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Bah, Humbug to the Bleak Story of Women Law Faculty: A Response to Professor Neumann

Dan Subotnik

[T]hat discrimination or bias can be inferred from statistical inequalities . . . is the reigning *non sequitur* of our times, both intellectually and politically.¹

[We must] relegate the national discussion of . . . gender tensions so that we can get past the Catch-22 in which merely talking about it is considered an act of war.²

Is a callous patriarchy keeping women law professors down? Or are too many women avoiding the necessities for success in legal academia? A glance at data from Law School Past and Present begins our inquiry. In 1965 women represented 4 percent of the law school student population;³ today that datum is 50 percent. Making up less than .5 percent of tenure-track law school faculty in 1960,⁴ today they are 22 percent of professors, 46 percent of associate professors, and 48 percent of assistant professors.⁵ The story of women in legal education may well be the greatest story of group professional success ever told.

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1. Thomas Sowell, *The Quest for Cosmic Justice* 62 (New York, 1999).
2. Patricia Williams, *The Rooster's Egg: On the Persistence of Prejudice* 40 (Cambridge, Mass., 1995).
3. Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 Temp. L. Rev. 799, 801 (1988).
4. *Id.*
5. See Richard A. White, *Ass'n of Am. Law Schools Statistical Report on Law School Faculty and Candidates for Law Faculty Positions 1999–2000*, Table 2, at <www.aals.org/statistics/T2A.htm>. If anyone objects to these developments, he is awfully quiet about it.

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Is it time to celebrate? Apparently not.⁶ Feminist scholars have complained bitterly of “a hostile learning climate” for women law students.⁷ Highlighting the decline in the rate of new women assistant professors for the first time in six years,⁸ they have warned of a “glass ceiling” in hiring and tenure.⁹ They have pointed to women’s predominance in low-prestige, low-benefit positions and their relative scarcity in dean positions.¹⁰ A teacher of female jurisprudence has concluded “that law schools . . . favor men over women in almost every way imaginable.”¹¹

A number of explanations have been offered for the remaining gap between male and female law faculty.¹² Students force women academics to adopt teaching personae that are alien to them.¹³ Students not only evaluate female faculty more harshly than male faculty, but they also measure women according to wholly irrelevant criteria.¹⁴ So great is the burden on women to function as men that Lani Guinier adopts as an epigraph for her work Audre Lorde’s famous query: “Am I to be cursed forever with becoming someone else on the way to myself?”¹⁵

Among recent critiques of the law school gender climate for faculty women, Richard Neumann Jr.’s is the most comprehensive, and his data and conclusions are the principal focus of this piece. That women often do not position themselves for success in legal academia is one of the dramatic lessons readers might take from “Women in Legal Education: What the Statistics Show.”¹⁶ Not that Neumann draws that lesson. Providing a raft of data on male-female differences in hiring of tenure-track law faculty, tenure rates, hiring of legal

6. Marina Angel’s grudging assessment is typical: “My 1988 study of women in legal education showed that the status of women was gradually improving. On the surface, it still appears that there has been constant progress. A more careful view proves otherwise.” *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 *J. Legal Educ.* 1, 1 (2000).
7. Lani Guinier et al., *Becoming Gentlemen: Women, Law School and Institutional Change* 57 (Boston, 1997).
8. The rate dropped from an average of 51.7 percent in the period 1994–99 to 48 percent in 1999–2000. See White, *supra* note 5.
9. See Angel, *supra* note 6, at 1.
10. See Richard Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 *U. Pa. L. Rev.* 537, 548 (1988); Angel, *supra* note 3, at 802.
11. Morrison Torrey et al., *What Every First-Year Female Law Student Should Know*, 7 *Colum. J. Gender & L.* 267, 309 (1998).
12. Lani Guinier and coauthors have complained about the mode of teaching, the emphasis on winning, and the sexism of male students in law schools. See Guinier et al., *supra* note 7. If these authors are on target, a life in the academy must be among the last things successful women law students should want.
13. See Kathleen S. Bean, *The Gender Gap in the Law School Classroom—Beyond Survival*, 14 *Vt. L. Rev.* 23 (1989).
14. See Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 *Yale J.L. & Feminism* 334 (1996).
15. See Guinier et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 *U. Pa. L. Rev.* 1, 2 (1994).
16. 50 *J. Legal Educ.* 313 (2000). Page references will be in parentheses in the text.

methods faculty, and decanal appointments, he concludes that women are “greeted, at best, with ambivalence” (352).

Here is Neumann’s first finding: “[T]he statistics show that women are not applying for tenure-track jobs at rates that would equal their presence in the cohorts from which law faculty are initially hired” (313). It is, of course, possible that a wretched law school climate for women faculty is responsible for the fact that, according to the Faculty Appointments Register, women have not applied for tenure-track jobs in proportion to their numbers among law school graduates (341).¹⁷ But surely a concomitant analysis of what happens to the women who do apply is essential for any fair picture of the law school hiring market. It turns out that for the last seven reported years, the job success rate for female tenure-track FAR applicants is marginally higher than that of men (342), and the fact that women are getting about 43 percent of new tenure-track and visiting jobs means that they are getting these jobs other ways.¹⁸ For Neumann, however, women’s application rate in the Faculty Appointments Register is enough to tell the whole story.

Neumann then addresses faculty retention and tenure. Here is his Table 17 (337).

Table 17
Tenure Rates for Men and Women Hired on Tenure Track in 1990 and 1991, Through the 1997–98 Academic Year^a

	<i>Tenured</i>	<i>Not tenured or no longer at an AALS school</i>	<i>Totals</i>
Women (199) ^b	61%	39%	100%
Men (239)	72	28	100

^aRichard A. White, Preliminary Report: The Promotion, Retention, and Tenuring of New Law School Faculty Hired in 1990 and 1991 (unpublished manuscript). White, the AALS statistician, collated this data from the questionnaires law faculty fill out every spring for AALS directories.

^bNumbers in parentheses are raw numbers.

Does the fact that 72 percent of men but only 61 percent of women gained tenure mean that women were being forced out? There are several likely reasons for that disparity that militate against such a grim interpretation. Among them are two that many women scholars have not hesitated to point out. First, women bear children and are their primary caretakers. The implications of these realities for women in law firms, if not legal academia, are clear. The reason most frequently cited by women for leaving their law firms is “the difficulty of sustaining a law firm career once one has children.”¹⁹ Second, women are far more likely than men to follow their spouses geographically on

17. In recent years women have made up about 35 percent of such applicants.

18. I derive the 43 percent figure from White, *supra* note 5, at Table 4, at <<http://www.aals.org/statistics/index.html>>.

19. See, e.g., Suzanne Nossel & Elizabeth Westfall, Presumed Equal: What America’s Top Women Lawyers Really Think About Their Firms at xix (Franklin Lakes, 1998). It would be nice to hear from women law academics as to why they resigned, but apparently no such study has been undertaken.

their career paths.²⁰ So it should not be surprising that 43 percent of women but only 32 percent of men either left law teaching or moved to another school. If the decision to leave is the product of rational and free—if painful—choice, surely we need a more nuanced notion of institutional “ambivalence” than the simple fact of a disparity.²¹

To the extent that there is a gap in the tenure denial rate, a fuller discussion is required.²² In her new book, *Unbending Gender: Why Family and Work Conflict and What to Do About It*, Joan Williams urges employers to create a part-time track for parents, with full proportionality of benefits, to accommodate their extra burdens of domesticity.²³ She is thinking mostly of women, of course, for 90 percent of women become mothers at some point in their lives (9), she tells us, and women provide 80 percent of the childcare and 67 percent of the housework (2); 88 percent of women believe it is their responsibility to care for their family (31). These data, she adds, help explain why one-third of fathers work at least forty-nine hours per week outside the home while two-thirds of mothers (of children under eighteen) who are themselves between the ages of twenty-five and forty-five work less than forty hours per week (2) and why virtually no custodial mothers work substantial overtime (71). Relationships between spouses, according to Williams, would appear to be no different in academic families.²⁴ Women see themselves as “co-breadwinners or committed workers” in only 20 percent of dual-career families (27).

Williams announces boldly: “It is time to admit that women as a group do not perform the same as men as a group when jobs are designed around an ideal worker with men [having] access to a flow of family work most women do not enjoy” (272).²⁵ If Williams is right that women cannot be competitive, *if*—for a combination of reasons—women cannot normally become the “ideal workers” who earn their promotions, then tenure rates for women could be expected to be *somewhat* lower than those for men.²⁶

20. Joan Williams, What Stymies Women’s Academic Careers? It’s Personal, *Chron. Higher Educ.*, Dec. 15, 2000. Note the focus on women academics.

21. See Nossel & Westfall, *supra* note 19, at xviii (reporting that women associates admitted that their chances of promotion were equal to those of men “provided they [were] willing and able to put in the long hours and enormous energy”). No data are provided on why women academics left their schools.

22. For purposes of this discussion it is assumed that the differential is significant.

23. New York, 2000. Page references in parentheses in this paragraph and the next are to Williams’s book.

24. See Williams, *supra* note 20.

25. Ideal workers “not only must be able to do good work but also must be able to do it for fifty to seventy hours a week. Few mothers can do this.” See Williams, *supra* note 23, at 5. I do not suggest an identity between the available time people have for work and hours actually worked. A married person may well work more hours than a single person because her life is more stable. Williams’s data and conclusions, however, suggest that the time gap is too great in the case of women with children.

26. I should make clear that I do not have enough information to judge whether women are the overall productive equals of men in law practice. If they are not the productive equals for some of the foregoing reasons, it is likely that any gap is smaller in academia where at least work hours are more flexible. I am not even sure how I would measure productivity. This is no place for a full discussion of the productivity matter; I raise the issue only to suggest the need for serious study of the implications of Williams’s argument.

If, moreover, women are aware that the gravity of domesticity limits their growth—and it is hard to imagine that they are not—will they not lower their professional sights accordingly? Yet here is where Neumann stakes out his strongest claim: “Perhaps the most stark finding is that *everywhere* in legal education the line between the conventional tenure track and the lesser forms of faculty employment has become a line of gender segregation” (314). What Neumann is referring to here is that women are overrepresented in low-status positions such as legal methods. Women do indeed represent almost 70 percent of legal methods teachers.²⁷ But is this a story worthy of Neumann’s and our despair? If regular teachers have stronger credentials than do legal methods teachers, and if legal methods teaching requires less commitment in time and energy (for example, less pressure to publish), might that not explain gaps in benefits? Big *ifs*, to be sure, but not necessarily insurmountable ones. To begin with, a recent study of legal methods teachers suggests that they may not have the same elite school and law review pedigrees as tenure-track faculty.²⁸ A woman director of legal methods for twenty years reports, moreover, that a great number of applicants for her legal methods slots have been women with young children who chose to leave their law firms in order to spend more time with their families.²⁹ Perhaps, then, a considerable part of the legal methods benefits gap is tied to legal methods teachers’ working substantially fewer hours at their jobs than tenure-track teachers—a surmise consistent with the fact that men (and presumably single women) spend substantially more time on the job than do married women with children.³⁰ In sum, the legal methods problem—like the hiring and tenure problem—needs a more subtle inquiry than Neumann gives it.

If, according to Neumann, the climate for women is disagreeable on the teaching side of legal education, it is atrocious on the administrative side. At the present time, he reports, women make up less than 13 percent of law school deans (323). Again, what is to be made of this datum? I’ve mentioned that women currently make up only 22 percent of full professors, the group from which most deans emerge. And since the average dean is probably older

27. See Angel, *supra* note 6, at 5.

28. Maureen J. Arrigo, Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs, 70 Temp. L. Rev. 117, 155 (1997). The normative value to be assigned such pedigree is, of course, another question entirely. For what it’s worth, I believe that such credentials should count initially for little, if anything, and for absolutely nothing beyond five years of academic work.

29. My source has asked to remain anonymous for obvious reasons.

30. According to a recent study, 45 percent of the gender wage gap is attributable to women’s family status. See Williams, *supra* note 23, at 15. Another survey reported recently of graduates of Harvard’s law, business, and medical schools that 70 percent of the women cut back on their hours after having children. *Id.* A colleague complains at this point that all my *ifs* constitute “reaching” on my part. My response, at least with respect to legal methods teacher compensation, is that legal methods teachers currently enjoy benefits much inferior to those enjoyed by regular faculty. As far as I can tell, notwithstanding the handwringing by legal methods teachers, there has been no engagement on that issue. It is not hard to imagine why; discussion of value and merit is not easy in polite company. Not facing the fundamental questions posed here, however, effectively precludes change, change which legal methods teachers may well deserve.

than the average full professor, one might reasonably expect female deans to represent about 12 percent of the decanal population. Given that women make up about 30 percent of tenured associate deans, it seems silly to hold that women are not welcome in the dean's office.³¹

Here again we need to know whether women apply for the jobs that are most demanding in time and effort, the jobs that keep them out of the house for large blocks of time, or whether they are opting for a balance in their lives between family and career in an environment where difficult choices must be made. Williams is clearly suggesting that the latter is the case. Looking at private law practice, where the money and prestige are presumably greatest, and citing a recent ABA study, Susan Estrich rebukes young women attorneys for their unwillingness to make the sacrifices that their seniors made to become partners.³² In law firms they "drop out in much higher numbers" than men; even women who could make it don't because they never signed up (12). And it is not only having children that causes women to do what they do: according to Estrich, too many women "simply don't want to get to the top" (249). Estrich urges young women to persevere and avoid stigmatizing the entire sex. "The message we are sending, very clearly, is that being a mother matters, and it does. But motherhood doesn't need a movement anywhere near as desperately as ambition does" (245).

We do not have to guess about what happens in decanal search processes. Last year I sent out questionnaires to some twenty-five law schools identified by the ABA as having recently undergone a dean search. Only five responded usefully. While one school reported that women made up 30 percent of the dean candidates, the corresponding percentage at the second school was 17 percent. The three other schools reported that "far fewer women than men applied," "it is extremely difficult to attract women and minorities," and "very few women did apply."³³ Here again, women may not be positioning themselves for advancement.

Neumann's disinclination to probe behind the numbers reflects acceptance of the proposition that, as Thomas Sowell puts it in my epigraph, "discrimination or bias can be inferred from statistical inequalities," a notion Sowell characterizes no less than as "the reigning *non sequitur* of our times, both intellectually and politically." Instead of expecting equality in all things, he tells us, we should expect inequality because diversity is the dominant condition on this planet, not sameness. "What is wholly unsubstantiated is the prevailing assumption that the world would be random or even, in the absence of discrimination or bias by individuals, institutions or 'society.'"³⁴ To

31. See White, *supra* note 5.

32. Sex and Power (New York, 2000). Parenthetical references in this paragraph are to Estrich's book.

33. The last datum was supplied by a female associate dean. All responses were very brief. We would presumably have more useful data to analyze here were it not for articles like those by Neumann and Angel, which in creating gender tensions increase the risk of litigation for respondents.

34. Sowell, *supra* note 1, at 63. In this paragraph and the next, page references in parentheses are to Sowell's book.

support this assertion Sowell cites a dazzling range of esoterica, such as that more than four-fifths of the donut shops in California are owned by people of Cambodian ancestry. Presumably few would ascribe a malignant cause to data of this kind. And yet, it is hard to deny, many of those who insist that diversity is good will insist with equal vigor, when faced with actual difference, that it is bad.

Sowell spells out a number of the factors making for difference among individuals, including intelligence, family literacy and discipline, birth order, age of population, and marital status (66). To illustrate the latter point, he reports that, as late as twenty years ago, long before "gender equity" became a major legal issue, women who had never married and had worked continuously since high school were actually earning more than never-married continuously working men (92). If Sowell is right, it would make no sense to accept the frequently asserted proposition that, because of difficulties in proving intent, statistical disparities in the areas of race and gender should be sufficient to prove discrimination.

Sowell focuses little of his attention on gender, but his datum regarding earnings of single women clearly suggests that career limitations experienced by women in the workplace are not the product of gender per se but of motherhood and marriage, in the context of which women have made hard choices that should be ascribed to their own agency, not to decisions made for them. This conclusion is consistent with the one reached, as we have seen, by Williams, that most married women with children cannot be "ideal workers." But if we listen carefully and honestly to women's voices, we will hear articulated a more encompassing and fundamental reason why women drop out of today's workplace disproportionately: they lack the psychological makeup for success.

"[M]any more women put on the camouflage to get by," writes essayist and novelist Anna Quindlen, "but at a certain point they say to themselves, *Work is what I do, but it's not who I am*. Whereas men are still really invested in a work-is-everything kind of thing."³⁵ Relational feminists may explain why. Men, they suggest, attempt to dominate their environments, while women seek to establish and deepen relationships with those around them. But if Coke is looking for an executive today, it surely cannot afford to hire someone suffused with an "ethic of care," a person not inclined to crush Pepsi under a rallying cry of "Pepsico delenda est." To be sure, there could be micro and macro advantages in a ladylike sharing of the marketplace, but such an arrangement is out of bounds on the playing fields of today's capitalism.

Nor are things much different in the legal arena. To remain in that game the top firms would seem to need attorneys who prefer taking the whole pot to splitting it, who are more disposed to destroy the competition than to bond with it. Elite law schools spare no effort in their unceasing and quixotic quests to establish themselves as Number One, and making oneself the best almost inevitably requires seeing others as competitors, if not enemies. If things were

35. Quoted in Elizabeth McKenna, *When Work Doesn't Work Anymore: Women, Work and Identity* 240 (New York, 1997).

otherwise, law schools would adopt the grade school practice of evaluating students on playing well with others. In intensely competitive situations, to sum up, relational women will bail out.

That women are predisposed to being relational is, of course, only one of feminism's principal theories. The classic response to relational feminism was formulated some years ago by Catharine MacKinnon: "Take your foot off our necks, then we will hear in what tongue women speak."³⁶ For MacKinnon, women's "ethic of care" is not "essential" or even self-selected; it is imposed upon them by men who will not allow them to participate as equals in public life. Hence the name generally given to the movement she helped found, *dominance feminism*. But even accepting the teachings of the dominance school, i.e., that women have been programmed by a male culture to be nurturing and to avoid competition, nothing changes for our purposes. *Why* a woman may not respond well to work demands can be of only marginal interest to a law firm or a law school, which has little power to reformulate either her personality or its own competitive setting.

I am not suggesting that feminists have ignored the issue of *choice*. Challenging landmark cases such as *EEOC v. Sears, Roebuck & Co.*,³⁷ commentators have rightly observed that a company or industry's culture can easily discourage women from considering a choice that may be legally theirs.³⁸ But women, as we have seen, now get 43 percent of the new tenure-track and visiting jobs in legal academia and represent 30 percent of associate deans with professor titles. Under these circumstances, the argument that women are an alien culture in law schools surely requires more than a showing of certain disproportionalities. Unless, of course, we want to write the central liberal notion of choice right out of our political theory.

Endocrinology and sociobiology may be no less helpful than psychology in explaining women's relationship to decanal and faculty positions.³⁹ For the noted anthropologist Helen Fisher, testosterone and estrogen are directly implicated in the inability of women as a group to match the success of men in the corporate world.⁴⁰ We might also consider one of the reigning academic clichés, that men and women have different reproductive strategies: never being secure in his fatherhood, the male's objective is to spread his seed as far and wide as possible. This would explain Midge Decter's famous observation about men's "undifferentiated lust," the desire to bond with the entire female

36. *Feminism Unmodified: Discourses on Life and Law* 45 (Cambridge, Mass., 1987).

37. 839 F.2d 302 (7th Cir. 1988) (holding that the substantial underrepresentation of women in commission sales work was the product of their "lack of interest" and not the company's discriminatory policy).

38. See, e.g., Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 Harv. L. Rev. 1749 (1990).

39. A colleague arm-twists me into conceding that this may not be saying much. On the other hand, if there is anything to pregnancy envy and sociobiology, it has to show up somewhere.

40. *The First Sex: The Natural Talents of Women and How They Are Changing the World* 47 (New York, 1999). Fisher cites sociologist Steven Goldberg, *The Inevitability of Patriarchy* (New York, 1973) for the proposition that testosterone makes men natural leaders.

population.⁴¹ Bearing the burden of pregnancy, breastfeeding, and nurture generally, the female, by contrast, must be more cautious, more protective of herself in her sexual dealings. The connection? The male is programmed to project himself onto life's stage and take the consequences. In the process he learns, as he must if he is to survive, the importance of convincing himself that while acceptance is personal, rejection is not. The female has no analogous essentialist experience. Her search is not for job O.K., but for job safe.

Is this theory so farfetched? If women scholars can derive women's "ethic of care" from childbirth and breastfeeding, is it absurd for a male scholar to infer a devil-may-care ethic and a competing drive for creation from the biology of men?

It seems fair to conclude that if women, particularly married women with children, have not had men's success in the workplace, the reasons for that condition are at present underdetermined. Do women seek lesser responsibilities in the marketplace, whether because of housework, childcare, or other factors? If so, do we need to apply a different standard to law teachers who are mothers?⁴² Do legal methods teachers invest less time and bring fewer skills to their work than do regular teachers? Does the general lack of a publishing requirement for legal methods teachers justify the disparities in salary, status, and benefits? Or, more fundamentally, why should we not suppose that the market and only the market is the basis for salary disparities?

If the murkiness of contemporary gender theory precludes firm answers to such questions, a few things are pellucid. First, these issues require more light and less heat. Second, we all want opportunities to drop in our laps, but to the extent that women also want success in the marketplace, they simply have to spell their wants out—male-like—to those who can satisfy them. But fetishizing female authenticity and hoping to reformulate the world in women's image, women law school theoreticians will hardly allow a man to do the (heavy) work of raising women's consciousness in this regard. More important, neither will they do it themselves. "Although some have said . . . that perhaps women are not suited to law school or should learn to adapt better to its rigors," write Lani Guinier and coauthors, "we are inclined to believe that it is law school—not the women—that should change."⁴³ True equality, says Catharine MacKinnon, who would seem to hate the idea that women should "measure ourselves by

41. See Leslie Farber, *Lying, Despair, Jealousy, Envy, Sex, Suicide, Drugs and the Good Life* 170 (New York, 1976).

42. To evaluate Williams's proposal one could ask the following questions. Are two thirty-hour employees the functional equivalent of one sixty-hour employee who does not have to spend any time communicating with himself? Whatever the answer, is a law requiring employers to provide a part-time track with proportional pay and benefits workable? Would such a law not have the adverse effect of allowing sexist administrators to push mothers into part-time tracks, thereby taking away their choice for full-time work? Would (at least some) husbands be similarly inclined, so as to burden their wives with even more housework? In other words, would Williams's proposal not reduce the need of spouses to bargain with one another to allocate the burden of housework fairly, which is clearly the solution of choice? And, finally, would women who could manage full-time work drop out, thereby losing potential leadership positions and expanding the stigma on women in the workplace?

43. See Guinier et al., *supra* note 15, at 5.

male standards, on male terms,” means “the aspiration to eradicate not gender differentiation, but gender hierarchy.”⁴⁴

Can Scripture offer a way out? Or is the Good News just the fundamental source of patriarchal authority? “Ask,” the Bible announces, “and it shall be given to you.” By asking, we wrench ourselves into a world of possibility. Are ambitious women not well advised to apply for dean positions? Without this controlled experiment, surely there can be no Law School Future for women nor an end to law review articles bemoaning a “hostile gender climate.” Nor, finally, will women find any joy in their extraordinary achievements when they remain stuck at the stage of excoriating an allegedly brutish male professoriat for greeting them “at best with ambivalence” and then confining them *under* a glass ceiling, and even *to* a glass house—from which, if they were right, they should perhaps not be throwing stones.

44. MacKinnon, *supra* note 36, at 22.