

# DISMANTLING THE “OTHER”: UNDERSTANDING THE NATURE AND MALLEABILITY OF GROUPS IN THE LEGAL WRITING PROFESSORATE’S QUEST FOR EQUALITY

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## I. INTRODUCTION

Walk through a law school building, or anywhere else in the world for that matter, and take notice of the various groupings of people. Almost anywhere one looks can be seen evidence of the ways we as humans choose to group ourselves: flyers promoting an upcoming program sponsored by the Family Law Society, bulletin boards announcing the newest members of the Moot Court team, a collection of students huddled in front of a television in the student lounge watching the horrific images of their home town of New Orleans in the wake of Hurricane Katrina. Whether the association is formal or informal, we believe, on a rational, intellectual, level, that we have chosen our compatriots wisely and intelligently. Likewise, we believe that we have excluded certain individuals from our groups for specific, identifiable reasons, and, without question, for good cause. Because we are secure in this understanding of how we relate socially with those we come in contact with, we are firm in our belief that our choices are not only defensible but correct. It is this security that allows us to sleep peacefully at night.

The groupings of individuals on any given law school faculty are no exception. In every law school in America, numerous groups among various members of the faculty exist: tenured professors, tenure-track professors, full professors, associate professors, clinical professors, legal writing professors, torts professors, contracts professors, male professors, female professors, Caucasian professors, African American professors, Asian professors, Jewish pro-

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fessors, right-handed professors, left-handed professors, and so on. Some of these groups overlap (female professors and associate professors, for example); some do not (male professors and female professors); some we consider nonsensical (left-handed professors) and some we consider vitally important (tenured professors). Those we consider nonsensical become irrelevant to us and, as such, invisible. Although the differences continue to exist, we choose not to recognize them as defining characteristics.

Those differences we consider important, however, become easily apparent, and the implications of membership in that group or outside of it become vital, in some cases, to our financial, emotional, and personal well-being. The legal writing professorate knows these implications all too well: by being considered something other (or less) than tenured or tenure-track doctrinal professors in the overwhelming majority of American law schools, it receives significantly smaller salaries, less job security, and a muted voice in faculty governance. In short, the legal writing professorate has suffered greatly as a direct result of the importance placed upon the differences between the legal writing faculty and its doctrinal counterpart.

This Article contends that not only does this differentiation not have to be the case but that the very classification of professorial groupings is arbitrary, artificial and, surprisingly, incredibly malleable. As this Article will show, contrary to our assumptions, because groupings typically take place in our unconscious minds, there is no rational, intellectually defensible reason why legal writing professors are grouped together and apart from the rest of the law school faculty. Rather, the differences between these two groups are identified after the fact—after the classification has been made—and highlighted in our rational explanations of such groupings as a means of justifying why our unconscious minds separated them the way they did. By contrast, the differences that nevertheless exist among members of the tenured and tenure-track professorate (torts professors versus contracts professors, etc.) are ignored because our unconscious minds do not process these differences as significant.

This Article will first explore the relevant social and physical science behind the operation of our unconscious minds in order to better understand why we group individuals the way we do. Thereafter, drawing from this understanding of how groups are formed, this Article will discuss important symbolic alterations that inevitably alter the makeup of groups so as to transform the

members of an out-group into members of an in-group. Contrary to our rational beliefs, groups are not permanent, unalterable fixtures; rather, they are best understood as a description of the relationship between two sets of individuals. Change the relationship and one can change the groupings rather naturally and easily.

This Article will show that (1) the granting of voting rights to the legal writing professorate and (2) the integration of legal writing offices among all faculty offices are such symbolic alterations on law school faculties that are crucial first steps in dismantling the legal writing professorate's perception as the "other"—the perception, on behalf of the doctrinal faculty, of the legal writing faculty as an undesirable out-group, unworthy of equal status, salary parity, and respect. Contrary to much of the scholarship on the subject of equality for the legal writing professorate, this Article will conclude that it is nigh impossible for a doctrinal faculty "group" to both recognize the legal writing "group" as such and then treat it equitably. Unfortunately, and as empirical psychological research on this subject has demonstrated, the denigration of out-group members is a natural, unavoidable, human tendency. As such, it is asking too much of anyone to attempt to overcome his or her unconscious inclination to do so in the name of fairness to the legal writing faculty.

This Article will demonstrate that the only way for the doctrinal professorate to treat its legal writing counterpart equally is to convince it that a difference does not exist; that there is no "other," that we are all part of the same group. Although the ability to vote and the existence of integrated offices will certainly not change the status of the legal writing professorate overnight (indeed, as this Article will discuss, many legal writing departments have one or both of these yet still feel stigmatized as the "other"), such advances provide the foundation for greater change—change that cannot occur until the perception of the legal writing faculty as an out-group begins to dissipate. Once this divide has been breached, integration and equality on a more substantial level can begin to take place. Whether it does, however, depends on continued vigilance and foresight. Nevertheless, it will be the small but attainable steps discussed in this Article that provide the tools for more substantial change later on and which make the goal of a fully integrated legal writing faculty a realistic possibility in the future.

## II. GROUPING AS AN UNCONSCIOUS ACTIVITY

Contrary to what our rational brains tell us, we very often group individuals unconsciously and then justify our groupings after the fact.<sup>1</sup> Thus, in a very real sense, the determination of “us” versus “them” is a subconscious feeling rather than the result of a rationally deduced observation.<sup>2</sup> Without our even being aware of it, our brains formulate mental codes that lead to emotional responses (again, outside of our control) based upon the meaning of the indicators.<sup>3</sup> Although this loss of control over our actions, at first glance, may make us appear more like animals and less like the exalted human species we like to consider ourselves, it is uniquely human to group others in this way. Animals, by contrast, search for familiar smells, sounds, and sights—objective, measurable things—in order to determine who belongs to their group and who is an outsider.<sup>4</sup> Humans, by contrast, look for signs and then process them unconsciously.<sup>5</sup> What’s more, we do this constantly; testing each other to see if those who come in contact with us belong with us or are better left on the outside of our circle.<sup>6</sup> Without our even knowing it, our brains never stop working, constantly adding up all of the cues and producing the feelings that ultimately guide our behaviors toward other people.<sup>7</sup>

<sup>1</sup> See Jennifer L. Eberhardt & Susan T. Fiske, *Motivating Individuals to Change: What Is a Target to Do?* in *Stereotypes & Stereotyping* 369, 387 (C. Neil Macrae et al. eds., Guilford Press 1996) (noting that, according to social identity theory, initial categorization is the “default option” in our brains. It is the first thing we do. Thereafter, once the categorization is made, we seek to justify it rationally.).

<sup>2</sup> See John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 *Am. Psychologist* 462, 463, 465, 475–476 (1999) (defining “conscious” process and distinguishing it from the more amorphous “automatic” process, on page 463; recognizing wide acceptance of the proposition that “social perception is a largely automated psychological phenomenon”; and recognizing the relation between automatic evaluations and conscious judgments, on pages 475–476).

<sup>3</sup> See David Berreby, *Us and Them* 213–214 (Little, Brown & Co. 2005) (available at <http://www.davidberreby.com/files/Faq3-17.05.pdf>) (providing examples of the malleability of our subconscious kinship “dividing line,” which “shifts back and forth with ease”).

<sup>4</sup> See *id.* at 214–215 (analyzing social activity of the chimpanzee).

<sup>5</sup> See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> This emerging view of how the human brain operates is at odds with hundreds of years of philosophical thought on the very nature of human existence. Philosophers as far back as Plato opined that it is rational thought that separates man from the animals that roam the jungles. See Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *Psychol. Rev.* 814, 815 (2001). From this perspective, humans act as rational judges, weighing the evidence on both sides of an issue before issuing their “rulings,” which then guide their actions. *Id.* Without a rational justification, no action could then be taken. *Id.* Stoic philosophers likewise frowned upon the

What emerges from this process is what is commonly referred to as "stereotype." Although, when first used in this context, the term implied "rigidity, permanence, and lack of variability from application to application"<sup>8</sup> (in fact, stereotypes initially became a subject for scientific study in the hope they would explain the nature of prejudice and discrimination),<sup>9</sup> more recent science has determined that these generalizations are, for the most part, incorrect.

Instead, stereotypes are something much less sinister than what many researchers initially thought. Basically, they are simply the categories we create that bring coherence and order to our social environment.<sup>10</sup> Without them, our brains would quickly become overloaded with all the stimuli careening toward them and would be unable to make sense of our environment.

Thus, although we may believe we "group" or "stereotype" based upon rational, objective criteria, psychological studies have shown that in fact, these groupings are made subconsciously, without our even realizing it.<sup>11</sup> Later, once we have created the stereotype, we then seek to rationalize it through what we believe to be "objective," solid information.<sup>12</sup> In reality, we merely justify our unconscious feelings to our rational selves.

For the legal writing professorate, this information is important because it indicates that the historical means by which it has

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unconscious mind, taking "an even dimmer view of the emotions, seeing them as conceptual errors." *Id.* Similarly, Medieval Christian philosophers likewise linked emotions to "desire and hence to sin." *Id.* David Hume attempted to rebut these approaches, arguing that people have a built-in moral sense and concluding that moral judgments are derived from sentiment, not reason, but he found his philosophy not well-received and forcefully rebutted by others such as Kant in his "rationalist ethical theory." *Id.* However, psychological and social scientists are now starting to line up behind Hume, to produce data and analysis that demonstrates that it is our unconscious emotions that rule our behaviors, operating stealthily, computing and analyzing information, and producing the feelings that we act upon for reasons unknown to us. *Id.*

<sup>8</sup> See Wolfgang Stroebe & Chester A. Insko, *Stereotype, Prejudice, and Discrimination: Changing Conceptions in Theory and Research*, in *Stereotyping & Prejudice: Changing Conceptions* 3, 4 (Daniel Bar-Tal et al. eds., Springer-Verlag 1989).

<sup>9</sup> See David J. Schneider, *Modern Stereotype Research: Unfinished Business*, in *Stereotypes & Stereotyping*, *supra* n. 1, at 419, 445.

<sup>10</sup> See Henri Tajfel, *Experiments in Intergroup Discrimination*, 223 *Sci. Am.* 96, 98 (1970) (analyzing "the need to bring some kind of order into our 'social construction of reality'"); see also Bargh & Chartrand, *supra* n. 2, at 465–466 (surveying an array of literature including studies that demonstrate "stereotypes of social groups become activated automatically on the mere perception of the distinguishing features of a group member").

<sup>11</sup> See Bargh & Chartrand, *supra* n. 2, at 465–466.

<sup>12</sup> See David Berreby, *All About Us & Them* 5, <http://www.davidberreby.com/files/Faq3-17.05.pdf> (accessed Aug. 4, 2007). As Berreby observes, in many cases, our brains work the opposite of how we would expect. "First the category, second, the evidence." *Id.*

sought to achieve inclusion into the grouping of “real” professors in the legal academy is based upon a rational argumentation that does not explicitly focus on the psychological bases for how groups operate and how they open themselves up to some, while closing themselves off to others. In this regard, much scholarship has focused on data collection, together with a rational analysis and argument regarding the myriad reasons why the legal writing community deserves to sit “at the grown-up’s table” within the legal academy.<sup>13</sup>

This analysis, in large part, appeals to the conscious part of the brain, where the psychological research shows the significant activity that takes place with regard to groupings is the after-the-fact justification of them. As such, the arguments have inherent limitations, because the psychological research demonstrates that in order to change the grouping, one has to appeal to the part of the brain where groups are made—the unconscious part. Thus, while such data and rational arguments directed to doctrinal professors may lead to intellectual acceptance of the logic contained within the rational arguments, the legal writing professorate remains an out-group in those cases where the doctrinal faculty still unconsciously “feel” as if the legal writing professorate is somehow different from them.<sup>14</sup> The door will remain closed, and, what’s more, there is really nothing these doctrinal professors can do about it. They have no rational control over the grouping. Appealing to their rational minds may begin the process toward change,

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<sup>13</sup> See e.g. Jo Anne Durako, *Dismantling Hierarchies: Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, 73 UMKC L. Rev. 253 (2004) [hereinafter *Dismantling Hierarchies*]; Jo Anne Durako, *Second Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 J. Leg. Educ. 562 (2000) [hereinafter *Second Class Citizens*]; Susan P. Liemer & Jan M. Levine, *Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching (Three Years Later)*, 9 Scribes J. Leg. Writing 113, 122 (2003–2004) (“Information about faculty voting privileges was obtained from 89% of the [selected] schools. At 61% of them, the director may vote on all matters or on all matters except promotion and tenure. At 37% of the schools reporting, all the legal-writing professors enjoy such broad voting privileges. But at almost half the schools, 49%, the professors cannot vote at all. Finally, at 21% of the schools reporting, neither the director nor the other legal-writing professors can vote. At these schools, faculty decision-making and self-governance occurs without a vote from any legal-writing professor. The situation hits bottom at [three] schools, where the full-time writing professors are not even permitted to attend faculty meetings. Presumably, at the thirty-five schools that rely primarily on adjuncts to teach legal writing, the adjuncts also do not attend faculty meetings.”); David T. Ritchie, *Who Is on the Outside Looking in, and What Do They See?: Metaphors of Exclusion in Legal Education*, 58 Mercer L. Rev. 991 (2007).

<sup>14</sup> See e.g. Berreby, *supra* n. 3. As Berreby observed, we create the stereotype and then search for the justification after the fact. *Id.* As the remainder of this Article discusses, oftentimes, we create the stereotype and then search for the justification after the fact.

but the feeling of inclusion will not necessarily be affected, unless their rational minds allow for environmental changes to the status quo.<sup>15</sup>

More problematic, however, is the potential for the rational argument to not merely fail in its quest but to make matters worse by highlighting the presence of an out-group, identifying it as such, and opening the door for even greater ostracization by the in-group. Arguments that call upon the legal academy to recognize and respect the legal writing community are potentially dangerous because studies have shown that first recognizing and then treating an out-group fairly is an unnatural sequence of activities.<sup>16</sup> Rather, it is the natural state of affairs for people, once identified with members of their group, to denigrate and discriminate against those in other groups.<sup>17</sup> Because the formation of groups implies a competitive relationship between in-groups and out-groups, whenever we are in a situation in which some form of inter-group categorization appears relevant, we are likely to act in a manner that discriminates against the out-group and favors the in-group.<sup>18</sup> As a result, by highlighting the presence of the legal

<sup>15</sup> See Eberhardt & Fiske, *supra* n. 1, at 401. As Eberhardt & Fiske note, alerting people to their "should-would discrepancies" (what they *are* doing as opposed to what they *should* be doing) can be dangerous, because "[t]hose who think of themselves as egalitarian may feel quite betrayed and insulted by targets who directly address these discrepancies, particularly if the target has relatively little power." *Id.*

<sup>16</sup> See Tajfel, *supra* n. 10, at 96 (recognizing the "intricate interdependence of social and psychological causation" where "a dialectical relation [exists] between the objective and the subjective determinants of intergroup attitudes and behavior . . . reinforc[ing] each other in a relentless spiral").

<sup>17</sup> *Id.*; see also Bargh & Chartrand, *supra* n. 2, at 470 ("One tactic that people often use to restore self-esteem is to denigrate others, especially groups of low power and status within society."); Eberhardt & Fiske, *supra* n. 1, at 383 ("[I]ntergroup discrimination is most likely in situations that accentuate group distinction and thus encourage social comparisons between groups.").

<sup>18</sup> *Id.*; see Brian Lickel et al., *Varieties of Groups and the Perception of Group Entativity*, 78 *J. Personality & Soc. Psychol.* 223, 242 (2000) (observing "a competitive context, in which groups are in conflict with one another, may increase perceptions of entativity"). This observation is true even if a particular member of an in-group is not involved in any real or even imagined conflict with the out-group. As for why this response occurs, studies have shown that people have a tendency to evaluate themselves positively. Therefore, if they then define themselves in terms of a particular group membership, they are likely to evaluate the group positively as well. Because groups are evaluated in relation to other groups, this positive self-image *requires* that other groups be evaluated negatively. See Eberhardt & Fiske, *supra* n. 1, at 283–285 (surveying scholarly contributions to "Social Identity Theory"); Tajfel, *supra* n. 10, at 98–102 (illustrating and analyzing data collected on ingroup and outgroup behavior). As Tajfel noted, "Whenever we are confronted with a situation to which some form of intergroup categorization appears directly relevant, we are likely to act in a manner that discriminates against the outgroup and favors the ingroup." Tajfel, *supra* n. 10, at 98–99; see also Lickel et al., *supra* n. 18, at 226 (outlining research goals, including

writing faculty as an out-group, the legal writing professorate is inviting discrimination. Therefore, it is at best irrelevant, and at worst damaging, to argue that doctrinal faculty members *should not* engage in behavior that is deleterious to the legal writing faculty. The fact that not only do they do so but that it is, of all things, a natural behavior should cause the members of the out-group to choose a different tactic if they seek inclusion within this group.<sup>19</sup>

Up to this point, much of the story of groups has been one of bad news: they are formed out of our control; they naturally discriminate against others; and rational arguments, regardless of their logic and appeal, are powerless to stop their discriminatory effects. However, there is good news as well. Due to the very nature of groups themselves, they are easily manipulated. As such, it is quite possible to make undesirable groupings disappear and replace them with other, more desirable ones. For the legal writing professorate, this insight is crucial if the goal of integration within the legal academy is to be achieved. The key is to understand how they are formed: how the unconscious brain goes about its business of coding and processing the information it is receiving, spitting out the groups that do not “belong.” The key is in understanding why we somehow “feel” whenever we see a collection of people, an irrational feeling that we then seek to rationalize after the fact. Once this process is better understood, the manipulation of this process becomes a rather straightforward, and surprisingly effective, affair.

With regard to the malleability of groups, in many instances groups remain the same for centuries: Catholics, Protestants, Americans, Germans, etc.<sup>20</sup> However, they can also change rather

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the testing of the hypothesis that “the personal importance of one’s group memberships and the social identity value . . . of those groups deriving from the psychological benefits gained by membership in them may be important influences on the perceived entativity of groups to which the perceiver belongs”).

<sup>19</sup> This is not to suggest that members of an in-group will never feel the urge to act fairly toward outsiders. In fact, “fairness” is another powerful group norm and one that is acted upon frequently. However, “fairness” takes a backseat to “groupness” whenever the two come into conflict as the urge to conform to one’s group is more powerful than any other. By compelling the doctrinal professorate to first recognize their “groupness” and then to ask it to nevertheless act upon its “fairness” urge is to pit these two powerful urges against each other and to expect the impossible. Tajfel, *supra* n. 10, at 102. “Unfortunately, it is only too easy to think of examples in real life where fairness would go out the window, since groupness is often based on criteria more weighty. . . . Socialization into “groupness” is powerful and unavoidable . . . .” *Id.*; see also Lickel et al., *supra* n. 18, at 226.

<sup>20</sup> See Berreby, *supra* n. 3, at 167.

quickly as a result of experience. Groups change, merge, disappear, and materialize all the time. In the legal academy, this malleability can most easily be seen through the continual process of the resegregation of female faculty members. Because our unconscious "feelings" about gender are strong (as gender is an obvious and easily identifiable characteristic),<sup>21</sup> our perceptions of groups can change when women enter what was previously a predominantly male group, causing new groups to emerge. For decades, because most doctrinal faculties were overwhelmingly male, every doctrinal course was considered equally prestigious. However, with the emergence of women into the legal academy (the decade of the 1990s saw a 45.6% increase in the overall population of female law professors),<sup>22</sup> new groupings of courses emerged, with certain courses such as Contracts, Conflicts of Law, and Constitutional Law being seen as "male" courses and others, such as Family Law, Juvenile Law, Poverty Law, and, of course, Legal Writing, being seen as "female."<sup>23</sup> Some courses, such as Health Law, were once thought of as "male" but are increasingly being thought of as "female." Consequently, given the larger numbers of women now teaching these "female" courses, they are perceived as less desirable than before.<sup>24</sup> Family Law professors, once considered part of a desired in-group, with the differences between them and their Constitutional Law brethren once invisible and unnoticed, have since become identified and set apart from them. Suddenly, what was invisible has become apparent. Nothing objective about the course has changed over the years. What *has* changed is the composition of the unconscious groupings of courses due solely to the emergence of female faculty members. To many male faculty members, Family Law—once a course that "felt" part of them, now "feels" like something else entirely. Just as it naturally felt a part of their world beforehand, it now just as naturally feels like part of something else, something less desirable. The course catalog may remain the same for decades, but this does not mean that the

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<sup>21</sup> Schneider, *supra* n. 9, at 425 (noting that categories with strong visual cues such as race, gender, and age "seem more 'natural' as opposed to artifactual, and lead to 'more potent categorization'").

<sup>22</sup> Marjorie Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender among Law Professors*, 73 UMKC L. Rev. 293, 308 (2004). This change reflects a move from 21.7% to 31.8% of overall faculties. *Id.* at 348 tbl. 5.

<sup>23</sup> *Id.* at 309.

<sup>24</sup> *Id.* at 317.

groupings of the courses contained within necessarily will remain similarly unchanged.

The above example shows that nothing about groups is inherently permanent. They are constantly shifting, changing, adapting to our perceptions of the nature of the people who comprise them. When people are arranged to seem similar, they satisfy the “mind’s syntax for a thing made of people.”<sup>25</sup> This prompts us to see the group as a single being. However, if the people are arranged differently, or made to appear to align differently, our mind’s perception of the group changes accordingly.<sup>26</sup> With regard to the legal writing community’s current status as a perceived out-group on most law faculties, it follows that this perception is very likely caused by the “feeling” that the legal writing faculty is likewise perceived as a distinct entity made of people. However, if this perception can be changed, the grouping will change as well.

Currently, on most faculties, the legal writing professors are perceived as somehow different from the greater faculty. Legal writing itself is considered different from doctrinal courses, from the way it is taught to the skills it teaches,<sup>27</sup> and this perception affects how everything in conjunction with it is perceived on an unconscious level. Because of these perceived differences, the members of the legal writing faculty are seen as having a distinct, “common fate,” a fate different from that of the rest of the faculty. As a result, in the minds of these faculty members, an unconscious trigger is tripped, activating the human kind code mechanism where what is enclosed within (legal writing professors) is thereafter perceived as a distinct whole. This unconscious coding leads to what is referred to as “the looping effect” of human kinds where, once people are convinced that a category of people exists, they then begin to act on that belief, treating it as though it were real, giving teeth to this artificially created group.<sup>28</sup> None of these observations are meant to suggest that the differences themselves between legal writing courses and doctrinal courses are artificial.

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<sup>25</sup> Berreby, *supra* n. 3, at 132; *see also* Schneider, *supra* n. 9, at 442 (“Perceived homogeneity of groups may encourage applications of stereotypes to group members.”).

<sup>26</sup> *See generally* Berreby, *supra* n. 3.

<sup>27</sup> Debra Moss Curtis, *You’ve Got Rhythm: Curriculum Planning and Teaching Rhythm at Work in the Legal Writing Classroom*, 21 *Touro L. Rev.* 465, 482–483 (2005) (discussing the various ways and reasons that teaching styles in legal writing classrooms differ from “substantive” courses).

<sup>28</sup> *See* Berreby, *supra* n. 3, at 57–58. “Looping effects go on in perpetuity. Once a human kind is defined, the people in it even change how they think and act, to better fit the definition.” *Id.* at 58.

Rather, the differences are real.<sup>29</sup> The point, however, is that differences exist between all types of courses taught within a given law school. It is just that once the human kind coding process is triggered, the differences are perceived and then acted upon.<sup>30</sup> If it is not, then they are ignored. Hence, the inherent and very real differences that exist between a Torts class and a Contracts class go unnoticed.

Because of the looping effect, the artificiality of any group cannot be brushed aside simply because it is a figment of our unconscious imaginations. Once people start to act on their feelings of "otherness" towards an out-group, very real consequences emerge. The legal writing community knows such consequences all too well. Perhaps most obviously, classification as an out-group has hurt many legal writing professors in terms of salary parity, as deans in many schools seek to justify their discriminatory treatment of this out-group through lesser salaries than they would offer to other faculty members.<sup>31</sup> Although many deans cite "supply and demand" as a justification for such lower salaries,<sup>32</sup> they ignore the reality that these very same market factors would very well exist with available tenure-track positions as well, should all faculty positions be made available at equivalent salaries. In all likelihood, the grouping, not the market, drives these deans to treat their legal writing faculty members differently than the rest of their faculty. Accordingly, it is crucial for the legal writing professorate to appreciate the ramifications of unconscious, artificial grouping and make conscious efforts to change it. The

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<sup>29</sup> Berreby, *supra* n. 12, at 5 ("Our beliefs about human kinds are not fantastical. If we didn't see real, apparent, measurable differences among the categories, they would not convince us.")

<sup>30</sup> *Id.*; see also Miles Hewstone, *Contact and Categorization: Social Psychological Interventions to Change Intergroup Relations*, in *Stereotyping & Prejudice: Changing Conceptions*, *supra* n. 8, at 323, 326. Hewstone notes that category based interaction occurs when "a given in-group member responds to out-group members as interchangeable representatives of a fairly homogeneous category." Once this occurs, everyone within the out-group is seen as possessing the differences that mark the group as an out-group. In other words, at that point, differences are sought out and will, inevitably, be found. *Id.*

<sup>31</sup> See Richard K. Neumann, *Women in Legal Education: What the Statistics Show*, 50 *J. Leg. Educ.* 313, 347–348 (2000). Neumann notes that in his experience as a director of legal writing programs for over a decade and at more than one school, he has been privy to numerous discussions on the topic by deans and faculty members. *Id.* As he observes, "[w]hen challenged about the gender line separating teachers who are not conventionally tenured or tenure-tracked from those who are, some deans answer that they are only responding to a market that allows people to take the jobs for which they are qualified and determines through supply and demand what they will be paid." *Id.*

<sup>32</sup> *Id.*

first step in this process is to understand what makes a group feel like a group in the first place.

### III. GROUPS AS RELATIONSHIPS

When we group, we categorize. In fact, the word “category” was first used by Aristotle who defined it as “to accuse”; Aristotle’s definition demonstrates why “category” remains an apt term today,<sup>33</sup> because we pigeonhole people based on certain feelings that register with us. Once we experience such a feeling, we then categorize the person based upon whether they’re with “us” or with “them.” An unavoidable byproduct of such categorization is stereotyping—a term familiar to anyone who has ever fought for equality for teachers of legal writing. In fact, much of the push to gain equality is rooted in the effort to eliminate the stereotypes that tag those who teach legal writing. For example, the mission statement of the *Journal of the Association of Legal Writing Directors*, the first journal devoted exclusively to the publication of scholarship on the substance of legal writing, states one of its main purposes is to help alleviate the stereotype that legal writing professors are not scholars.<sup>34</sup> Because of this stereotype, the mission statement continues, the legal writing professorate suffers a lack of respect from the rest of the legal academy.<sup>35</sup>

However, as stated earlier, our perceptions of stereotyping are largely inaccurate. Not only are stereotypes not inherently negative, they are not even “things” as we imagine them to be. As indicated by the ALWD Journal mission statement, when the legal writing community thinks of the stereotypes attached to legal writing professors, it conjures up images of things—and bad things at that (i.e., poor scholars, with inferior academic credentials, etc.): collections of tangible, inaccurate perceptions of things that need to be eliminated in order to improve the legal writing professorate’s standing within the legal academy. However, a stereotype

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<sup>33</sup> Berreby, *supra* n. 3, at 64.

<sup>34</sup> Michael R. Smith, *The Next Frontier: Exploring the Substance of Legal Writing*, 2 J. ALWD 1, 24–25 (2004).

<sup>35</sup> *Id.* at 24. (“The third goal [of the *Journal of the Association of Legal Writing Directors*] . . . involves gaining more recognition for legal writing within the more general legal academy. . . . By producing [articles focusing on pedagogy rather than theory], the legal writing profession has allowed others to conclude that legal writing skills scholarship lacks the intellectual depth of other areas of legal study. If legal writing skills scholarship is to gain recognition and respect in the academy, it must embrace a more theoretical approach.”).

does not describe a thing but rather the relationship between two groups.<sup>36</sup> As a result, the objective accuracy of any given stereotype is irrelevant because we do not categorize people based on facts about them but, instead, on how we relate to them. In short, “we imagine ourselves in a world of nouns, like ‘France,’ or ‘the Muslim world,’ or ‘old people.’” But the mind’s environment is a world of *verbs*—perceiving, feeling, and thinking. Categories are the adverbs that color experience” in that they join feelings to things.<sup>37</sup> Consequently, the objective “facts” concerning the education or scholarly interests of members of the legal writing community are irrelevant in a vacuum. Rather, it is the relationship the members of this community have with the rest of the legal academy (and, more specifically in this case, the members of the doctrinal faculty in a given law school) that determines the stereotype.

In some respects, this renders the quest for equality exceedingly difficult for members of the legal writing professorate; there is no “magic bullet,” no easily identifiable “thing” the legal writing community can do to change how it is perceived within the legal academy. Because the facts do not matter, it is not as simple as altering scholarly interests, hiring more legal writing professors with impressive clerkships—tweaking the facts—in order to change the perception. Instead, in order to reach the unconscious minds of those doing the stereotyping, it is important to focus not on facts but on relationships.

This becomes evident when it comes time to attempt to change a given stereotype. As stated earlier, stereotypes are not inherently “good” or “bad,” they just are.<sup>38</sup> They cannot be avoided. Because we stereotype subconsciously, they are merely an expression of our perceptions, not of some rationally deduced reality. They are the expression of how we as humans view the world. As such, it is pointless to argue for the removal of stereotypes because to do so is to argue for the elimination of that which makes us human. Rather, the key is to understand the stereotype and to work to change the categorization that led to it. Contrary to the popular

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<sup>36</sup> Berreby, *supra* n. 3, at 164.

<sup>37</sup> *Id.* at 321.

<sup>38</sup> Schneider, *supra* n. 9, at 421. According to the social cognition perspective, stereotypes “are beliefs we have about people in groups. They may or may not be false, negative, held rigidly. They need not be shared with other people, and the assumption that stereotypes bear a close relationship with prejudice and discrimination is not to be made lightly.” *Id.*

understanding of stereotypes, they are not necessarily the polar opposite of the “truth” about any particular individual or group.<sup>39</sup> They are not “fantastic, arbitrary notions” that are inherently inaccurate.<sup>40</sup> Nor are they “good facts about real people.”<sup>41</sup> In fact, they are neither. So, if they are not inherently “right” and they are not inherently “wrong,” then what are they? They are—and this is the key that unlocks their secrets—the result of the perception of the stereotyper.<sup>42</sup> By studying the relationship between the stereotyper and the individual or group being stereotyped, one can identify exactly where the stereotype itself comes from.<sup>43</sup> And once the source of the stereotype becomes apparent, it is then possible to change the stereotype to a different one. Importantly, the goal should not be to eliminate the stereotype (as this goal is impossible and, in any event, objective facts are irrelevant to the process) but rather to change it to something with which the group being stereotyped is more comfortable.<sup>44</sup> For the legal writing community to become a member of the larger legal academy in-group, it is imperative for it to understand its relationship with that group and then try to change it. And this awareness, once it is understood, turns out to be not all that difficult to develop after all.

#### A. “*Kind Reading*” versus “*Mind Reading*”

In any social situation, the first thing we do subconsciously is to break people up into categories—things made of people.<sup>45</sup> Thereafter, this is how we will understand “them” and their relationship to “us.” We decide what “kind” of people they are in relation to how we perceive ourselves.<sup>46</sup> How we feel about ourselves in relation to the collection of people we are categorizing determines

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<sup>39</sup> *Id.* at 438.

<sup>40</sup> Berreby, *supra* n. 3, at 105.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 165.

<sup>43</sup> *Id.*

<sup>44</sup> See Schneider, *supra* n. 9, at 426 (“[T]he use of one category may diminish stereotypic thinking based on other categories.”). In this respect, it is not the presence of a stereotype that is the problem; rather, it is the presence of an unflattering or inappropriate one. Thus, the key is to create a new category—a new stereotype—which, in the process, causes the old one to disappear.

<sup>45</sup> Berreby, *supra* n. 3, at 132.

<sup>46</sup> See Eberhardt & Fiske, *supra* n. 1, at 387 (“[I]nitial categorization is the default option, and people only go beyond their categories when they have the capacity and the motivation. If people do go beyond initial categorization, they attend to the target’s other, potentially individuating attributes.”).

the group. In this way, human kinds are made (in our subconscious), not discovered.<sup>47</sup> The objective facts regarding these people are irrelevant; rather it is our beliefs that determine our categorization of human kinds. In this regard, whenever we first see someone, we act as "kind" readers—we ask not who a particular person is in the objective sense but what he is in relation to us. Accordingly, we first know each other merely as types.<sup>48</sup>

Of course, "kind reading" is inherently superficial and often-times inaccurate. Our beliefs regarding a particular person may not in fact be an accurate reflection of who they are or even how they stack up against us based upon the objective facts.<sup>49</sup> Regardless, we have already made the categorization and will then seek to rationalize it later. And, as discussed, because differences exist between any two groups or individuals, we will always be able to justify our categorizations. Through this mechanism of "kind reading," stereotypes are created—stereotypes that are not inherently wrong or inherently accurate, but merely stereotypes that exist to make sense of the world in which we live.<sup>50</sup>

"Kind reading," however, is not the end of the story. If it was, then we would never understand each other on anything more than a superficial basis. Because we do in fact develop deeper, more personal, relationships with certain people, something else must be going on beyond this initial reading. And there is. Within certain kinds, we move on to "mind" reading—determining how the people within a particular group stand with us, what they think, or how they feel.<sup>51</sup> If we believe we can predict such thoughts and feelings, we develop a kinship with them and consider them to be part of our group—the in-group as far as we are concerned.<sup>52</sup> With people we know well, we believe we know what they think because of the feeling of community we share with them.<sup>53</sup> This shared sense of understanding about the world and the comfort we find in being able to predict how they will react in

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<sup>47</sup> Berreby, *supra* n. 3, at 31.

<sup>48</sup> *Id.* at 125.

<sup>49</sup> See Eberhardt & Fiske, *supra* n. 1, at 387.

<sup>50</sup> *Id.*

<sup>51</sup> See Hewstone, *supra* n. 30, at 326. Hewstone refers to this phenomenon as "de-categorization": in which personalization occurs where "an in-group member responds to out-group individuals in terms of their relationship to self. . . ." *Id.*

<sup>52</sup> Schneider, *supra* n. 9, at 439. Schneider noted that stereotypes can change based upon interaction with out-group members. Negative perceptions change and are replaced by positive, individualized ones based upon shared beliefs. *Id.*

<sup>53</sup> Berreby, *supra* n. 3, at 124.

certain situations leads to a deeper bond with the people in our group.<sup>54</sup> Groups are not static, however. All one needs to do is change the relationship between the members such that the commonalities of fate line up differently and the kinds will change as well.<sup>55</sup> In this way, groups are amazingly malleable.

An example of the malleability of kinds and, therefore, groups, comes from the various and shifting kinds that exist within the legal academy. On the one hand, most legal writing faculty consider the members of their institution's doctrinal faculty to be a distinct kind with a common fate. It is likely that members of the doctrinal faculty see their legal writing counterparts much the same way: as single, cohesive units—a clearly distinct kind. However, when the relationships change, so do the groups. Within the doctrinal faculty, new kinds emerge based on the different relationships. Here, there are male and female faculty members, with each group seeing the other as a distinct and separate kind.<sup>56</sup> Tenured and tenure-track professors are additional kinds when considered together. The list is endless. Most importantly, few of these groupings have much to do with the facts concerning them. Rather, it is to a large degree based upon the relationships between them. The “us” in one relationship (doctrinal professors) will be the “them” in another (female faculty members). With regard to the legal writing community, many think of themselves simply as the objective, unchanging “them” within the legal academy, but they may fail to realize that in many situations, when the relationship dictates it, they become a part of “us” with the doctrinal faculty. For instance, from the perspective of many within the practicing bar, all law teachers are part of the same kind: a distinct group sharing the common fate of educating future lawyers.<sup>57</sup> Thus, when the perspective arising from the relationships shifts, so does the grouping.

To reach the goal of equality within the legal academy, achieving a state of “us-ness” in the eyes of their doctrinal colleagues, legal writing professors must contend with the insight that their relationship with this group ultimately determines their fate. Cur-

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<sup>54</sup> *Id.*

<sup>55</sup> See Eberhardt & Fiske, *supra* n. 1, at 387–388.

<sup>56</sup> See generally Neumann, *supra* n. 31 and accompanying footnoted text.

<sup>57</sup> See ABA Sec. Leg. Educ. & Admis. to the B., *Legal Education and Professional Development—An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 1, 3 (ABA 1992) (commonly referred to as the “MacCrate Report”).

rently, the legal writing professorate is hampered by the fact that when many among the doctrinal professorate look at legal writing professors, they see a thing made of people, a clearly defined out-group with a common fate. To change the stereotype, the legal writing professorate must assist its doctrinal colleagues in moving from a superficial stage of "kind reading" to the more intimate "mind reading" that will lead to a feeling of shared understanding. However, there are barriers, in the names of "essentialism" and "immoral stigmatization" of the out-group.

#### IV. ESSENTIALISM IN THE LEGAL ACADEMY AS A BARRIER TO "MIND READING"

Essentialism is the belief that contemporary human kinds have always existed and are never-changing. This observation is comforting in that it provides us with a solid (if untrue) foundation for our beliefs. Our perceptions are correct, we believe, because things have always been as we now perceive them. As such, those perceptions are infallible.<sup>58</sup> Essentialism is an extremely powerful feeling in that it makes us feel good, giving credence to our beliefs, which are actually arbitrary and artificial.<sup>59</sup> A natural extension of this belief is one that assumes that, because things have been a certain way in the past, they no doubt will remain unchanged in the future.<sup>60</sup> This unchanging feeling we get with regard to our beliefs gives them a permanence that otherwise would be lacking, given that our beliefs really stem from our ever-changing relationships with others. Regardless, essentialism allows us to feel secure that our beliefs are "correct" when "correct" is a relative term.

The phenomenon of essentialism occurs with regularity in the legal academy. Of particular relevance to members of the legal writing community, essentialism occurs in the belief among many members of the legal academy that legal writing as a discipline and a course has "always" been inferior to those courses within the curriculum believed to be more theoretical and substantive. This feeling therefore justifies the feeling that it is "correct" to think of legal writing (along with the professors who teach it) as inferior today because it is just as likely to continue to be inferior well into

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<sup>58</sup> Berreby, *supra* n. 3, at 60.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

the future. This essentialist belief in the inferiority of legal writing justifies its perpetual treatment as an out-group.

However, like many essentialist beliefs, this one as well does not withstand closer examination. In fact, given that it is a relatively new addition to most law school curriculums, arguably the most recent major addition, legal writing has no longstanding tradition within the legal academy.<sup>61</sup> If anything, rather than having a permanent, unbreakable link with the past, the only constant with regard to most legal writing programs has been their continual evolution. Many law schools did not even have formal legal writing programs until the 1980s.<sup>62</sup> Since then, they have evolved from programs operated as addendums to certain first-year doctrinal courses (and taught by first-year doctrinal professors), to ones run by upper-level students, to ones run by adjunct instructors, to ones taught by full-time faculty members. And this transformation has occurred roughly within the past twenty-five years. Given the continual metamorphosis of legal writing programs across the country, it seems hard to believe that any essentialist feelings and beliefs could be attached to it. Nevertheless, the fact such feelings persist is testament to our strong, natural desire to believe in them. For without them, the foundations of our beliefs become untethered, causing us discomfort. By simply not thinking about the sources of our beliefs, it somehow “feels” natural to think of legal writing as a constant, unchanging thing even though, intellectually speaking, it has perhaps undergone more changes than any other discipline within the legal academy in recent memory.

By contrast, numerous courses and doctrines have emerged in other disciplines within the legal academy but because these courses and doctrines somehow “feel” different to doctrinal faculty members, the essentialist trappings surrounding them cause many faculty members to treat them as if they have always existed and consider those other disciplines, along with the professors who

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<sup>61</sup> See Durako, *Second Class Citizens*, *supra* n. 13, at 577 (noting that “legal writing is the newest big addition to the law school curriculum”); cf. David S. Romantz, *The Truth about Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. Kan. L. Rev. 105, 107–108 (2003) (“[W]hile the pedagogy of legal writing and doctrinal courses may differ, both categories strive to inculcate students with the critical thinking skills required of lawyers and, thus, complement the other. As such, legal writing courses ought to enjoy the same significance and curricular importance as their doctrinal counterparts.”).

<sup>62</sup> See Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 Berkeley Women’s L.J. 1, 7–8 (2001) (providing a brief history of the development of legal writing programs in the legal academy and emphasizing the devaluation of female teachers in the field).

teach them, as part of their in-group. Law and Technology, Law and Economics, in fact, much of the "law and \_\_\_\_" catalog has developed only within the last two decades or so; nevertheless, because of the power of essentialism, they somehow "feel" as if they have always existed. Consequently, those disciplines are treated as canon disciplines despite the fact that Christopher Columbus Langdell would hardly recognize the doctrinal course catalog of any twenty-first century law school.

The relevant focus of analysis here is not merely to recognize and call attention to the inherent similarities between, for example, law and economics and legal writing; as stated earlier, when it comes to groups, the facts are irrelevant. Rather, the point is to understand just why it is these two disciplines somehow "feel" different to members of the doctrinal academy such that they develop differing essentialist feelings for these otherwise similar emerging disciplines. When this analysis is undertaken, two factors emerge. Each will be discussed in turn.

#### *A. Differing Approaches to Teaching the Relevant Subject Matter*

In her study of the various approaches to teaching legal writing, Debra Moss Curtis addressed major categories of both teaching and course design and applied them to the law school context.<sup>63</sup> Most doctrinal teachers, she found, focus on one approach—the "formal" approach—to the subject matter, stressing content and theory. In contrast, many legal writing teachers teach pursuant to the "demonstrator" model, which focuses on the "ability to do" rather than "knowing about," or the "facilitator" model, which stresses the primary importance of skills over content.<sup>64</sup> As a result of the choice of pedagogical method, the classroom role of the typical doctrinal teacher is quite different from that of the legal

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<sup>63</sup> The four categories of course design are (1) the formal approach (focusing on content with the expectation that students will learn and organize these ideas in a particular order); (2) the demonstrator approach (focusing on performance of certain standards by students, with "clearly defined steps and through situations based on the practical field"); (3) the facilitator approach (focusing on skills rather than content with the goal being to teach the student how to learn a particular subject rather than teaching them the subject itself); and (4) the delegator approach (focusing on "the personal growth of students, rather than on specific content, procedures, or skills," where the approach is to start students "on the process of working through problems and situations that model a desired end result"). Curtis, *supra* n. 27, at 475–476, 479.

<sup>64</sup> *Id.* at 475–477; see also Romantz, *supra* n. 61, at 108.

writing teacher. In many doctrinal classes, the teacher plays the role of the all-knowing sage, replete with a store of knowledge students cannot hope to ever match but perhaps, if they pay attention, can possibly tap. In many legal writing classes, however, the teacher plays the role of a coach, one who is more experienced and knowing than his or her students but not necessarily more inherently talented.<sup>65</sup> These different approaches lead to different feelings. When a doctrinal professor sees a legal writing professor, she sees somebody different from herself, as the legal writing professor's role is quite different from hers. This, in turn, leads to the essentialist belief that not only is her legal writing colleague different but always has been and always will be. It is not a large step from this to the "ghettoization" of legal writing as a whole as something different and therefore inferior.<sup>66</sup>

*B. Differing Approaches in the Makeup and  
Selection of Legal Writing Teachers*

Of course, different teaching styles cannot account for everything. Depending on the nature of a law school's review process, many doctrinal teachers will not have observed a legal writing class and would not know, at least first hand, of these pedagogical differences (although the "feeling" that legal writing classes are, in and of themselves, somehow "different" likely still attaches). So there must be more to it. And there is. Despite the radical metamorphosis in the composition of legal writing faculties over the past two-plus decades, the changes taking place within the legal writing professorate are, to a large degree, occurring outside the traditional faculty "feeder" schools—those elite schools most often tapped to provide the next generation of law teachers.<sup>67</sup> As a result, because most doctrinal faculty members, even those more recently appointed, graduated from schools with antiquated legal writing programs, the perception persists that the teaching of, and status accorded to, professors of legal writing have somehow remained a constant when in reality they have been constantly evolving.

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<sup>65</sup> *Id.*

<sup>66</sup> See generally Durako, *Dismantling Hierarchies*, *supra* n. 13; Durako, *Second Class Citizens*, *supra* n. 13.

<sup>67</sup> See Neumann, *supra* n. 31, at 317 tbl. 4. The twelve schools identified as "feeder" schools in Neumann's article are: Yale, Harvard, Chicago, NYU, Columbia, Stanford, Berkeley, Michigan, Duke, Georgetown, Virginia, and Pennsylvania.

Approximately 47% of all tenured and tenure-track teachers graduated from the twelve traditional "feeder" schools.<sup>68</sup> Of these, ten (as of 2003) have legal writing programs that lag behind the current norms in the field.<sup>69</sup> Given this reality, it is no wonder that legal writing "feels" as if it has always been different and inferior to the graduates of these law schools. In their experience going back to their days as law students, it always has been. Moreover, the treatment of women in these feeder schools is likewise relevant to the essentialist feelings of many current doctrinal faculty members.<sup>70</sup> Because we group quickly and unconsciously, and because gender is such a defining characteristic, it is easy to see how a doctrinal faculty member's "kind reading" of any faculty segregates the doctrinal "us" from the legal writing professorate's "them" and how graduates of feeder schools will have some basis to believe that, largely owing to their own experiences as students, things have always been this way and will just as naturally continue along the same path in the future. For in their experience as students, they have been exposed to two realities: relatively few women holding high status teaching positions and legal writing programs that truly are inferior to their doctrinal counterparts. It is no wonder that as teachers, when presented with legal writing programs dominated by women, they would similarly see them as inferior despite the reality that in the school in which they now teach, the makeup of the legal writing program may be quite different than that with which they were accustomed as students.

A further illustration of this phenomenon comes from the fact that newer law schools appear to experience much less essentialism with regard to legal writing than their more established coun-

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<sup>68</sup> *Id.* at 318.

<sup>69</sup> See Susan P. Liemer & Jan M. Levine, *Legal Research and Writing: What Schools Are Teaching, and Who Is Doing the Teaching (Three Years Later)*, 9 *Scribes J. Leg. Writing* 113, 135–161 (2003) (identifying Berkeley and Michigan as the two exceptions). Six of these schools (Yale, Columbia, Harvard, Georgetown, Virginia, and Pennsylvania) had programs still taught primarily by students; three others (Chicago, NYU, and Stanford) ran "capped" programs; and one (Duke) considers its legal writing faculty to be something less than full-time law teachers, classifying them at three-fourths time rather than full time, and does not permit them to attend faculty meetings. *Id.*

<sup>70</sup> See Neumann, *supra* n. 31. Approximately 70% of all legal writing teachers are female; however, Harvard, the leading feeder school, regularly admits significantly fewer women to its law school than the national average (41% versus 45.2%). *Id.* at 319 tbl. 5. In addition, only 22% of female faculty members teaching at these schools are either tenured or on the tenure track (as opposed to the 61% who are on something other than the tenure track). See *id.* at 322 tbl. 7 (furthering the feeling that, due simply to the gender makeup of most legal writing faculties, they are something different and, therefore, something inferior).

terparts. Although there are several reasons why teachers of legal writing are considered part of the in-group at these schools, one of them is quite possibly because these newer schools hire from outside of the traditional feeder schools at a much greater rate.<sup>71</sup> Because the doctrinal faculty members come from schools where the percentage of women in tenured or tenure-track positions is much higher, and where teachers of legal writing are accorded more job security and respect, they do not bring to the legal academy essentialist feelings of legal writing as a distinct out-group. With regard to these doctrinal faculty members, the fiction of essentialism is eroded, at least somewhat.

## V. THE IMMORAL “OTHER”

Inexorably tied to the grouping of human kinds is our determination of the bounds of morality. We “feel” that people who are like us are moral and that people unlike us are not.<sup>72</sup> In this sense, morality contributes to the groupings we make.<sup>73</sup> Consequently, if an individual’s feelings regarding the morality of a group can be changed, it is very likely that he or she will come to see an out-group as an in-group and vice versa. In fact, we often sense similar kinds based on nothing more than our feelings of morality. As such, the power of morality is very strong, perhaps the strongest indicator of human kinds that exists.

Morality is, however, completely arbitrary. Studies show that morality is not based on objective factors but rather, on whether we “feel,” on a subconscious level, that the focus of our attention is part of “us” or “them.”<sup>74</sup> In short, “what is not us is not normal.”<sup>75</sup> As a consequence, many of our feelings regarding “right” or “wrong” are more accurately feelings regarding “us” or “them.”<sup>76</sup> People who are with us are inherently moral; people who are not are inherently immoral. Although, on an intellectual level, this

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<sup>71</sup> See Mitchell Nathanson, *Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor*, 11 *Leg. Writing* 329, 353 (2005). The article cites a study that found that less prestigious schools (defined as schools ranked below the national top 25) are six times as likely to hire doctrinal candidates from outside of these same top 25 schools as their top tier counterparts.

<sup>72</sup> See Berreby, *supra* n. 3, at 191–192.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 200.

<sup>75</sup> *Id.*; see also Hewstone, *supra* n. 30, at 324 (noting that typically, stereotypical perceptions of out-groups are often negative).

<sup>76</sup> See Berreby, *supra* n. 3, at 200; Hewstone, *supra* n. 30, at 324.

tautology should strike us as offensive, it nevertheless feels natural.<sup>77</sup> In the end, human kinds line up not merely as “us” and “them” but as “good” and “bad” with “good” synonymous with “us” and “bad” synonymous with “them.”<sup>78</sup>

Issues of morality come into play with regularity when the relationship between the legal writing and doctrinal professorates is analyzed. To each group, it is not merely that the other is somehow different but that it is actually immoral or “bad” in some way. These feelings, in turn, make the members of each group feel secure in their distance from the other, justifying their participation among their group as well as the ostracization of the other. Although these feelings of immorality may not be a problem when analyzed from the perspective of the doctrinal faculty (after all, they have no desire to join the legal writing professorate), such feelings are a tremendous obstacle for the legal writing professorate who, despite these feelings, desire inclusion in this larger faculty “group”; it is, after all, difficult to convince a group to let immoral or “bad” members join in. Naturally, there will be stiff resistance to this push. The legal writing community feels this resistance with regularity.

Evidence of the “badness” tagged to the legal writing community comes from many avenues. First, the term “legal writing” itself is a negative one in that, in many circles, is synonymous with bad writing.<sup>79</sup> Legal thinking, on the other hand (and in the minds of many within the doctrinal community) is considered a good thing.<sup>80</sup> Thinking like a lawyer is to be commended; writing like one is to be ridiculed. The teachers of each discipline similarly line up along these “good” versus “bad” lines. Moreover, the greater legal academy’s persistent association of legal writing with academic support is another unconscious recognition of how this group negatively perceives the out-group.<sup>81</sup> In many law schools,

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<sup>77</sup> See Berreby, *supra* n. 3, at 200.

<sup>78</sup> *Id.* at 199.

<sup>79</sup> See Kathleen Elliot Vinson, *Improving Legal Writing: A Life-Long Learning Process and Continuing Professional Challenge*, 21 *Touro L. Rev.* 507, 520 (2005).

<sup>80</sup> *Id.*; see also generally Romantz, *supra* n. 61.

<sup>81</sup> Mitchell Nathanson, Integrated Office Survey (conducted Jan. 16–31, 2006, on the Legal Writing Institute listserv) (results on file with Author). In this survey, one respondent highlighted this presupposed relationship, noting that “it has . . . been suggested that I would naturally have a close working relationship with our academic support person, unlike the students’ other professors who never speak to her. I’m not sure I’ve ever understood why that relationship should be different, unless you think of legal writing as more like academic support, which I think some people probably do.” *Id.*

the natural pool from which to tap academic support administrators is the legal writing faculty. Although, at first glance, this connection might “feel” natural, upon examination, it might be asked just what the connection between these two fields is. Academic support is a remedial program, dealing with students who are struggling with many aspects of legal education, in writing as well as in their grasp of the legal doctrines discussed in their doctrinal classes. It makes just as much sense to tap a teacher of contracts, for example, for the job as someone who teaches legal writing who has no specialized skills in reaching struggling students. However, to the larger legal academy, the connection “feels” natural because, to them, both legal writing and academic support deal with students with problems (“bad” students).

This “good” versus “bad” paradigm plays out even more when one considers traditional ivory tower opinion of the practice of law. Historically, members of the legal academy demonized it, considering it to be immoral in many ways—ways that the study of the theory and concepts of it was not.<sup>82</sup> Today, this feeling may be less persistent, but still, it remains to a degree if one considers the scholarly topics of interest of many doctrinal faculty members (topics of practical concern are perennially at the bottom of the list).<sup>83</sup> This scholarly focus may impact the doctrinal faculty members’ perceptions of a segment of their faculty that has, as a whole, much greater practical experience and stronger ties to the practicing bar than they.<sup>84</sup>

In addition, a survey conducted in conjunction with this Article on the legal writing professorate’s sense of belonging within the larger legal academy (hereinafter the “integrated office survey”) unearthed additional examples of the “immoral other” at work.<sup>85</sup> Some respondents stated they believed their doctrinal colleagues

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<sup>82</sup> See Mitchell Nathanson, *Taking the Road Less Traveled*, 11 *Leg. Writing* 329, 358–360 (2005); see also Susan Liemer, *The Hierarchy of Law School Faculty Meetings: Who Votes?* 73 *UMKC L. Rev.* 351, 370 (2004).

<sup>83</sup> This was shown to be true among the top quintile of law reviews, which are the ones in which it is considered most prestigious for law professors to publish. See Michael J. Saks et al., *Is There a Growing Gap among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 30 *Suffolk U. L. Rev.* 353, 374 (1996).

<sup>84</sup> See Nathanson, *supra* n. 82, at 336–341. A comparison of a random sample consisting of doctrinal and legal writing professors demonstrated that, on average, legal writing professors arrive at their first academic positions with more than twice as much practical experience (defined as law firm, in-house, governmental, or public interest employment) as their doctrinal counterparts.

<sup>85</sup> Nathanson, *supra* n. 81.

blamed them whenever their students did poorly on their exams—believing that the cause of this underperformance was something the student picked up in their legal writing class. Others noted that they were blamed whenever student research assistants turned in work that demonstrated poor citation ability. Still others remarked that student complaints regarding classes were handled differently depending on whether the complaint was directed toward a doctrinal or legal writing class; if it was a doctrinal class at issue, the student would normally be told that there was nothing that could be done about it, but if it was a legal writing class at issue, the complaint was handled more seriously. The implication is that with regard to the doctrinal classes, the fault could not possibly lie with the inherently “good” professor; with the legal writing classes, however, the fault may very well rest with the “bad” professor.

Regardless of the sources for the allegations and assumptions, each has one thing in common: they have little or no factual basis. This is of little matter, however, as it is our natural tendency to demonize the “other,” to place morality tags on behaviors in order to justify our feelings towards ourselves and those around us.

#### VI. FROM “KIND READING” TO “MIND READING”: DISMANTLING THE “OTHER”

Because we see each other as kinds first, it is necessary to move beyond this superficial form of categorization if the makeup of any particular group is going to be altered. Thus, for the legal writing professorate to become fully integrated within the greater law faculty “group,” it must facilitate this more intimate form of perception.<sup>86</sup> At that point, the myriad differences between the two groups, which currently are highlighted, will fade into the background and eventually become invisible, much like the myriad differences that currently exist among members of the doctrinal faculty.<sup>87</sup> In short, the point is not that differences cannot exist, but

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<sup>86</sup> See Hewstone, *supra* n. 30, at 327. Pursuant to the “contact hypothesis,” contact between members of different groups will improve relations between them. Other theories (such as the social identity and interdependence-power theories) have challenged this simple hypothesis, however, and noted that some forms of contact succeed in merely further ingraining negative stereotypes. See Eberhardt & Fiske, *supra* n. 1, at 391. Pursuant to these theories, it is not merely contact but *the right kind* of contact that diminishes unwanted stereotypes. My view is that the contact engendered through integrated offices and, most particularly, voting rights, facilitates such forms of contact.

<sup>87</sup> *Id.*

rather, to get to the point where these differences are no longer seen as important markers that differentiate the legal writing professorate from the rest of the faculty.

There is much legal scholarship that focuses on the existence of the legal writing and doctrinal groupings and that approaches the issue on a rational, intellectual level, advocating for the acceptance of the legal writing professorate into the greater legal academy group, contending that because it is the “right” thing to do, it should be done.<sup>88</sup> These rationally-based arguments, however, require members of the desired group to overcome the impulses of their unconscious minds, to accept the legal writing professorate into their fold despite their feelings of difference at a level these people cannot verbalize or even recognize. Hence, this is asking the mind to do something it is not equipped to do. As such, it is asking the (nearly) impossible. Instead, as this Article has shown, the focus should be on the unconscious mind, with the goal being to invite “mind reading” so as to cause the differences between these groups to be ignored. Therefore, in order to achieve equality within the legal academy, the legal writing professorate cannot simply point out its virtues to its doctrinal brethren and wait for an invitation that will be a long time in coming, if it ever does. Rather, it must succeed in persuading the greater legal academy to not notice it at all, at least as a distinctive, separate group.<sup>89</sup>

To the extent that lawyers and legal academics are, for the most part, not all that different from the general population,<sup>90</sup>

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<sup>88</sup> See e.g. Durako, *Second Class Citizens*, *supra* n. 13. Durako concludes her article by stating that “[t]he collection of isolated examples of unequal treatment produces a subtle pattern of bias that reflects poorly on legal education. Improving the status and salary of women legal writing directors is but a first step. Eliminating the status and salary gaps will begin to elevate women directors in the academy and women in the profession.” *Id.* at 586. If only it were that simple.

<sup>89</sup> Berreby, *supra* n. 3, at 191.

<sup>90</sup> It may be the case that lawyers and, more particularly, law professors are something of an anomaly. For instance, much of the training of a lawyer is an attempt to overcome these natural tendencies to seek out similarities in that “thinking like a lawyer” stresses the importance of seeking out differences and distinctions. Throughout law school, students are taught to break things down and to be on the lookout for minute differences. Whether this sort of training has any effect on the unconscious mind’s grouping activity is something that requires further study. Moreover, at least some of the anecdotal information received in response to the integrated office survey, *supra* n. 81, indicates that academics, and more specifically, law professors, may likewise be more prone than the general population to search for differences than similarities when sizing up other individuals. More than a few respondents remarked that they did not believe that their fellow faculty members treated anyone as equals—as similar kinds—regardless. One replied that at her school, faculty members kept to themselves to such a degree that she wondered “whether any of them are truly integrated into the faculty or even society for that matter.” Another re-

their unconscious groupings can be altered based upon nothing more than changed feelings toward those currently categorized in their out-group. And this can be done, as discussed above, through the process of moving from kind to "mind reading." If the barriers to this more intimate form of perception can be removed, than the roadblocks of essentialism and immorality of the other will likewise be less enduring.

The following two subsections of this Article will discuss two ways to go about such a change. Of course, this list is not exhaustive; there are myriad ways to foster "mind reading." However, the two highlighted here (the granting of voting rights and the integration of office space) are effective initial steps in fostering the type of individual interaction between group members necessary to encourage, in this case, members of the doctrinal professorate, to perceive members of the legal writing community as individuals and not merely a collective "thing made of people" with a common fate that thereby signals the triggering of their unconscious feelings of "the other."<sup>91</sup> Through this process, the "looping effect of human kinds" can be avoided wherein the doctrinal professorate becomes persuaded that the legal writing professorate is in fact a distinct kind and then acts upon this feeling in ways (by offering reduced salary and employment protection) that give this artificial difference "teeth."<sup>92</sup> Instead, these avenues discussed below encourage "mind reading" that, in turn, is more likely to result in feelings of ease and acceptance, feelings among members of the doctrinal faculty that they are among members of their group whenever interacting with their legal writing colleagues.<sup>93</sup> These feelings will then, in turn, cause them to feel as if they are among good, moral people.

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marked that she believed that her status as a non-tenure-track faculty member had very little to do with her feeling of belonging, noting that many on her faculty "think they're better than almost anybody." Perhaps people self-select the academic life (to the extent that they have the academic pedigrees to do so) and the status both attached to it externally as well as the rigid hierarchical nature of it from within, precisely because their internal desire for "us-ness" is much weaker than those from among the general population. Again, this is an issue for further study.

<sup>91</sup> See Berreby, *supra* n. 3, at 132.

<sup>92</sup> Berreby, *supra* n. 12, at 3.

<sup>93</sup> See Hewstone, *supra* n. 30, at 329.

*A. Voting Rights*

An example of the continuous evolution of legal writing programs throughout the country (and contrary to the essentialist assumption) comes from examining the issue of voting rights. From something that was all but unheard of in the 1970s, today almost half of all legal writing faculties are permitted to vote, to some extent, during faculty meetings.<sup>94</sup> Apart from being an obvious status indicator on a rational level, voting, and the activities that surround it, sends signals to the unconscious mind, encourages “mind reading,” and works to effect change in perception on a much deeper level (where such change, if it is to have a significant impact, must occur).

On a rational level, the status attached to voting is obvious. Voting, in an academic setting just as in the world at large, is power, and those who have it are perceived as superior in status to those who do not.<sup>95</sup> Beyond these more objective observations, however, voting is much more significant on a subconscious level and it should be sought for these reasons rather than for power alone. For the determination of who votes is, at its core, a determination of who is considered competent to govern<sup>96</sup> and those considered competent to govern will be those who are believed to be good, moral people. Conversely, those denied this opportunity are inherently considered something less. Thus, in those schools in which the members of the legal writing faculty are not permitted to vote, the “immorality of the other” is inherently demonstrated at each and every faculty meeting.

On another level, having the right to vote leads to additional interaction with members of the greater law faculty, which facilitates the “mind reading” necessary to overcome feelings of “otherness” toward this group. Voting invariably leads to back-room politicking on hot-button or close issues, which inherently necessitates more interaction between the two groups.<sup>97</sup> And more interaction leads to more opportunities for these members of the faculty to see the commonalities between these two groups rather than the dis-

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<sup>94</sup> See ALWD & Leg. Writing Inst., *2005 Survey Results* app. C-15 (2005) (available at [http://www.alwd.org/surveys/survey\\_results/2005\\_Survey\\_Results.pdf](http://www.alwd.org/surveys/survey_results/2005_Survey_Results.pdf)); see also Liemer, *supra* n. 82, at 360.

<sup>95</sup> See Liemer, *supra* n. 82, at 385.

<sup>96</sup> *Id.* at 363.

<sup>97</sup> *Id.* at 372–373.

tinctions.<sup>98</sup> As such, it is necessary for the legal writing community to foster opportunities wherein the rest of their faculties have the ability to encounter them as teaching colleagues and not merely as legal writing professors—a distinct group with the dreaded common fate.

The integrated office survey confirms these conclusions to a degree, with the qualification highlighting a crucial point about the nature of the legal writing faculty's feelings of "otherness." Although the survey focused solely on the value and effects of integrated offices, several respondents volunteered information on voting rights as equally or even more relevant to feelings of inclusion on their faculties. One stated that, despite having integrated offices, she did not feel "truly integrated" with her doctrinal faculty because she is unable to vote. She also stated that she was not included in the discussion of law school topics for the same reason. Others voiced similar concerns. However, some respondents stated that even though they did have a vote, they still were not consulted as often as their doctrinal colleagues. One respondent wrote,

Lately there seem to be little cabals of faculty developing for and against various changes that have been proposed, whether it is to curriculum or a hiring decision or relocation of law review space. . . . No one from any of these little groups trying to garner support for their position has ever come to talk to me or the other writing instructor seeking our support or finding out where we stand, though we will be voting on these issues. . . . Two votes could make a difference; I just don't think we're on the radar screen.

As this respondent has indicated, the process of dismantling the "other" is more complex than a simple, rational case of cause and effect. Instead, because these feelings are hidden within the unconscious, most likely a combination of factors contributes to the feeling of "otherness." It is not as simple and straightforward as identifying a problem on a rational level, fixing it, and then assuming that the problem will be resolved.

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<sup>98</sup> See Hewstone, *supra* n. 30, at 329; see also Eberhardt & Fiske, *supra* n. 1, at 387. Eberhardt and Fiske note that, although under Social Identity Theory not all contact leads to a breakdown in stereotypes, certain types do. Primarily, contact that is outcome dependant, "that is, wanting resources controlled by another party," leads to "potential individuation." Voting is classically outcome dependant in that it is not possible for one to get what one wants without cooperation (favorable votes) from others. This form of required dependency is precisely what, under Social Identity Theory, would lead to a breakdown in stereotypic thinking.

Voting rights are at least an initial piece of the puzzle, however (and, given the increase in legal writing faculty voting rights through the decades, apparently one that can be reasonably achieved despite the essentialism and immorality of the other that currently exists). Activities at faculty meetings send both conscious as well as unconscious cues to those in attendance with regard to who is a member of “us” and who is a member of “them.” Two respondents to the survey noted the reality at some law schools that non-voting members are required to physically get up and leave in the middle of meetings to allow the voting members to conduct their vote outside of their presence. There is not a clearer visual cue identifying a collection of individuals as a distinct outsider group with a common fate than this one.

### *B. Integrated Offices*

Historically, legal writing faculty offices in many schools have been lumped together and segregated from those of doctrinal faculty members while other first year faculty offices were not similarly situated together (i.e., torts professors next to torts professors and contracts professors next to contracts professors, etc.) and apart from the general faculty population.<sup>99</sup> As for why this segregation might exist, several explanations lead to the unmistakable one: legal writing professors “feel” different so are therefore treated differently—the looping effect of human kinds in action. The fact that so many legal writing faculty offices are not merely segregated but actually grouped together further ingrains this feeling: that the legal writing faculty is a “thing made of people” and, as such, a distinct human kind. Although the traditional argument against such classification and segregation—the lessening of prestige and power among the legal writing professorate—certainly has merit on its own right,<sup>100</sup> the subconscious effects of this form of segregation are of more relevant concern.

Initially, segregation, like the withholding of voting rights, leads to reduced opportunities for interaction with members of the doctrinal faculty; hence, it frustrates the “mind reading” required to alter the nature of the groups that presently exist.<sup>101</sup> Here

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<sup>99</sup> Durako, *Dismantling Hierarchies*, *supra* n. 13, at 255–256.

<sup>100</sup> *See id.* at 257–258.

<sup>101</sup> *See* Liemer, *supra* n. 82, at 385. Here, however, the dependence considered so important under the Social Identity Theory is absent.

again, the integrated office survey confirmed these assumptions. Many respondents remarked how, regardless of the status of the people contained within the actual offices themselves, interaction among individuals in offices situated closely together was greater than among those situated further apart. In at least one school, the offices of the legal writing faculty were located on a separate floor from the rest of the faculty offices. This separation resulted in minimal interaction between these two groups. However, among those situated together, informal lunch groups and impromptu discussions on both law school and other issues was reported to be quite frequent. One respondent put it best when she said, "to reverse an old cliché, in sight, in mind." This integration led more than one respondent to conclude that he or she felt "part of the team," an indication that in these schools, perhaps, a new group was in the process of emerging. Another respondent stated,

Yes, I do regularly interact with other faculty members. I am always asked to join the "lunch group," as are other members of the faculty who teach writing. . . . I discuss scholarship with anyone who wants to listen, and I often discuss non-work issues. Regarding visiting, I always visit other offices, and members of the doctrinal faculty often visit my office. I really do feel part of the "team."

The use of the word "team" was not uncommon in the survey responses.

Other responses were similarly indicative of the dissipation of the legal writing "group" and the emergence of a new, more inclusive faculty "group" as a result of integrated offices.<sup>102</sup> One respondent noted that he felt that his merit as a teacher and scholar was judged by the same criteria as the rest of the faculty—an indication that essentialism did not predominate in his school. Another provided a particularly illuminating response;

I think the biggest benefit to integration has been that the distinctions are largely made on more "objective" criteria (i.e., do I publish, how well-received is it, how am I perceived as a teacher, etc.), *not* on the fact that I teach legal writing instead of say, Torts.

Of course, the criteria described by this respondent are no more "objective" than any other. Instead, these are merely new classifications of visible differences among members of a particular hu-

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<sup>102</sup> See Schneider, *supra* n. 9, at 426.

man kind. What is significant about this respondent's remark is that the old classification of differences (legal writing teacher versus doctrinal teacher) had dissolved. Because, in this particular school, legal writing teachers no longer "feel" different from members of the doctrinal faculty, the very real (and similarly "objective") differences between these two groups are no longer seen because they are no longer being searched out. Within this school's one human kind (law teachers), a new set of differences emerge and become visible in order to resegment the group into subsets within the larger group.<sup>103</sup> Because this set of differences is being applied to members of the legal writing faculty along with members of the doctrinal faculty, the new bases for resegmentation "feel" objective. On closer scrutiny, of course, they are as arbitrary as any other.

Integrated offices, just like voting rights, are not a cure-all. Despite the increased interaction between groups, several respondents still felt as if they were members of the out-group in relation to their doctrinal colleagues. One respondent noted that he felt that he was perceived to be something less of an equal by the rest of the faculty because the legal writing faculty at his school did not engage in scholarship. Another remarked that different titles for members of the legal writing faculty likewise contributed to this feeling, branding these members of the faculty as somewhat lower in the academic hierarchy—a distinct thing made of people. Another noted that not being able to serve on committees was similarly relevant to his feeling as an outsider. There were several responses that touched on these sorts of differences as relevant to the issue of integration.

All of these responses are indicative of how the mind operates in classifying our interactions and creating order in our lives. We are constantly testing others to see what lines up with us and what does not.<sup>104</sup> The more a person lines up with us initially, the easier it is for us to graduate from "kind reading" to "mind reading." Thus, those who somehow "feel" different to us will be subject to greater scrutiny as additional differences will be sought to justify these feelings (differences in title, committee work and scholarship, for example). However, regardless of our initial reaction to a person, if daily interactions persist, the differences we initially perceive will become less visible as we move on to a more intimate

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<sup>103</sup> *Id.*

<sup>104</sup> See Berreby, *supra* n. 3, at 214–215.

relationship with this person.<sup>105</sup> Because voting rights and integrated offices foster this type of interaction, they are helpful first steps in altering the makeup of the groups that presently exist in many law schools. They will not, however (as the survey results indicated), solve the problem alone. They are means to an end, not the end themselves.<sup>106</sup>

## VII. CONCLUSION

The intent of this Article is to demonstrate a better way of righting the multitude of wrongs afflicted upon the legal writing academy. The traditional method of attack—based upon rational, conscious thought, that urges members of the greater legal academy to initially recognize and then treat members of the legal writing professorate more fairly—however noble in effort, is ultimately doomed to failure because of the unconscious reasons and causes underlying how we go about categorizing people. Once members of an in-group sense the presence of an out-group, they will, unconsciously and for reasons they themselves are not aware of, seek to justify their feelings of “otherness” toward this group and will, without fail, find them. The forces of essentialism and the immorality of the other, when combined with the reality that differences exist between any groupings of individuals make this response inevitable. Instead, it is more effective to convince the greater legal academy that the grouping of “legal writing professors” does not exist at all, or at least no more than the groupings of “contracts professors” or “property law professors.” And this change must take place on the subconscious level. It cannot take place anywhere else.

Thus, it is critical that, when considering reform in any legal writing program in any given law school, attention be paid to the order in which the steps to equality are taken. Demanding equality in salary at the first approach is a recipe for failure in those

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<sup>105</sup> This is true only to a degree, however, and it depends on which theory one chooses to believe. Under the Contact Theory, see Hewstone, *supra* n. 30, interaction is all that is required; under the Social Identity Theory, see Eberhardt & Fiske, *supra* n. 1, the contact must be of the proper kind. Regardless, the type of interaction discussed herein would seem to be satisfactory under either theory.

<sup>106</sup> Of course, the process of negotiating for integrated offices and voting rights will very well call to attention to the differences among doctrinal and legal writing professors and may result in a further entrenchment of these distinct groups. However, any integration setbacks caused by these acts could be outweighed in the long run by the increased interaction between members of these two groups over time.

schools where doctrinal faculty members “feel” differently towards members of the legal writing faculty. As a result, those who “feel” a difference will always be able to justify the differences in salary based on perceived differences between the two groups. Instead, the better approach is to first seek those areas of reform that place the two groups in greater contact with each other. Voting rights and integrated offices are two such examples but there are many others. Once these initial steps are completed, the feelings of “otherness” will lessen, perhaps to the point where one day, doctrinal faculty members will wonder why it was that some of their colleagues were ever treated differently than anyone else.