm> (NYU Lawyering Program faculty job posting with starting salary for this skills position as \$60,000 (information publicly unavailable for non-skills professors) (accessed Apr. 15, 2011)).

98. *See* Socy. of Am. L. Teachers, *SALT Equalizer, 2009–2010 Salary Survey*, <http://www.saltlaw.org/userfiles/SALT%20salary%20survey%202010%20-%20final.pdf> (June 2010) [hereinafter *Salary Survey*] (NYU not reporting). Anecdotally, CUNY is known to be a school that pays on the low end of the scale.

99. *2010 Survey Results*, *supra* n. 59, at vi. Note that this number includes many legal writing professors with years, and even decades, of teaching experience.

100. *See e.g. Salary Survey*, *supra* n. 98.

they place on skills instruction by paying their skills faculty fairly and equally.

*E. The Carnegie Report Implies That Legal Writing Is Graded on a Pass/Fail Basis, When It Usually Is Not.*

Whether a course is graded may also be an important indicator of the importance that law school places on that course. At almost every law school,<sup>101</sup> students receive letter or number grades in virtually all non-skills courses.<sup>102</sup> If legal writing courses are graded pass/fail when other courses are not, this grading system sends an important—and likely negative—message to students and faculty about how highly the course, its content, and even its faculty are valued within the law school curriculum and within the larger law school community. But some sections of the *Carnegie Report* seem to dismiss concerns about the lack of credibility that pass/fail grading gives to a course, stating, for example,

The [lawyering course at NYU] is graded pass/fail. This means that lawyering runs the risk of being treated as less than serious by highly competitive, ambitious students. At a place like NYU, this is a particular problem in the first year, when the stakes represented by final grades are highest. So, [the former program director] argues, it is important to en-

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101. Harvard, Yale, and Stanford are three notable exceptions. See *Carnegie Report*, *supra* n. 1, at 168 (“In most law schools a predetermined and rigid distribution of As, Bs, Cs, and so on, is the norm, regardless of the mean ability of the students. . . . There are noteworthy exceptions to this norm. Yale Law School, for example, grades first-year courses on a pass/fail basis.”); see also Yale L. Sch., *Grades*, <http://www.law.yale.edu/academics/jdgrades.htm> (describing lack of letter grades for 1L’s at Yale Law School) (accessed Sept. 28, 2010); Harv. L. Sch., *HLS Grading Policy*, <http://www.law.harvard.edu/current/careers/ocs/employers/about-our-students/grading.html> (describing lack of letter grades at Harvard Law School) (accessed Sept. 28, 2010); Stanford L. Sch., *Grading System*, [http://www.law.stanford.edu/experience/careers/ocs/students/resources/pdf/Grading\\_System\\_Explanation.pdf](http://www.law.stanford.edu/experience/careers/ocs/students/resources/pdf/Grading_System_Explanation.pdf) (describing the change from letter grades to a modified pass/fail system in 2008) (accessed Sept. 28, 2010).

102. But see *Carnegie Report*, *supra* n. 1, at 173 (explaining that those teaching practice-based courses generally engage in better assessment than those teaching non-skills courses. “[L]aw schools usually do not give significant academic weight to courses in legal writing [or] lawyering . . . . This tends to undercut . . . the seriousness of the assessment that students receive in these courses. Although doctrinal courses in every year count significantly toward students’ overall academic scores, the same is rarely true of courses that fall mostly within the apprenticeship of practice.”); but cf. *2010 Survey Results*, *supra* n. 59, at 9 (reporting that 170 out of 185 law schools grade legal writing courses and calculate the grade into students’ overall GPA).

gage students as early and as fully as possible in the intrinsic rewards offered by the lawyering experience.<sup>103</sup>

While the *Report* does argue that engaging students can help to overcome that obstacle,<sup>104</sup> it later acknowledges that “[p]ass-fail leads students not to work hard. No grades, no standards. When students must make decisions about time allocation, they do what’s needed to ‘only pass.’”<sup>105</sup> In fact, almost all law schools grade the first-year legal writing course and include the grade when calculating students’ grade point averages.<sup>106</sup> Only four schools—NYU among them—grade on a purely pass/fail basis.<sup>107</sup> And at NYU, the lawyering course is the only regular course offering—other than teaching assistantships, student journals, and moot court<sup>108</sup>—with required pass/fail grading.<sup>109</sup>

Teaching legal writing, or any skills course, as pass/fail presents two unique yet related problems, only one of which the *Report* acknowledges. First, ungraded courses may not incentivize students to excel the way graded courses do. Without a clear institutionally-signaled incentive, students likely will not spend as much time working on skills-related work, and in turn, students will not receive the full benefit of the class. Second, by requiring a class, but only offering it as pass/fail, a school sends a not-so-subtle message to students that the class may be less important than its graded counterparts. This message, in turn, may give students the idea that legal writing and auxiliary research skills are not necessary for success in the legal profession.<sup>110</sup>

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103. *Carnegie Report*, *supra* n. 1, at 39.

104. Andy Williams, the director of the NYU Lawyering program, explains that the pass/fail grading system has its benefits; “Just speaking for myself (and there are others who would disagree), I think that the pass/fail grading system is one of the strongest parts of the program. It allows the students to take risks, to think through the material freely, and to engage with the process. . . . I am explicit with them that they get out of it what they put into it. I’m blown away with their work product.” *Williams Interview*, *supra* n. 63.

105. *Carnegie Report*, *supra* n. 1, at 169 (quoting an administrator at an unnamed regional law school).

106. *See 2010 Survey Results*, *supra* n. 59, at 9 (finding that 159 out of 185 responding schools do so).

107. *See id.* (reporting that ten others grade on an honors/pass/fail basis and eleven use some hybrid means of grading).

108. *See* NYU Law, *Credit/Fail Options for J.D. Students*, <http://www.law.nyu.edu/recordsandregistration/creditfailjdauditing/index.htm> (accessed Sept. 28, 2010).

109. *See e.g. id.* More information was gathered by Lisa McElroy in a telephone call to NYU Law School Records and Registration Department (Sept. 28, 2010).

110. *See e.g. Report and Recommendations*, *supra* n. 14, at 33.

As to the first problem, students often do not perform to their optimal level when enrolled in a pass/fail course. While several studies note that pass/fail classes may provide some benefits,<sup>111</sup> most studies reject the idea that such classes result in increased learning.<sup>112</sup> One study by Professor Barbara Von Wittich reported that foreign language students in a pass/fail class averaged a “C” letter-grade, while the same students averaged a grade of “B+” letter grade in their other classes, which were graded.<sup>113</sup> Similar results occurred when the pass/fail students were compared to their graded peers in the same class; the graded students averaged a “B” while the pass/fail students averaged a “C.”<sup>114</sup> In a separate study by Professor Richard Lempert, students taking a “creditor’s rights” class pass/fail earned on average one letter-grade lower than those taking the class on a traditional grading scale.<sup>115</sup> While the empirical evidence suggests that student performance suffers under a pass/fail system, the studies fail to answer *why* this occurs.

As to the second problem, these same studies suggest that by offering an ungraded skills course in a curriculum with graded non-skills classes, a school incentivizes students to divert valuable time away from the skills classes and towards the non-skills classes and thereby marginalizes the skills class. Because time,

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111. See generally Barbara Glesner Fines, *Competition and the Curve*, 65 UKMC L. Rev. 879 (1997) (describing benefits including a less competitive learning environment, incentives for students to engage in long-term learning, distraction from the law school ranking system, student equality, cooperative learning, and professionalism).

112. See e.g. Richard Lempert, *Law School Grading: An Experiment with Pass/fail*, 24 J. Leg. Educ. 251, 267 (1971–1972) (finding students performed more poorly in pass/fail courses than in letter grade courses, possibly because letter grades are motivational); Barbara Von Wittich, *The Impact of the Pass/fail System upon Achievement of College Students*, 43 J. Higher Educ. 499, 508 (1972) (concluding that courses at the study institution should not be offered pass/fail because of the apparent lack of incentive to achieve under such a grading system).

113. See Von Wittich, *supra* n. 112, at 504, 505 tbl. 3 (noting that students in pass/fail and letter grade groups did not differ significantly in terms of GPA, ACT scores, or course load).

114. See *id.* at 504 tbl. 2.

115. See Lempert, *supra* n. 112, at 267. However, while the results of Lempert's experiment suggest that if a “wildcard” type pass/fail system (or a system where a law student takes one course pass/fail and other courses under a typically graded system) such as the one used in this experiment were to be generally adopted, student performance in pass/fail courses as measured by examination grades would fall off noticeably, the results also suggest that it is unlikely that a substantial proportion of the pass/fail students would use the time or energy they did not put into their pass/fail course to work harder in other courses. *Id.* at 284.

especially in the first year of law school, is finite, students commonly spend more time on classes that will comprise a larger part of their grade-point-average.<sup>116</sup> Anecdotal evidence supports this tendency. Indeed, as Professor Barbara Glesner Fines has commented, when students take graded and ungraded classes during the same term, they often direct their effort to the graded courses.<sup>117</sup> Professor Fines argues that graded courses provide a more immediate form of reward—a letter-grade—while ungraded courses, although perhaps equally as rewarding in the long run, lack a short-term incentive.<sup>118</sup> The disparity in academic importance creates an incentive for students to expend the least amount of effort necessary to pass the legal writing course.<sup>119</sup> Furthermore, as Professor Laurie Magid has argued, under a pass/fail system, students are penalized for spending too much time on legal writing, because any time spent on legal writing is time not spent studying for graded doctrinal courses.<sup>120</sup>

Incentivizing students to shift time away from legal writing not only diminishes the value of a first-year legal writing course, it may also have lasting effects on students' perceptions of the importance of writing to the legal profession.<sup>121</sup> Grading skills classes using a pass/fail system while grading other courses using traditional grades is but one of a myriad of other choices an administration makes in determining the amount of emphasis placed on legal writing. If a school places too little emphasis on legal writing, students may perceive the subject as unimportant.<sup>122</sup> Although employers of first-year graduates rank research and writing as one of the skills most in need of improve-

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116. *But see e.g.* Adam G. Todd, *Exam Writing as Legal Writing: Teaching and Critiquing Law School Examination Discourse*, 76 *Temp. L. Rev.* 69, 71 n. 12 (2003); Marguerite L. Butler, *Rule 11 Sanctions and a Lawyer's Failure to Conduct Competent Research*, 12 *Prof. Law.* 2, 14 (Winter 2000) (both recommending teaching real-life applications and implications of legal writing skills or errors as motivators, especially when assignments are not graded).

117. Fines, *supra* n. 111, at 884.

118. *Id.*

119. Laurie Magid, *Awarding Fair Grades in a Process-Oriented Legal Research and Writing Course*, 43 *Wayne L. Rev.* 1657, 1661–1662 (1997).

120. *Id.* at 1662, 1663; *but see* Lempert, *supra* n. 112, at 284.

121. *See e.g. Carnegie Report*, *supra* n. 1, at 106 (citing Scott Turow's *OneL* in which Turow notes that most of his fellow Harvard classmates considered the Lawyering class, “an unfair sacrifice of time that could have been put into the larger [graded] courses.” (quoting Scott Turow, *OneL* 128 (Warner Bks. 1977))).

122. Pamela Edwards, *Teaching Legal Writing as Women's Work: Life on the Fringe of the Academy*, 4 *Cardozo Women's L.J.* 75, 99–100 (1997).

ment,<sup>123</sup> teaching the legal writing course as pass/fail sends students the message that the subject is less important, and less deserving of their time.

Importantly, employers also weigh grades heavily and may be dismissive of courses taken under a pass/fail system. Professor Anthony Ciolli has found that law firms are more likely to employ students from schools using letter grades (like Columbia) rather than those using pass/fail grades (like Yale).<sup>124</sup> According to Professor Ciolli,

There is an additional reason to believe that no-grades systems impair the average student's employment prospects. It is not hard to imagine that the examination papers from Yale students taking their first-year courses on a pass/fail basis are significantly lower in quality than they would be under a letter-grade system. To the extent that this is the perception of potential employers, they may prefer to hire students from roughly comparable schools.<sup>125</sup>

In other words, students and employers alike are motivated by grades: students to excel, and employers to recognize that excellence. The *Report's* failure to acknowledge this common-sense fact demonstrates its unconscious adherence to traditional views about the value of skills courses in the law school curriculum.

*F. The Report Uses Different Titles for Skills Faculty and Non-Skills Faculty.*

Yet another missed cue in the *Carnegie Report* that contributes to this marginalization lies in its references to legal writing professors themselves, especially as compared to its references to other law school teachers. The *Report* acknowledges that students' concept of professional identity is learned and modeled in part from law faculty.<sup>126</sup> As the *Report* explains, "professional education aims to initiate novice practitioners to think, to perform, and to conduct themselves (that is, to act morally and ethi-

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123. See Valentine, *supra* n. 29, at 182.

124. Anthony Ciolli, *The Legal Employment Market: Determinants of Elite Firm Placement and How Law Schools Stack Up*, 45 *Jurimetrics* 413, 433 (2004–2005) (noting that lower-ranked firms might hire on the basis of Yale's "name" alone, but that higher ranked firms look to both school rank and student grades in making hiring decisions).

125. *Id.* at 433–434.

126. See *Carnegie Report*, *supra* n. 1, at 126–161.

cally) like professionals.”<sup>127</sup> Throughout the *Report*, however, the authors refer to non-legal writing professors as “faculty,”<sup>128</sup> “professors,”<sup>129</sup> “instructors,”<sup>130</sup> and “teachers.”<sup>131</sup> In its in-depth discussion of legal writing programs, however, the *Report* refers to skills professors only as “instructors.”<sup>132</sup>

Titles send messages; in academia, a title carries prestige, and, with it, respect.<sup>133</sup> And the “what to call the professor” issue is a real one.<sup>134</sup> Social scientists have begun to look at the issue of student perception of educators’ titles, concluding that students “do perceive educators’ titles as significantly distinct.”<sup>135</sup> In a study comparing student perception of the titles “Dr.,” “Dean,” “Mr./Ms.,” “Professor,” and no title [last name only], students perceived the titles of “Dean” and “Dr.” as being most powerful, followed by “Professor.”<sup>136</sup> “Mr./Ms.” and [last name only] were perceived as the least potent.<sup>137</sup> The researchers speculated that, based on the results of the study, students were more likely to exhibit respect for educators with “most powerful” titles.<sup>138</sup>

In fact, social scientists who have studied stereotypes, traits, and human behavior have noted that “[t]he mere perception of a person or a group of persons triggers a mechanism producing the tendency to behave correspondingly.”<sup>139</sup> In fact, scholars note, “the notion that behavior is under direct perceptual control is of

127. *Id.* at 22.

128. *E.g. id.* at 44, 47, 64, 78, 91, 98, 132, 135, 140, 145, 156, 161, 165, 166, 168, 171, 178, 180.

129. *See e.g. id.* at 35, 50, 100–101 (referring to a “substantive course on family law” and the teacher as “professor”).

130. *E.g. id.* at 49–50, 64, 72–73.

131. *E.g. id.* at 49, 148, 180.

132. *See e.g. id.* at 35, 104, 105, 106, 109, 111; *cf. id.* at 39 (referring to the “special faculty” who teach lawyering at NYU); *see supra* nn. 60–81 and accompanying text (discussing job security and status limits for skills faculty).

133. Interestingly, in 2001 and 2002, “teachers” scored higher than “professors” when people were polled about whom they trusted to tell the truth. Harris Poll #61 (Dec. 12, 2001); Harris Poll #63 (Nov. 27, 2002).

134. *See e.g.* Ben Yagoda, *What Should We Call the Professor?* 49 *Chron. Higher Educ.* B20 (June 13, 2003) (commenting that students call professors by first names or titles depending in part on university culture, in part on professor's individual preference).

135. Vickie Shamp Ellis & Jon E. Travis, *Professional Titles in Higher Education: Do They Matter to Students?* 41 *College Student J.* 1168, 1168 (2007).

136. *Id.* at 1177.

137. *Id.*

138. *Id.* at 1179.

139. Ap Dijksterhuis & Ad van Knippenberg, *The Relation between Perception and Behavior, or How to Win a Game of Trivial Pursuit*, 74 *J. Personality & Soc. Psychol.* 865, 865 (1998) (citing several studies proving the proposition).

central importance for the understanding of human behavior . . . Upon meeting someone, . . . [o]ne activates stereotypes automatically.”<sup>140</sup> Thus, “[a]s stereotypes are associated with traits . . . , the priming of a stereotype [will] activate the related trait constructs.”<sup>141</sup> Moreover, people are not always conscious that such instantly perceived stereotypes affect their behavior even if they do not intend to let them do so.<sup>142</sup> Scholars understand that “behaviors are mentally represented . . . and . . . [that] these perceptual and behavioral representations are somehow intimately linked.”<sup>143</sup>

In looking at these links, Dutch social psychologists Ap Dijksterhuis and Ad van Knippenberg sought to demonstrate that stereotypes—“professor,” “secretary,” and “hooligan”—could affect study subjects’ performance on a general knowledge test.<sup>144</sup> They hypothesized that priming subjects with these stereotypes would lead to disparate performance on the test,<sup>145</sup> with subjects primed with the “professor” stereotype performing best.<sup>146</sup> Their hypothesis was borne out; the “professor”-primed subjects’ performance scored significantly higher than did the non-primed, “secretary”-primed, and “hooligan”-primed subjects.<sup>147</sup> The longer the prime, the greater the effect.<sup>148</sup> The authors described the study results as evidence that “priming a social category leads one to behave as a (stereotypical) member of this social category.”<sup>149</sup> In other words, when people are exposed to someone about whom they hold a stereotype—like a professor, a secretary, or a hooligan—they will then unconsciously act in a way consistent with the stereotype.<sup>150</sup> If students perceive legal writing educators as “profes-

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140. *Id.*

141. *Id.* at 866.

142. *Id.* at 865.

143. *Id.* at 866.

144. *Id.* at 867, 868.

145. *Id.* at 868.

146. *Id.*

147. *Id.* at 873.

148. *Id.*

149. *Id.* at 870.

150. This work was furthered in subsequent studies, where the researchers found that whether a subject perceives herself to be a part of the group represented by the prime also makes a difference in how she behaves or performs. Where a subject has been primed to view the exemplar as a part of an out group, then she will likely behave contrary to the stereotype. See e.g. Ap Dijksterhuis et al., *Seeing One Thing and Doing Another: Contrast Effects in Automatic Behavior*, 75 *J. Personality & Soc. Psychol.* 862 (1998); Robyn A. LeBoeuf & Zachary Estes, “*Fortunately, I’m No Einstein*”: *Comparison Relevance as a*

sors,” then they might model their professional behavior differently than if they were to perceive them as “instructors.”

One finding of the *Carnegie Report* may inadvertently support the assertion that legal writing titles make a difference in student perception, and hence student professionalization and socialization. As the *Report* authors say,

[S]urfing the Internet for guidance is no substitute for constructive and critical feedback on a student’s own work by the person or persons who will be evaluating that work. These student observations help fill in the more general findings of the [2005] Law School Survey of Student Engagement (LSSSE), which found that a significant minority of students “never” receive “prompt written or oral feedback from faculty members.”<sup>151</sup> This finding suggests that law faculty are not, as a whole, committed to timely feedback with the intensity that the development of student competence demands.<sup>152</sup>

In contrast, another survey (the 2010 ALWD/LWI survey, conducted by legal writing professors) details exactly what feedback first-year law students receive in their legal writing classes, and that feedback is extensive.<sup>153</sup> That survey does find that students in a large number of doctrinal courses receive considerably less feedback on their assignments for those courses than they do on their assignments in their legal writing courses.<sup>154</sup> So the accuracy of students’ responses on the 2005 LSSSE survey—or at least the *Report’s* characterization of them—must be questioned when looking at the findings of the ALWD/LWI survey, which

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*Determinant of Behavioral Assimilation and Contrast*, 22 Soc. Cognition 607 (2004); Thomas M. Schubert & Michael Hafner, *Contrast from Social Stereotypes in Automatic Behavior*, 39 J. Experimental Soc. Psychol. 577 (2001).

151. *Carnegie Report*, supra n. 1, at 166–167 (citing Ind. U. Ctr. for Postsecondary Research, *The Law School Years: Probing Questions, Actionable Data—Law School Survey of Student Engagement 2005 Annual Survey Results* 7 (Ind. U. 2005) [hereinafter *The Law School Years*]).

152. *Id.*; see also Ind. U. Ctr. for Postsecondary Research, *Student Engagement in Law School: Enhancing Student Learning—Law School Survey of Student Engagement, 2009 Annual Survey Results* 9 (Ind. U. 2009) (available at [http://lssse.iub.edu/pdf/LSSSE\\_Annual\\_Report\\_2009\\_forWeb.pdf](http://lssse.iub.edu/pdf/LSSSE_Annual_Report_2009_forWeb.pdf)).

153. *2010 Survey Results*, supra n. 59, at 17.

154. *Id.* at 31 (with only three schools reporting that students receive the same amount of feedback in doctrinal courses as in legal writing courses, 32 reporting that they receive somewhat less such feedback, 75 reporting that they receive considerably less feedback, and 75 lacking information).

notes that almost all legal writing professors give feedback on writing assignments in the form of margin comments,<sup>155</sup> general feedback memos addressed to all students,<sup>156</sup> feedback memos written to individual students,<sup>157</sup> short comments written at the end of the paper,<sup>158</sup> comments in person during student conferences,<sup>159</sup> grading grids or score sheets,<sup>160</sup> and other methods such as oral feedback, general feedback in class, audio comments, peer review exercises, and checklists.<sup>161</sup>

But the question then becomes this: If fully 18 percent of students perceive that they *never* receive prompt feedback from faculty,<sup>162</sup> does that mean that they do not perceive legal writing professors as faculty?<sup>163</sup> And if not, why not? Based on the literature, we can at least hypothesize that some of that perception derives from the titles these professors either actually hold or are presumed to hold. Moreover, the *Carnegie Report's* use of less prestigious titles to describe skills educators may signal the *Report's* unconscious adoption of (or at least failure to discard) traditional values about the role that skills faculty play in the legal academy.

The *Carnegie Report* expresses concern that law students respect and value skills education, and the *Report* emphasizes that socialization about professionalism and professional values is tacit as well as explicit.

As the *Report* notes,

In their passage through law school, students apprentice to a variety of teachers, but they also apprentice to the aggre-

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155. *Id.* at 17 (186 out of 191 reporting schools).

156. *Id.* (156 out of 191 reporting schools).

157. *Id.* (129 out of 191 reporting schools).

158. *Id.* (169 out of 191 reporting schools).

159. *Id.* (175 out of 191 reporting schools).

160. *Id.* (135 out of 191 reporting schools).

161. *Id.* (40 out of 191 reporting schools).

162. *Carnegie Report*, *supra* n. 1, at 167 (citing *The Law School Years*, *supra* n. 151, at 7).

163. According to Lindsey Watkins at the Center for Postsecondary Research, the Center does cognitive interviews to make sure that students are conceiving of terms in the same way the researchers are. She did not specify, however, how the Center defines "faculty" or how students conceive that term. Interview by Lisa McElroy with Lindsey Watkins, Project Manager, Ind. U. Ctr. for Postsecondary Research, in Bloomington, Ind. (Sept 1, 2010). Of course, another interpretation of the answer to the question is that some students do not view any feedback from professors (including that from legal writing professors) as "prompt."

gate educative effects of attending a particular professional school and program. That is, they are formed, in part, by the formal curriculum but also by the informal or “hidden” curriculum of unexamined practices and interaction among faculty and students and of student life itself. As is typical of organized apprenticeship, much of this informal socialization is tacit and operates below the level of clear awareness. However, abundant studies have confirmed socialization’s great importance for the process of learning what it is to be a professional.<sup>164</sup>

Furthermore, the *Report* reports, “Students in [the *Report*’s] focus groups also talked about an atmosphere in which many law students and faculty feel superior to other people, and many of their fellow students seemed to care only for self-promotion. Many students express discomfort at the general sense of elitism pervading the law school experience.”<sup>165</sup> The *Report* even quotes a student who expresses concern about law schools’ narrow perception of “success”: “Students are acutely aware of these individualistic values on their campuses. As one student said, ‘I wish the faculty had a more diverse idea about what success in the law is. There seems to be one version of success . . . .’”<sup>166</sup>

Regrettably the *Report* does not follow through by making recommendations for improving the status of skills education and does not explicitly recognize the socialization of students through law school hierarchies.

*G. Even Recognizing the Carnegie Report’s Limitations, It Includes Valuable Suggestions for Reform*

And so we must ask: If the *Carnegie Report*’s authors believe—as they undoubtedly do—that good legal writing courses are critical to a law school’s mission and success, how can the *Report* fail

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164. *Carnegie Report*, *supra* n. 1, at 29.

165. *Id.* at 150 (referring to lawyers’ roles in society and self-perceptions).

166. *Id.* (equating student success with getting high-paying jobs); *see also* Daisy Hurst Floyd, *We Can Do More*, 60 *J. Leg. Educ.* 129, 130–131 (2010) (published in a symposium entitled, *What Does Balance in Legal Education Mean?*) (“Unfortunately, legal education defines the prizes as goals that cannot be achieved by most of our students. If winning is defined by being in the top 10 percent of the class, then 90 percent of our students are set up for failure from the beginning. Most students enter because they want to graduate, pass the bar, and become lawyers. Almost all of them will do so. Yet many will see themselves as failures by the time they accomplish the goal because of the artificial definition of success implicit in the law school environment.”).

to point out the institutional limitations that hinder that success? The answer may lie in the explicit recognition that “integrating, toward a common formative mission, the long-separated and unequally established forms of law school pedagogy will not be a simple or effortless process. On the part of the faculty, it will require both drawing more fully on one’s own experience and learning from each other.”<sup>167</sup>

One way to address this hierarchical disparity may be to encourage non-skills professors to draw on the expertise of skills faculty who routinely use best practices in education, including formative assessments. Part III of this Article starts by describing the *Carnegie Report’s* recognition that using formative, rather than solely summative, assessments is crucial to legal education’s mission. The balance of part III then discusses how the newly proposed ABA Standards incorporate these recommended assessment tools, and how skills faculty—experts in such assessments—can share this expertise with their non-skills colleagues. Recognizing that the *Report* missed an opportunity to acknowledge and highlight this expertise, and thereby reverse some of the existing hierarchies within legal education, this Part nevertheless illustrates some of the many proficiencies that legal writing educators can share with the academy.

### III. Formative Assessments: Legal Writing Professors’ Signature Pedagogy

As the *Report* recognizes, legal writing professors are experts in assessment. Because they are regularly engaged in both formative and summative assessment of student work, they may be the most experienced and skilled assessors in the legal academy,<sup>168</sup> and written and oral formative assessment may even be deemed legal writing’s “signature pedagogy.”<sup>169</sup> This part looks at

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167. *Carnegie Report*, *supra* n. 1, at 200.

168. For a discussion of the types of assessment legal writing professors do and the types of feedback they offer students, see *supra* nn. 146–154 and accompanying text. See also Susan Hanley Duncan, *The New Accreditation Standards Are Coming to a Law School Near You—What You Need to Know about Learning Outcomes & Assessments*, 16 *Leg. Writing* 605, 611 (2010) (discussing that “many of the underlying philosophies and practices associated with an outcomes-based approach are already accepted and being utilized by legal writing professors”).

169. The *Carnegie Report* refers to law school’s signature pedagogy as the Socratic method. See *e.g.* *Carnegie Report*, *supra* n. 1, at 2–3, 48–84.

changes in the ABA Standards Review Committee's Standards and Interpretations and considers how legal writing professors can draw on the *Report's* recognition of their skills to improve their status in law school communities.

Non-skills professors have much to learn from legal writing professors in implementing the *Report's* suggestions, especially because the ABA's Standards Review Committee has proposed amendments to its Standards and Interpretations<sup>170</sup> to include student outcome measures, with formative assessment tools. The proposed amendments, if passed, will likely improve legal education. The proposed amendments, however, may also highlight the effectiveness of the teaching techniques that legal writing professors commonly employ, teaching techniques that to this point have gone largely unrecognized and unheralded by non-skills faculty and administrators.

#### A. *The Use of Formative and Summative Assessments*

Formative assessment methods "are measurements at different points during a particular course or over the span of a student's education that provide meaningful feedback to improve student learning."<sup>171</sup> Educational theory explains that "[l]earning is a loop in which the teacher facilitates learning, students perform what they have learned, the teacher assesses students' performance, the teacher provides students feedback on the students' performance and students use the feedback to improve their performance on the next learning task."<sup>172</sup> While Socratic teaching techniques do facilitate some learning,<sup>173</sup> most law students do

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170. For an excellent and comprehensive discussion of the ABA's Section on Legal Education and Admission to the Bar, as well as its process for amending accreditation standards, see Duncan, *supra* n. 168, at 605–608.

171. ABA Sec. of Leg. Educ. & Admis. to B., Stands. Rev. Comm., Student Learning Outcomes Subcomm., *Draft for January 8–9, 2011 Meeting* 4, Interpretation 304-1 (2011) (available at [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review.html](http://www.americanbar.org/groups/legal_education/committees/standards_review.html); under heading, "Meeting Date: January 8–9, 2011; click on "Report of Subcommittee on Student Learning Outcomes").

172. Rogelio Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 *Barry L. Rev.* 73, 75 (2010) (citing S. Gregory Munro, *Outcome Assessment for Law Schools* 68–69 (Inst. L. Sch. Teaching 2000) (available at <http://lawteaching.org/publications/books/outcomeassessment/>)).

173. See Madison, *supra* n. 23, at 304 ("One of the goals of the Socratic dialogue is to keep students prepared for class and skillful in oral dialogue. This preparation will in turn equip students for their post-law-school 'trial by fire' of a hot appellate bench or a feisty trial judge."); Rhodes, *supra* n. 38, at B15 ("In the hands of an adept professor, [So-

not receive any type of meaningful feedback that could improve their performance during or after the course, or in learning different analytical concepts that may build upon each other.<sup>174</sup>

The Socratic dialogue can trace its roots to the 1870's, when Dean Christopher Columbus Langdell set out to reform legal education at Harvard Law School.<sup>175</sup> Interestingly, at the same time that the Socratic method was introduced, Harvard "reintroduced examinations."<sup>176</sup> The end-of-term or summative examinations were meant "to compliment . . . [the] new case method of instruction"<sup>177</sup> with full-blooded "essay questions whose complexity increased over time."<sup>178</sup>

By the beginning of the twentieth century, this summative assessment model spread throughout legal academies in America.<sup>179</sup> While the format of the questions has changed somewhat, the summative assessment model remains the primary mode of

cratic techniques] cultivate useful professional skills, such as careful preparation, reasoned analysis and fluent oral presentations.").

174. Lasso, *supra* n. 172, at 12 (citing *Carnegie Report*, *supra* n. 1, at 166).

175. For an excellent and entertaining discussion of the history of legal education examination process, see Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis on Law School Final Exams*, 65 UMKC L. Rev. 657 (1997); see also Coughlin et al., *supra* n. 17, at 366 (citing Kenneth M. Ludmerer, *Learning to Heal: The Development of American Medical Education* 67 (Johns Hopkins U. Press 1996)) (explaining that at the time Langdell reformed legal education, many disciplines were undergoing reform efforts as "scholars in quite different fields [began] rejecting deductive logic, traditional authority, and dry, sterile textbook learning. . . . such thinkers as Thorstein Veblen in economics, Oliver Wendell Holmes, Jr., in law and Charles A. Beard in history").

176. Sheppard, *supra* n. 175, at 671. Professor Sheppard notes that before the historic reforms of the 1870s, at Harvard Law School "students were given oral or written examinations weekly as well as at the end of each text or topic. Written examinations were not apparently required in every course . . . [but a] final examination, of a kind, was also required, covering the content of the entire course, in the form of set dissertations." *Id.* at 665. This changed in 1829 and from that time to until 1871, "Harvard seems to have had no formal examination of student performance that could bar a student from the degree." *Id.* at 666.

177. Lasso, *supra* n. 172, at 86 (citing Sheppard, *supra* n. 175, at 671).

178. One primary purpose of these exams, however, was to emphasize competency in the "application of legal doctrine to varying factual scenarios." *Id.* at 81. In an interesting twist, the ABA's proposed amendments, which explicitly mandate student competency in legal analysis and reasoning, can be said to come full circle back to the true intent of Langdell's legal reform measures. See *supra* n. 172 and accompanying text.

179. Lasso, *supra* n. 172, at 173, 174 (citing Roy Stuckey et al., *Best Practices for Legal Education: A Vision and a Road Map* 236 (Jossey-Bass 2007) [hereinafter *Best Practices*], which is considered to be a widely prominent source supporting the legal education reform movement); Sheppard, *supra* n. 175.

assessment used by law schools today.<sup>180</sup> As Professor Steven Sheppard notes,

These essay questions have required an increasing depth of analysis of fewer issues and subjects. The questions represent increasingly complicated choices by the examiners in the method of evaluation, sometimes requiring a greater proportion of the answer to be occupied by policy analysis and criticism than by recitation or application of the applicable rules. For these reasons, and because of the influence of the bar exams, the essays [now] have been augmented with the addition of batteries of short machine-scorable “objective” questions, which were initially true-false and then multiple choice.<sup>181</sup>

This summative model assigns grades and class rank (which may be important to future employers) but does little to improve analytical abilities or class performance (which is even more important to future clients).<sup>182</sup> As Professor Sheppard explains, “student performance on these end-of-term exam[ ] . . . questions, form the basis, almost universally in this century, of grades.

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180. *Best Practices*, *supra* n. 179, at 10; *but see* Dolin, *supra* n. 38, at 222 (“Current law school pedagogy is stuck in Langdell’s 19th century. Except for word processing and the greater speed of electronic research, law school has not changed much since those days. The teaching methods and casebooks we use today seek to replicate those taught by Langdell. Despite the passage of over 130 years, Langdell’s methods remain the dominant teaching modality, largely unquestioned by those who populate legal academia even though there is no sound pedagogical reason for its pervasive use. By and large, law teaching has stagnated.” (footnotes omitted)).

181. Sheppard, *supra* n. 175, at 671; Lasso, *supra* n. 173, at 79 (“In most law school courses, particularly in the critical first year, the only assessment most students experience is a three or four hour end-of-the-semester final.” (citing *Best Practices*, *supra* n. 179, at 236)); *see also* Dolin, *supra* n. 38, at 224 (“[L]egal educators have refused to acknowledge the 130 years of learning about learning.”).

182. *See* John M. Bruman, *Out-of-Class Assignments as a Method of Teaching and Evaluating Law Students*, 42 *J. Leg. Educ.* 447, 448 (1992) (“During my law school career, I became convinced that the finals system was neither an accurate method of evaluating students nor a particularly effective teaching method. The system rewarded those of us who thought like law professors, quickly and ‘creatively,’ and who wrote easily and well. But I watched students with whom I had studied receive much poorer grades than mine, even though I knew they had learned at least as much. Those classmates have since become excellent lawyers, despite their performances on exams. Although final examinations made no sense to me as a student, I thought that perhaps they had something to do with the practice of law, something which would become apparent to me only as an attorney. I was wrong.”); Lasso, *supra* n. 172, at 82 (“While one end-of-the-semester summative assessment may serve to assist employers and perhaps to protect the public by ensuring basic levels of competence, it does little to enhance the learning experience and improve student performance in law school.”).

These grades are averaged, of course, allowing a student to be placed in rank order among other students, as well as given honors, allowed to graduate, or asked to leave.”<sup>183</sup>

Professor Mary Beth Beazley explains that the summative model is problematic because “in the typical [non-skills] course the student spends the semester reading and talking, but receives a grade based on a written exam, which requires skills that they have not practiced all semester.”<sup>184</sup> Moreover, “[e]xternal variables (student is sick, something is going on in student’s life, for example) may prevent a student from doing well on a particular day. In addition, a student may do better with one type of assessment compared to another.”<sup>185</sup>

Importantly, there is no research to support the contention that “giving one exam at the end of the semester will adequately assess a student’s knowledge.”<sup>186</sup> The summative model, in fact, directly contradicts current data on best educational practices, which indicates that learning opportunities are maximized through the use of formative, rather than summative, assessments.<sup>187</sup> Specifically, learning opportunities are maximized when the instruction includes multiple assessments and feedback and is designed (or revised) to meet the students’ learning

183. Sheppard, *supra* n. 175, at 671.

184. Mary Beth Beazley, *Better Writing Better Thinking: Using Legal Writing Pedagogy in the Casebook Classroom (Without Grading Papers)*, 10 *Leg. Writing* 23, 71–72 (2004). By using a creative analogy, Professor Beazley makes the following convincing point:

[t]hese concerns are not limited to the law school. In *Harry Potter and the Order of the Phoenix*, Hogwarts students are outraged to learn that they will not be practicing in class the spells they will have to perform in the year-end Ordinary Wizarding Level (OWL) tests. One student says incredulously, “Are you telling us that the first time we’ll get to do the spells will be during our exam?” The professor tries to reassure the worried students: “As long as you have studied the theory hard enough, there is no reason why you should not be able to perform the spells under carefully controlled examination conditions.”

*Id.* (footnotes omitted) (quoting J.K. Rowling, *Harry Potter and the Order of the Phoenix* 224 (Scholastic Press 2003)).

185. Duncan, *supra* n. 168, at 624 (citing Michael Hunter Schwartz et al., *Teaching Law By Design: Engaging Students from the Syllabus to the Final Exam* 157 (Carolina Academic Press 2009)); see also Greg Sergienko, *New Modes of Assessment*, 38 *San Diego L. Rev.* 463, 469 (2001) (“[T]he traditional law school exam does not test the ability to interpret and apply unfamiliar legal materials. As a result of this discrepancy, there is a substantial lack of congruence between the subjects taught and the subjects tested. . .”).

186. Duncan, *supra* n. 168, at 624 (citing Schwartz et al., *supra* n. 185, at 154–158).

187. See Robin A. Boyle & Rita Dunn, *Teaching Law Students through Individual Learning Styles*, 62 *Alb. L. Rev.* 213, 215–216 (1998); Dolin, *supra* n. 38, at 223 (“Researchers now know how students learn and process information, as well as the most effective methods for teaching students of all kinds, including law students.”).

needs.<sup>188</sup> Not only do formative assessments provide feedback for the student as to what concepts they comprehend, formative assessments provide essential information for the law professor concerning what worked in the class.<sup>189</sup> As Professor Beazley explains,

In the typical [non-skills] course, the exam is used at the end of the semester to sort the students from the best to the worst. The teacher cannot use the exam to adapt teaching methods for that class, because the class is over. . . . Thus, the “disconnected” nature of the case method/final exam course structure does not lead [non-skills] faculty to experiment with changes that would help particular students achieve particular goals, or to be able to see and understand the effectiveness of particular teaching methods if they did so.<sup>190</sup>

Recognizing the short-comings of the summative assessment model used by most law schools, the *Carnegie Report* states that “assessment should be understood as a coordinated set of *formative practices* that, by providing important information about the students’ progress in learning to both students and faculty, can strengthen law schools’ capacity to develop competent and responsible lawyers.”<sup>191</sup> While the *Carnegie Report* emphasizes a need to create explicit outcome measures and use formative assessments,<sup>192</sup> it does not provide explicit guidance as to how law professors should incorporate those measures and assessments into their courses.<sup>193</sup> Most legal writing professors consider the use of outcome measure and formative assessment to be routine;

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188. Sheppard, *supra* n. 175, at 671.

189. See Lasso, *supra* n. 172, at 77 (“Formative assessments help teachers determine whether students are learning and help students develop learning skills.”).

190. Beazley, *supra* n. 184, at 35 nn. 52–55.

191. *Carnegie Report*, *supra* n. 1, at 162 (emphasis added).

192. See *id.*; see also *Best Practices*, *supra* n. 179; Catherine L. Carpenter et al., ABA Sec. of Leg. Educ. & Admis. to B., *Report of the Outcome Measures Committee* (July 27, 2008) (available at <http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf>) [hereinafter *Outcome Measures Report*].

193. The *Carnegie Report* discusses the “philosophical shift that is taking place throughout legal education that emphasizes the responsibility of law schools to teach students to be lawyers, not just think like them.” Karen Sloan, *Holding Schools Accountable: ABA Is Pushing Educators to Prove Their Law Graduates Can Cut It*, Natl. L.J. (Feb. 22, 2010) (available at [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202443899383&Holding\\_schools\\_accountable&slreturn=1&hblogin=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202443899383&Holding_schools_accountable&slreturn=1&hblogin=1)).

most non-skills professors, on the other hand, teach law the way they were taught and assess students the way they were assessed.<sup>194</sup> In this respect, at least, although the *Carnegie Report* has drawn a great deal of attention, it has not produced much meaningful legal education reform.<sup>195</sup>

The *Carnegie Report* has, however, significantly influenced the American Bar Association, which entered the debate over legal education reform in 2007.<sup>196</sup> Specifically, in May 2007, the ABA's Section on Legal Education and Admission to the Bar's Accreditation Policy Task Force took a "fresh look at accreditation from a policy perspective."<sup>197</sup> The then-Section Chair, the Honorable Ruth V. McGregor, Chief Justice of the Arizona Supreme Court, appointed a Special Committee on Output Measures (the "Committee") to "determine whether and how we can use output measures, other than bar passage and job placement, in the accreditation process."<sup>198</sup>

On July 27, 2008, the Committee published its findings and recommendations on Outcome Measures (the "Outcome Measures Report").<sup>199</sup> In doing so, the Committee followed Judge McGregor's charge to "consider approaches taken by other accrediting agencies, evaluate the criticisms of existing measures, and analyze relevant information and studies."<sup>200</sup> The Outcome Measures Report ultimately proposed revising the ABA's Accreditation

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194. Lasso, *supra* n. 172; see also Coughlin et al., *supra* n. 17, at 408 ("While individuals' teaching methods tend to be similar to those they themselves have experienced, they also tend to recall those previous teaching experiences that worked for them—in other words, they tend to teach with the same teaching methods that successfully matched their own learning style." (footnotes omitted)). Some of the ideas discussed in this Article were originally introduced by the authors in the earlier article.

195. This anomaly contrasts sharply with the medical education reform movement of 1910 when the Carnegie Foundation for the Advancement of Teaching published *Medical Education in the United States and Canada* (the "Flexner Report") and revolutionized American medical education. See Coughlin et al., *supra* n. 17, at 367; see also Abraham Flexner, *Medical Education in the United States and Canada* (D. B. Updike ed., Merrymount Press 1910); Ludmerer, *supra* n. 175, at 4; Molly Cooke et al., *American Medical Education 100 Years after the Flexner Report*, 355 *New Eng. J. Med.* 1339, 1339 (2006) (available at <http://www.nejm.org/doi/full/10.1056/NEJMra055445>).

196. See *Outcome Measures Report*, *supra* n. 192.

197. *Id.* at 1.

198. *Id.*

199. *Id.*

200. *Id.* The Committee also found that "England, Wales, Scotland, and Australia are all in the process of reforming their systems of legal education to focus more on outcomes." Mary Crossley & Lu-in Wang, *Learning by Doing: An Experience with Outcomes Assessment*, 41 *U. Toledo L. Rev.* 269, 272 (2009).

Standards and Interpretations from an input regime<sup>201</sup> to an output regime that would focus on student educational outcomes.<sup>202</sup> The Committee was influenced by the fact that legal education remains one of the only professional education models without formalized outcome assessment measures to assess student learning.<sup>203</sup>

Following the publication of the Outcome Measures Report, the Section on Legal Education and Admission to the Bar's Standard Review's Committee, Student Outcomes Subcommittee ("Student Outcomes Subcommittee") revised the Standards and Interpretations for accreditation of legal education programs. The language of the proposed amendments to Chapter 3, entitled "Program of Legal Education," is still in flux.<sup>204</sup>

The impact of the *Carnegie Report* is apparent in the Outcome Measures Report, as well as the various drafts of the proposed amendments to the Standards and Interpretations. For example, the Outcome Measures Report highlights the *Carnegie Report's* conclusion that "the common goal of all professional education—whether it be found in medical school, engineering school, the seminary, nursing school, or law school—is to 'initiate novice practitioners to think, to perform and to conduct themselves (that is, to act morally and ethically) like professionals.'"<sup>205</sup> Moreover, like the *Carnegie Report*, the proposed amendments recognize

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201. *Outcome Measures Report*, *supra* n. 192. An input regime focuses more on "the human and other resources schools are investing in the educational enterprise." *Id.* at 46; *see also* Crossley & Wang, *supra* n. 200, at 272.

202. *Outcome Measures Report*, *supra* n. 192, at 46; *see also* *Future of Legal Education Task Force: Status Report* (Apr. 20, 2009).

203. Duncan, *supra* n. 168, at 609 (explaining "[t]he assessment practices from other disciplines, other countries, and recent research and studies specific to American legal education all support a move to outcome measures."); *see also* *Carnegie Report*, *supra* n. 1, at 168, 174; Lasso, *supra* n. 172, at 76 ("[T]here is currently no coordinated effort in American legal education to determine the best use of assessments to improve law student learning.").

204. Duncan, *supra* n. 168, at 609 (noting at the time of that article, the Student Outcomes Subcommittee had already revised the proposed amendments five times (citing Stands. Rev. Comm., ABA Sec. of Leg. Educ. & Admis. to B., *Comprehensive Review of the Standards 2008-2010*, <http://www.abanet.org/legaled/committees/comstandards.html> [hereinafter *Comprehensive Review of Standards*])). Professor Duncan notes that the changes would require law schools in the accreditation process to do the following: "(1) identify outcomes; (2) offer a curriculum so students achieve outcomes; (3) assess outcomes; and (4) assess the assessment." *Id.* at 611. This Article focuses primarily on assessing educational outcomes.

205. *Outcome Measures Report*, *supra* n. 192, at 7.

knowledge, professional skills and core professional values<sup>206</sup> as the cornerstone of a professional legal education.<sup>207</sup>

The *Carnegie Report* further influenced the proposed amendments by explaining the need for formative assessments:

[T]he essential goal of professional schools must be to form practitioners who are aware of what it takes to become competent in their chosen domain and equips them with the reflective capacity and motivation to pursue genuine expertise. They must become “metacognitive” about their own learning, to use the psychologists’ term. This is why effective means of formative assessment are so critical for training professionals.<sup>208</sup>

The Student Outcome Subcommittee, in turn, has determined that including formative assessment measures is essential to any meaningful reform because “[a]ssessment methods and requirements have a greater influence on how and what students learn than any other single factor.”<sup>209</sup> The amendments proposed, however, go even further than the *Carnegie Report’s* recommendation by requiring the use of some type of formative assessments throughout the law school curriculum to determine whether students are actually learning the knowledge, skills, and values necessary for professional legal education.<sup>210</sup>

Requiring these types of educational reform measures to be added to the legal education curriculum is, of course, controversial. Law faculty and institutions have argued that the proposed amendments violate academic freedom, that the amendments are too costly, particularly in these tough economic times, and that the “one size fits all” approach is inappropriate for legal education.<sup>211</sup> In response to this feedback, the Student Outcomes Sub-

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206. *Id.* (citing *Carnegie Report*, *supra* n. 1, at 22).

207. *See* Duncan, *supra* n. 168, at 608–609.

208. *Carnegie Report*, *supra* n. 1, at 173; *see* Lasso, *supra* n. 172, at 88–89 (quoting *Carnegie Report*, n. 1, at 173).

209. *Carnegie Report*, *supra* n. 1, at 171; Lasso, *supra* n. 172, at 76; *see also* Duncan, *supra* n. 168, at 608 (noting that the Committee examined relevant scholarship in legal education such as the *Carnegie Report* and *Best Practices* that “pointed to the value of incorporating out-come measures into the accreditation criteria”).

210. *See supra* n. 171 and accompanying text.

211. *See* Duncan, *supra* n. 168, at 609–611; Ltr. from Mary Garvey Algero, Pres. ALWD, to Hulett H. (Bucky) Askew, Consultant, ABA Sec. of Leg. Educ. & Admis. to B. 6 (Sept. 30, 2010) (available at [http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/Outcome%20Measurements/Comment%20-%20Outcome%](http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/Outcome%20Measurements/Comment%20-%20Outcome%20)

committee has considerably revised—some say “watered down”—the proposed amendments requirements in its various drafts. In fact, Professors Roy Stuckey and Richard Neumann note that the current revisions may only require that “a teacher who doesn’t already give a mid-term exam might need to add one . . . [or] a teacher who does not already provide a post-exam model answer or its equivalent might need to do so. The only effect of all this would be to require mid-term exams and model answers.”<sup>212</sup> This minimal change would, of course, be inconsistent with the *Carnegie Report* and its call for “effective means of formative assessments.”<sup>213</sup>

The ABA’s proposed amendments will (at least in some way) require law professors to assess student learning outcomes through formative measures.<sup>214</sup> “These assessments need to be ongoing and focused not only on outcomes but experiences. They should be designed using best practices and the latest research on learning and teaching.”<sup>215</sup> While the changes may seem overwhelming to some legal educators, there are faculty in most law schools who are already using these formative assessment techniques regularly—the legal writing faculty.

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20 measures%20-%20ALWD%20-%20September%202010.pdf) (nothing that “the current draft’s omission of ‘reliability’ and ‘validity’ requirements found in the earlier drafts tend to undermine the value of the outcomes assessment process); Ltr. from Kenneth D. Chestek, Pres. Leg. Writing Inst., to Hulett H. (Bucky) Askew, ABA Consultant on Leg. Educ., & Donald J. Polden, Chair, Stands. Rev. Comm., ABA Sec. of Leg. Educ. & Admis. to B. 3 (Oct. 18, 2010) (available at <http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/Comment%20-%20outcome%20measures%20-%20Legal%20Writing%20Institute%20October%202010.pdf>) (“[V]alid and reliable outcome measures are relatively easy to devise and implement, although they may certainly require some effort over a period of time. Moreover, many of the sources necessary to do so are already available . . . since every law school with a well-developed legal writing program already has a group of experts on hand.”); Richard K. Newman, Presentation, *Draft ABA Standards 302–305 (Outcome Assessments)* (Sacramento, Ca. July 23, 2011) (with some asides on Standard 405 and political rhetoric).

212. Ltr. from Richard K. Neumann, Jr., Prof., Hofstra U. Sch. L., & Roy Stuckey, Prof. Emeritus, U. of S.C. Sch. of L., to Stands. Rev. Comm., ABA Sec. of Leg. Educ. & Admis. to B., *May 5th Draft of Student Learning Outcomes Standards* 16–17 (July 14, 2010) (available at <http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/Outcome%20Measurements/Comment%20-%20Outcome%20measures%20-%20Neumann%20Stuckey%20July%202010.pdf>).

213. *Carnegie Report*, *supra* n. 1, at 207.

214. Duncan, *supra* n. 168, at 626.

215. *Id.*

### B. Legal Writing Professors Use Formative Assessments

By requiring legal educators to use formative assessment measures in the law school curriculum, the proposed amendments clearly recognize the sophisticated level of instruction that is a mainstay in the legal writing classroom.<sup>216</sup> The majority of legal writing programs already use multiple types of formative assess-

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216. Ironically, at the same time the ABA is recognizing that the instruction and assessments methods used by legal writing professors, clinical professors, and other skills professors are essential in legal education reform, it is also considering proposals that will weaken job security and have a significant detrimental effect on parts of law faculty without power, particularly legal writing professors, clinical professors, and other skills professors. See Ltr. from Robert A. Gorman, Prof., U. Pa., to ABA Stands. Rev. Comm., *Comment, Security of Position, July 2010*, 4-5 (July 5, 2010) (available at <https://www.abanet.org/legaled/committees/comstandards.html>); see also *supra* nn. 213-216 and accompanying text; see e.g. Ltr. from Henry S. Bienan, Pres., Nw. U., to Hulett H. Askew, Consultant, Off. of Consultant on Leg. Educ., *Re: Statement of Certain University Presidents to the ABA Council on Legal Education* (Apr. 15, 2009) (available at <http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/4-09%20university%20presidents-statement.pdf>) (“The terms and conditions of employment offered to our faculty are within the exclusive province of our individual institutions. The ability of each of our universities to make those judgments and determinations is fundamental to our being able to offer flexible, responsive, and innovative educational programs.”); Pub. Cmt. of Am. L. Deans Assn., *On the Application of the American Bar Association (“ABA”) for Reaffirmation of Recognition by the Secretary of Education (“Secretary”) as a Nationally Recognized Accrediting Agency in the Field of Legal Education* (Apr. 12, 2006) (available at [http://www.nacua.org/documents/ALDA\\_Comment.pdf](http://www.nacua.org/documents/ALDA_Comment.pdf) (arguing that accreditation standards should not require law schools to have tenure or tenure-like employment conditions for legal writing faculty); but see Ltr. from Marry Algero, Pres. ALWD, to Bucky Askew, Consultant, ABA Sec. of Legl Educ. & Admis. to B., *Re: Comprehensive Standards Review—Chapter 4 Revisions* (Oct. 22, 2010) (available at <http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/ALWD%20Comments%20Ch%20%204%2010-22.pdf>) (“Job security, academic freedom, and a role in faculty governance are not just hypothetical ideas- they are necessary guarantees for all faculty if the ABA is serious about achieving meaningful curricular reform.”); Karen Sloan, *Faculty Mobilize Against ABA’s Proposal to Drop Tenure Requirement*, Natl. L.J. (Mar. 3, 2001) (available at [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202484184734&Faculty\\_mobilize\\_against\\_ABAs\\_proposal\\_to\\_drop\\_tenure\\_requirement&slreturn=1&hblogin=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202484184734&Faculty_mobilize_against_ABAs_proposal_to_drop_tenure_requirement&slreturn=1&hblogin=1)). The Georgetown Resolution stated,

The Standards Review Committee of the American Bar Association’s Section on Legal Education and Admissions to the Bar (“Committee”) has proposed substantial changes to ABA Standards 206, 405, and 603. These changes would dramatically reduce the ABA’s longstanding commitment to a system of tenure and of security of position for law school deans, traditional faculty, clinical faculty, legal writing faculty, and librarians. . . . [and] [u]ndermine the movement, long endorsed by Georgetown, to bring clinical law professors, legal writing professors, and library directors into full membership in the academy.

See James B. Levy, Legal Skills Prof Blog, *Georgetown Faculty Unanimously Passes Resolution Opposing Changes to ABA Law School Accreditation Standards*, [http://lawprofessors.typepad.com/legal\\_skills/2011/03/georgetown-faculty-unanimously-passes-resolution-opposing-changes-to-aba-law-school-accreditation-st.html](http://lawprofessors.typepad.com/legal_skills/2011/03/georgetown-faculty-unanimously-passes-resolution-opposing-changes-to-aba-law-school-accreditation-st.html) (Mar. 2, 2011) (providing text of the resolution).

ments.<sup>217</sup> In the legal writing classroom, the sequence, design, and timing of the assignments helps the student gain a deeper understanding of theory and skills needed for the next, more sophisticated assignment.<sup>218</sup> Professor Beazley notes that this process creates

a clear connection [ . . . ] between the goal of learning how to write and the methodology of classroom sessions about writing methods coupled with frequent, personal critiques of student-written work products. Teachers can easily see the connection between their teaching methods and student performance due to the multiple samples taken over the course of the semester.<sup>219</sup>

To illustrate, in the typical legal writing class, students may begin the semester by drafting a single legal argument that relies on a statute or one or two precedential cases or both.<sup>220</sup> The next major assignment may involve a closed universe of research with multiple cases requiring the student to synthesize the rule and construct counter arguments. A third assignment may involve an open universe of research requiring the students to be able to locate, cull through and weigh relevant authorities, synthesize an appropriate rule, and write about several different legal issues.<sup>221</sup>

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217. See Duncan, *supra* n. 168, at 611. Professor Duncan notes that “[m]any legal writing professors already identify concrete objectives for student learning, assess that learning, and use the results of the assessments to improve their classes.” *Id.*; see also *supra* nn. 146–154 and accompanying text.

218. Duncan, *supra* n. 168, at 621 (“[L]egal writing professors design several assignments and specifically identify the goals of each writing assignment. These assignments build upon each other and allow students the opportunity to progress from lower- to higher-order thinking skills, reinforcing old skills while learning new ones.”).

219. Beazley, *supra* n. 184, at 34. Professor Beazley goes on to state that legal writing “professors have instant feedback on the effectiveness of their teaching: they were teaching about how to write a memo, or a rule explanation, or whatever, and here are the documents, right in front of them, with *each student’s* attempts at the work.” *Id.* (emphasis in original).

220. See e.g. Christine Coughlin et al., *A Lawyer Writes: A Practical Guide to Legal Analysis* (Carolina Academic Press 2008); Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Analysis, Research and Writing* (5th ed., Aspen Publishers 2010).

221. See Duncan, *supra* n. 168, at 621 (“These assignments build upon each other and allow students the opportunity to progress from lower- to higher-order thinking skills, reinforcing old skills while learning new ones.”) (citing Lorraine Bannai et al., *Sailing through Designing Memo Assignments*, 5 Leg. Writing 193, 200 (1999)); Helene S. Shapo & Mary S. Lawrence, *Designing the First Writing Assignment*, 5 Persps. 94, 94–95 (1997); see generally Robin Wellford Slocum et al., *Legal Reasoning, Writing, and Persuasive Argument* (2d ed., LexisNexis 2006).

Following each assignment, the student receives further oral or written feedback on her final work product.<sup>222</sup> Legal writing professors are also using more innovative forms of feedback such as live feedback conferences, audio comments, peer review, checklists, and grading grids.<sup>223</sup>

Furthermore, the majority of programs provide an opportunity for students to rewrite one, if not all, of the major assignments following specific and individualized student feedback.<sup>224</sup> The draft submitted before the rewrite is typically ungraded or a small percentage of the overall grade.<sup>225</sup> In addition, some legal writing professors use self-reflective techniques such as private memos that articulate the students' "thought process behind the written analysis"<sup>226</sup> or "reflective writing" that details the analytic choices made and the learning goals obtained during the writing process.<sup>227</sup> Legal writing professors are, moreover, using electronic classroom assessment methods,<sup>228</sup> as well as computerized modes of instruction such as the CALI exercises,<sup>229</sup> the Interactive Citation Workbook,<sup>230</sup> and Core Grammar for Lawyers<sup>231</sup> that allow for individualized student feedback and enhanced self-improvement in areas such as analysis, research, citation, and grammar.

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222. 2010 Survey Results, *supra* n. 59.

223. See Duncan, *supra* n. 168, at 621–622; see generally Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 Mich. St. L. Rev. 1; 2010 Survey Results, *supra* n. 59, at 27; see also *supra* nn. 146–154 and accompanying text.

224. 2010 Survey Results, *supra* n. 59, at 27.

225. *Id.*

226. Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 Temp. L. Rev. 885, 894 (1991).

227. *Id.* (citing Ellen Mosen James, *Evaluating Writing in the Context of Experiential Learning*, Second Draft (bull. of Leg. Writing Inst.) 7, 9 (Jan. 1987)).

228. Lasso, *supra* n. 172, at 47.

229. CALI: Center for Computer-Assisted Legal Instruction, <http://www.cali.org> (accessed June 1, 2011).

230. Tracy L. McGaugh & Christine Hurt, *Interactive Citation Workbook for ALWD Citation Manual* (LexisNexis 2010); Tracy L. McGaugh & Christine Hurt, *Interactive Citation Workbook for the Bluebook: A Uniform System of Citation* (LexisNexis 2010); Tracy L. McGaugh & Christine Hurt, *Interactive Citation Workstation 2010*, LexisNexis, <http://www.lexisnexis.com/icw> (last updated July 2010).

231. Ruth Ann McKinney & Katie Rose Guest Pryal, *Core Grammar for Lawyers*, <http://www.coregrammar.com> (2010).

C. *All Legal Educators Can Learn from Legal Writing Faculty about Formative Assessments*

The *Carnegie Report* missed an important opportunity when it failed to recognize that many of the formative assessment techniques used by legal writing faculty can be used effectively by other types of legal educators, and that those who do not already use formative assessment can learn from the experts—legal writing professors. For example, examination criteria sheets, grids, or guidelines can be used “to identify the categories of information that [non-skills faculty] expect to see in student exams.”<sup>232</sup> Professors could also use an annotated sample exam answer discussing both effective and ineffective student responses; as an alternative, a professor could perform a live feedback in-class demonstration of grading the exam.<sup>233</sup> Specifically, “[t]he professor can both annotate the papers live (‘here is where the student laid out the counter-argument’) and react to them live (‘I don’t understand what rule the student is applying because he or she only referred to ‘a tort’ and did not name the specific tort.’).”<sup>234</sup>

Other helpful techniques involve self-reflection in the learning process, such as private memos,<sup>235</sup> soliciting general feedback about individual understanding of course concepts (either generally or using directed substantive content questions),<sup>236</sup> jour-

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232. Beazley, *supra* n. 184, at 73 (explaining that while the categories may have to be somewhat abstract, “a professor who always asked students to consider the general rule and then the exceptions during the semester could design a criteria sheet that consisted of a list of questions, such as “What is the general rule that governs issues of this type? Are there any exceptions to this rule? (List them.) Which exceptions apply in this case?”).

233. *Id.* at 74 (explaining that “[t]his technique was inspired in part by Dean Kent Syverud’s description of his use of a similar technique during our panel discussion on January 2, 2003). Professor Beazley goes on to explain that “[c]asebook faculty can implement this concept by giving students a practice exam and then annotating a model answer, using the analytical vocabulary mentioned above, a criteria sheet, or both, as a source of vocabulary for identifying what the writer of the model exam was doing in each section of the exam.” She notes that explicit annotation and discussion is necessary to success. *Id.*

234. *Id.* at 78. Professor Beazley goes on to suggest,

The professor might decide to engage the class even more by distributing excerpts or samples at the beginning of class (or even the day before, perhaps via e-mail) and asking the students to participate as readers. By articulating the reader’s thoughts when reading “good” exam answers and “bad” exam answers, the professor can communicate the reader’s thoughts and expectations to the students and help them to see written legal analysis through the reader’s eyes.

*Id.*

235. *Id.* at 59; Duncan, *supra* n. 168, at 623; Lasso, *supra* n. 172, at 75.

236. Beazley, *supra* n. 184, at 75. Professor Beazley explains that

nals,<sup>237</sup> and self-ratings.<sup>238</sup> There is also a range of self-instruction techniques, typically computerized, ranging from self-graded or ungraded practice exams,<sup>239</sup> to self-scoring computer quizzes,<sup>240</sup> CALI exercises, and electronic group assessment systems.<sup>241</sup>

Changing the status quo, however, is difficult for many law professors. As one scholar notes,

[N]ot all law professors will welcome this change but instead “find the call to student outcomes assessment threatening, insulting, intrusive, and wrongheaded.” Some faculty members object to assessment because they think it will endanger their academic freedom or be used to blame individual professors unfairly. In addition, others might question whether the real goals of higher education can be measured or argue that student learning is affected by factors beyond faculty control. Some might just be comfortable with the status quo and object to any change especially one they perceive might make them work harder.<sup>242</sup>

This resistance may be overcome, however. Deans Mary Crossley and Lu-in Wang detail the University of Pittsburgh’s experience in adopting student outcome assessment measures across the law school in *Learning by Doing: An Experience with Outcomes Assessment*.<sup>243</sup> Noting that the faculty initially was

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[f]aculty could give students a practice exam and ask students to use private memos to make their thinking visible to the teacher. The teacher could request two types of private memos. For “freestyle” private memos, the students could be asked to record whatever thoughts or concerns occur to them while writing. For “directed” private memos, the students could be required to answer specific questions, such as, “Which issue was the hardest to analyze?” “Are you worried that you left anything out of your analysis?” “What issue did you notice first?” “What aspect of the exam do you think represents your best work?” and so on.

*Id.*

237. Duncan, *supra* n. 168, at 623.

238. *Id.*

239. See Beazley, *supra* n. 184, at 78 (suggesting that “[a]fter the teacher develops generic exam standards, it could be very enlightening to design a self-grading instrument that requires students to identify where they think they are articulating rules, noting exceptions, applying law to facts, or identifying counter-arguments.); see also Lasso, *supra* n. 172, at 77.

240. Lasso, *supra* n. 172, at 96–97.

241. See *supra* nn. 231–233 and accompanying text.

242. Duncan, *supra* n. 168, at 609–610 (quoting Mary J. Allen, *Assessing Academic Programs in Higher Education* 13 (Anker Publg. Co. 2004)).

243. See Crossley & Wang, *supra* n. 200. While Deans Crossley and Wang detail this

negative and resistant to changing outcome assessments, Deans Crossley and Wang found the faculty ultimately became engaged in and embraced integrating assessment into the curriculum.<sup>244</sup> Overall, “an unquestionable good” came out of their journey because “it . . . provided an occasion and a focus for discussion, deliberation and fuller articulation of our educational mission.”<sup>245</sup> Deans Crossley and Wang provide specific recommendations to institutions as they institute outcome assessment measures.<sup>246</sup> They stress the need for faculty from both the doctrinal and skills areas (particularly those with experience in outcomes based assessment) to lead the “initiative and promot[e] a more effective and healthier ‘bottom up’ approach to integrating assessment and mission.”<sup>247</sup>

The University of Pittsburgh’s experience illustrates that although the status quo is difficult to change, such change is not only possible, but also desirable. And when the change was implemented, the faculty’s “experience [was] consistent with a number of recommendations in the literature on assessment of learning outcomes in legal education.”<sup>248</sup> Those recommendations are clear: “[t]he use of formative assessment is perhaps the most effective way to improve student learning and performance in a course, in law school, and, on the bar exam. As such, regular formative assessments should be the primary form of assessment in law school.”<sup>249</sup>

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process on an institutional basis, their experience in dealing with faculty adopting individual assessment measures in their courses is instructive.

244. See *id.* at 273–282. For example, Deans Crossley and Wang noted that

[i]ndeed, a (perhaps smaller) number of our colleagues embraced the idea of assessing student outcomes. . . . [T]hese colleagues noted the relationship among those objectives, our overall curriculum, and our individual courses—in other words, the relationship of assessment to “what” we teach. Some colleagues pointed out the value of the opportunity the assessment would provide us as teachers to be more self-reflective about our effectiveness and more rigorous in our methods—in other words, they noted the relationship between assessment and “how” we teach. Our colleagues who favored assessment viewed the expenditure of faculty time and effort on assessment as an investment that would relate directly to our teaching mission.

*Id.* at 276.

245. *Id.* at 282.

246. *Id.* at 279–282.

247. *Id.* at 281.

248. *Id.* at 279 (citing Munroe, *supra* n. 172; *Best Practices*, *supra* n. 179, at 265.)

249. Lasso, *supra* n. 172, at 88. With respect to the complaint about coverage, as James Dolin notes, “If there is too much law to learn, as professors always complain, then we need to move to a teaching method that can teach more law in less time.” Dolin, *supra* n. 38, at 254. Using formative assessments will result in more efficient teaching because

The *Carnegie Report* echoes this observation but, although it recognizes merit in legal writing courses generally, it does not encourage non-skills faculty to learn from skills faculty how to incorporate formative assessment techniques into their courses. Because the *Report* does not explicitly address the hierarchal inequities that exist in most law schools between skills and non-skills faculty, as well as the significant role of scholarship in promotion and tenure decisions, the *Report's* ability to persuade all legal educators to engage in formative assessments is likely limited until institutions as a whole make an institution-wide commitment.<sup>250</sup> As Professor Lasso notes,

[t]enure in most law schools is based primarily on scholarly output. Teaching effectiveness is a minor point, if it is considered at all. Compensation in law schools also depends more on scholarly output than on teaching effectiveness. As a result, teachers, particularly those who are not tenured, resist conducting multiple assessments throughout the semester because it would take time away from scholarly pursuits.<sup>251</sup>

Despite the fact that many legal writing professors lack professional job security, they still routinely use formative assessments because they recognize the necessity to improve student's analytical and writing abilities. Recognition of this expertise in the *Carnegie Report* not only would have provided much needed specific guidance to non-skills faculty charged with implementing these important changes, but also would have done much to acknowledge the unique expertise of skills faculty in employing these best educational practices. The proposed ABA amendments, however, will provide another opportunity for legal writing professors to exhibit leadership in this area. Because legal writing professors have used these formative assessment techniques successfully for years, "[b]eing familiar with the process makes legal writing professors ideal players for helping"<sup>252</sup> our col-

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specific outcomes are tied to continual assessment; therefore, students will learn more of the valuable course objectives in less time.

250. Lasso, *supra* n. 172, at 99; *see supra* nn. 211–216 and accompanying text.

251. Lasso, *supra* n. 172, at 95 (internal citations omitted).

252. Duncan, *supra* n. 168, at 609, 611–612, 631.

leagues understand why we use outcome based assessment measures and how to use them effectively.<sup>253</sup>

### CONCLUSION

*“Law school provides the single experience that virtually all legal professionals share. It forms minds and shapes identities.”<sup>254</sup>*

The *Carnegie Report* does much to advance the “singular” experience of law school by recognizing that an integrated approach to learning, as exemplified in many legal writing courses, can facilitate and even transform legal education. By using traditional rather than progressive nomenclature to refer to skills professors and their roles within the academy and by failing to recognize that these professors are a great source of expertise in formative assessments, however, the *Report* missed an opportunity to promote skills professors within the academy. Ultimately, law schools will not succeed in integrating pedagogies until faculty themselves are integrated and until both aspects of legal education—skills and non-skills—receive equal credit and value.

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253. *Id.* at 611 (“Regardless, legal writing professors will be natural leaders for their colleagues both within and without the legal writing discipline as everyone adapts to this new paradigm.”).

254. *Carnegie Report*, *supra* n. 1, at 2.