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## **Do Law Schools Mistreat Women Faculty? Or, Who's Afraid of Virginia Woolf?**

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# DO LAW SCHOOLS MISTREAT WOMEN FACULTY? OR, WHO'S AFRAID OF VIRGINIA WOOLF?

*Dan Subotnik\**

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It is fatal to be a man or woman pure and simple;  
One must be woman-manly or man-womanly.  
It is fatal for a woman to lay the least stress on any grievance;  
To plead even with justice any cause;  
in any way to speak consciously as a woman.  
And fatal is no figure of speech;  
For anything written with that conscious bias is doomed to death.  
Virginia Woolf<sup>1</sup>

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## I. INTRODUCTION

When complainants publicly air grievances, how do listeners react? How *should* they react? Strange as it may sound, the American rule on recovery of litigation expenses can usefully begin discussion of the first question. The principle that denies successful defendants a recovery for costs of defending themselves—and which thereby opens up to complainants rich possibilities for extortion—would seem to be premised on notions like the following: first, accusers can be expected to exercise care before going to court because, if their charges are found baseless, they waste their own time and money, risk losing credibility, and in some cases are humiliated; second, a fair amount of indignation is needed to fuel a public dispute, *and* where there is smoke there is fire. Hence, even if public complainants cannot prove their case, something likely is seriously awry, i.e., defendants are guilty of something, so policy-makers need not be concerned about their burdens.

Now to the second question: Do complainants for these reasons—whether or *not* in a lawsuit—deserve presumptions in their favor? Perhaps, but to the extent that the culture critic Marshall McLuhan is right, less so than they now receive: “Moral indignation,” he observed, “is a technique used to endow the idiot with dignity.”<sup>2</sup>

Out of this analysis emerges the focus of our inquiry here: How much fire, if any, is there to charges, first leveled more than fifteen years ago and continuing today, that a harsh law school culture oppresses women faculty? As Martha Chamallas, a well-known feminist law critic, writes,—and perhaps professes in class as well—“[f]or both new and senior women law professors, gender bias is still a major fact of life.”<sup>3</sup>

While clear enough, this formulation fails to sufficiently spotlight the moral failure implicit in the charge. So let us recast it as “men continue to bedevil both new and senior women faculty.” Curiously, harsh charges like these often go untested. “One of the most common violations of intellectual standards by intellectuals,” writes the sage Thomas Sowell, “has been the practice of attributing an emotion (racism, sexism . . . ) to those with different views, rather than answering their

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1. VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 104 (1929, 1957). Woolf is explicitly writing about fiction, but her logic applies no less forcefully to nonfiction.

2. See TOM WOLFE, *HOOKING UP* 117 (2000) (quoting Marshall McLuhan).

3. Martha Chamallas, *The Shadow of Professor Kingsfield: Contemporary Dilemmas Facing Women Law Professors*, 11 WM. & MARY J. WOMEN & L. 195, 197 (2005).

arguments.”<sup>4</sup> Since charges of sexism are almost always pressed by women who speak consciously as such, taking Virginia Woolf seriously would seem to require inviting men to discuss subjects such as whether the law school classroom oppresses women. *A Room of One’s Own*, for Woolf, does not mean a domain of one’s own.

And yet, an abstract of this paper was rejected for a major conference scheduled for June 2011, “Workshop on Women Rethinking Equality,” a large part of which is devoted to the condition of women and law schools. As of a few months ago, moreover, no men had been invited as speakers. Who’s afraid of Virginia Woolf?

Is it anti-woman or just bad form for a *man* to challenge women’s perceptions of their own lives? Not, it would seem, according to Zoë Heller: “The struggle for human rights is . . . not a matter of gender loyalty. It is a matter of ethical principle, and as such, it does not dictate automatic allegiance to the women’s side of any such argument.”<sup>5</sup> Accepting Sowell’s and Heller’s views, as I do, the women-in-law-school question must be subjected to generally applicable academic standards. If it turns out that faculty men are indeed treating faculty women badly, this problem needs to be addressed. But if the charges are unfounded, and maybe women in some cases enjoy unfair advantages over men, I suggest, this would need attention too.

After evaluating the complaints against law schools, which I spell out below—and renouncing any presumption in my favor—I conclude, unindignantly, that the charges are almost entirely unproven. The smoke, happily, seems paired less with fire than with mirrors.

This finding does not necessarily mean that historic and insidious sexism has been extirpated from our law schools; to prove that, much more data would be required, which neither I nor the complainants have as yet attempted to elicit. But perhaps for now, male faculty can lay down the burden of guilt for the long-term exclusion of women from the academy. More significantly, the finding suggests that, again for now,

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4. THOMAS SOWELL, *INTELLECTUALS AND SOCIETY* 283 (2009). Thinking about weighing in on these issues, some people may have been discouraged by the professional and political risks involved. An earlier draft of this article was rejected by no fewer than 175 law reviews, including the *Journal of Legal Education*. It seems hard to imagine that a journal devoted to law schools and legal education, a journal which gives great play to gender matters, would not want to consider the idea that conditions for women law faculty are much better than reported. This leads to another acknowledgment. Thanks go to Professor Jane Moriarty and to Morena Carter, Stephen Gombita, and the rest of the *Akron Law Review* staff for helping to make the discussion possible.

5. HELEN GARNER, *THE FIRST STONE: QUESTIONS ABOUT SEX AND POWER* (1995) (opening epigraph, no page number) (quoting Heller). Heller is the author of a number of novels, including *Notes on a Scandal* (2003). She is also a contributor to the *New Yorker*.

women faculty can feel at home in their home law schools and all of us can be human beings first instead of exemplars of our respective genders.

The principal charges leveled against the male establishment in terms of hiring, retention and promotion are: (1) that women faculty are discriminated against in initial appointments, judging by the rank they are assigned;<sup>6</sup> (2) they have been “steered” into non-prestigious fields such as trusts and estates instead of constitutional law,<sup>7</sup> and this undermines their careers and the educational process; (3) they have been steered into and kept in second-class legal writing positions, largely because they are women;<sup>8</sup> (4) they are penalized by an undue emphasis on scholarship, stemming from its abstract male nature,<sup>9</sup> rather than on teaching on account of its hands-on, caretaking female nature;<sup>10</sup> (5) they get weaker evaluations from students;<sup>11</sup> (6) for this reason and others, women are not promoted and tenured at the same rate as men;<sup>12</sup> (7) they are not being moved up into deanships fast enough;<sup>13</sup> and (8) they are assigned a disproportionate amount of service work, which also undermines their careers.<sup>14</sup>

Professor Ann McGinley, the William S. Boyd Professor of Law at the University of Nevada at Las Vegas, has written a comprehensive article that ties many of these issues together: “Reproducing Gender on

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6. See Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 274-75 (1997). See also Richard K. Neumann, Jr., *Women in Legal Education: What The Statistics Show*, 50 J. LEGAL EDUC. 313, 326 (2001); Ann McGinley, *Reproducing Gender on Law School Faculties*, 2009 B.Y.U. L. REV. 99, 116-117 (2009) (repeating the charge).

7. See Merritt & Reskin, *supra* note 6, at 275.

8. Marina Angel, *Women of All Colors Steered to Contingent Positions in Law Schools and Law Firms*, 26 CHICANA/O-LATINA/O L. REV. 169, 173-74 (2006); Kathryn Stanchi, *Who's Next, The Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 479 (2004).

9. Susan B. Apel, *Gender and Invisible Work: Musings of a Woman Law Professor*, 31 U.S.F. L. REV. 993, 1006 (1999). Because writing is so “atomistic” (i.e., solitary), Susan Apel explains, “[m]y own theory is that of all the criteria for tenure, scholarship (especially traditional scholarship) is the most essentially male.” *Id.*

10. See Kristen Konrad Robbins, *Philosophy v. Rhetoric in Legal Education: Understanding the Schism between Doctrinal and Legal Writing Faculty*, 3 J. ASS'N LEGAL WRITING DIRECTORS 108 (2006).

11. See JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 251 (2000).

12. See Neumann, *supra* note 6, at 323-24 (2000).

13. Richard K. Neumann, Jr., *Women in Legal Education: A Statistical Update*, 73 UMKC L. REV. 419, 423-25, 441-42 (2004).

14. See Nancy Levit, *Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics*, 49 U. KAN. L. REV. 775, 784-93 (2001).

Law School Faculties.”<sup>15</sup> I use her article as a template. For McGinley, an expert in the area of employment discrimination and gender, the fundamental problem is not that law faculties set out to discriminate.<sup>16</sup> Instead, it is that workplaces generally, which include law school, are founded on a culture of masculinities,<sup>17</sup> a part of which is a “flight from the feminine.”<sup>18</sup> The inequalities result from the “unconscious bias or structures that appear to be gender-neutral, but . . . have a disparate effect on women”<sup>19</sup> and thus require that well-meaning law schools “engage in serious self-examination with an eye towards eliminating gender segregation, gendered structures and gendered practices in law school faculties.”<sup>20</sup>

A principal inequity of the culture of masculinities is that work is structured around the reproductive processes of men and ignores that women’s childbearing years are restricted.<sup>21</sup> The best jobs presume “access to a flow of family work from a spouse, . . . [which includes] buying and preparing their food, purchasing and washing their clothing, maintaining their home and other possessions, and organizing their social life.”<sup>22</sup> The woman becomes the nurturer. By contrast, the man’s very identity is that of a “breadwinner.”<sup>23</sup> As a result of the culture, he can and is supposed to work extensive overtime.<sup>24</sup> A woman cannot be competitive in this setting.<sup>25</sup> Even if the woman might be willing to

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15. See McGinley, *supra* note 6.

16. *Id.* at 106.

17. Richard Neumann has put the matter this way:

[I]n academia, as elsewhere in life, people who are in a position to make or influence decisions about others tend, at least unconsciously, to credit what men do and discredit what women do, even if men and women are doing the same thing, because of a tendency to consider males and male traits as the “norm” in all situations other than ones in which women predominate.

Neumann, *supra* note 13, at 442 (citing McGinley, *supra* note 6).

18. See McGinley, *supra* note 6, at 108.

19. *Id.* at 105. From certain feminist perspectives, this statement expresses a view that must be assumed, by default, accurate: those who might challenge that view can do so only by meeting a burden of proof. From my own perspective, the view this statement expresses is just one in the whole spectrum of ideologies, all unprivileged. Privileging this kind of statement can lead to loss of discipline in the dialogue and exacerbate gender tensions at law school schools. Cui mal cerca, mal trova. (If you look for evil, you will find it. Italian proverb.)

20. *Id.* at 106.

21. See *id.* at 119-20.

22. *Id.* at 119.

23. *Id.*

24. *Id.*

25. “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’s access to a flow of family work most women do not enjoy.” See Williams, *supra* note 11, at 272. Williams is not speaking here of



focus as single-mindedly as her mate does on a career, and thereby neglects her children, society looks down on her.<sup>26</sup> Thus, it is the woman who ends up making the compromises.<sup>27</sup>

The result of all these cultural factors is a highly lopsided playing field. To balance it out, McGinley urges law schools to both “hire more men at the bottom and more women at the top,” a plan, both parts of which, are already being implemented by Howard University Law School.<sup>28</sup>

## II. INITIAL HIRING PRACTICES

### A. *Initial Appointments*

Are women faculty welcome in law school? We can begin with a gender study of rank in initial appointment twenty years ago in which Merritt and Reskin reported, disturbingly, that women were distinctly disadvantaged. Contrariwise, however, they reported that white women “obtained jobs at significantly more prestigious institutions than did white men with comparable credentials” and that black women fared no worse than white men.<sup>29</sup>

No one, however, appears to be charging discrimination in initial rank these days. On the related issue of prestige, James C. Phillips, has provided an upbeat update. In a new study, the Ph.D. candidate in the Jurisprudence and Social Policy Program at Berkeley, reports that white

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academics. It seems fair to assume that women professors who have primary childcare responsibilities have an easier time of managing their work schedules because of the nature of academic work.

26. See McGinley, *supra* note 6, at 121.

27. “Women go to certain schools for reasons such as because their husband works in that city or is going to school in that city or because they have children and don’t want to move the family, or because they just bought a house in that city.” D. Kelley Weisberg, *Women in Law School Teaching: Problems and Progress*, 30 J. LEGAL EDUC. 226, 238 (1979).

28. See McGinley, *supra* note 6, at 153; Karen Dybis, *The Search for Missing Voices*, THE NATIONAL JURIST, Mar. 2009, at 24. That such a strategy, claimed to be based on diversity, is actually founded on a deep psychological need of some women not to be tainted by women’s domination of legal writing is suggested by a lawsuit for sex discrimination filed against *Newsweek* in the early 1970s by women employees. *Newsweek* then had a disgraceful policy of hiring men as writers and women as researchers. After much negotiation, the company agreed not only to open up writing jobs for women but also “to make sure that a number of researchers were men.” See GAIL COLLINS, *WHEN EVERYTHING CHANGED: THE AMAZING JOURNEY OF WOMEN FROM 1960 TO THE PRESENT* 268 (2009).

29. See Merritt, *supra* note 6, at 274. The authors seem unsure how to present this advantage of white women. Right after they label the advantage as “significant[]” they proceed to characterize it as “modest” *Id.* at 199. The authors do say that sex gave white women advantage at the top sixteen schools. *Id.* at 236-46. See also Neumann, *supra* note 6, at 340-41.

women, whose pre-hire publication rates are on average appreciably lower than those of men, are nevertheless hired at somewhat more prestigious schools than white men on average.<sup>30</sup> Minority women are on average hired at institutions ranked considerably lower than those of white males, but they have publication rates that are far lower.<sup>31</sup>

Most important, and reassuring, men and women are hired now in tenure and tenure-track positions in approximately equal numbers.<sup>32</sup> Indeed, a recent and broader-based empirical study of the success rate of candidates listed in the 2005-06 AALS Faculty Appointments Register reports that far from confirming any bias, “women. . . were *much* more likely to be hired than male counterparts with similar credentials.”<sup>33</sup> Given all the circumstances, the charge of mistreatment of women in law school hiring seems off-base.

### B. *Non-Prestigious Fields*

Women, McGinley reports, also receive course assignments with lower status.<sup>34</sup> Citing Merritt and Reskin, and engaging in a wide-ranging study of her own, Professor Marjorie Kornhauser reports that individual courses are gendered both in the male/female proportion of the faculty teaching that subject and in the nature of the course.<sup>35</sup> Eighty percent of law school courses she examined suffered from a gender disparity, which she defines as a “statistically significant gender distortion;”<sup>36</sup> some courses, Kornhauser indicates, are treated more or less as inherently gendered. Traditional law school courses are gendered

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30. E-mail from James C. Phillips to Dan Subotnik, Professor of Law, Touro College, Jacob D. Fuchsberg Law Center (Jan. 17, 2011) (on file with author). Mr. Phillips can be reached at [Jamescleithrphillips@gmail.com](mailto:Jamescleithrphillips@gmail.com).

31. *Id.*

32. Women represented 49% of those who received a first appointment at professorial rank in 2007-08, 118 of 240. See 2007-2008 AALS STATISTICAL REPORT ON LAW FACULTY 34-35, available at <http://www.aals.org/statistics/report-07-08.pdf>, which shows that women’s numbers were greater than men’s in the assistant professorship class, 73 versus 58, but more men than women were hired as associate professors, 39 versus 29, and full professors, 25 versus 16. *Id.* Can this be explained by the fact that male applicants may have more advanced degrees? No one is saying one way or the other; of additional note, Faculty Appointment Register data show that almost twice as many men as women advertise their availability for positions thereon, see *id.* at 2-8. How are schools to hire more women if they don’t know who is interested?

33. Ming M. Zhu, *An Empirical Study of Race and Law School Hiring*, 16 MICH. J. RACE & L. (forthcoming May 2010) (manuscript at 17) (CELS 2009 4th Annual Conference on Empirical Legal Studies Paper), available at <http://ssrn.com/abstract=1434402> (emphasis added).

34. See McGinley, *supra* note 6, at 137-38.

35. See Marjorie Kornhauser, *Symposium: Rooms of their Own, An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 U.M.K.C. L. REV. 293 (2004).

36. *Id.* at 295.



male, as are “hot” courses like constitutional law and law and economics.<sup>37</sup> Because it is neither mathematically rigorous nor rich with consulting opportunity, juvenile law, she says, is gendered female whereas corporate finance is gendered male;<sup>38</sup> similarly, products liability is gendered male while poverty law is gendered female.<sup>39</sup>

Is there only one way to interpret gender differences in course assignments? For some the answer is inarguable. “[A]ny sex . . . bias in teaching assignments should raise alarm,” wrote Merritt and Reskin.<sup>40</sup> Because many of the gender disparities had increased between the time of Merritt and Reskin’s study and Kornhauser’s, the latter concludes that “the alarm should now be blaring at full blast. Until women proportionately teach the full range of courses in law school, they will not obtain equal status with men.”<sup>41</sup>

Should women be running for the exits? In all my almost thirty years of teaching I have known only one woman who wanted to teach constitutional law but was turned down. It is, moreover, perfectly plausible that gender motivates women’s course teaching preferences. To the extent that they are more compassionate, women may be more interested, say, in the rights of disadvantaged groups such as the young and less interested in antitrust and military law.<sup>42</sup> Is there a facile conflation of disparity and bias here? What happened to “difference” feminism? Rather than inquiring into the degree to which women law professors are exercising agency in their choice of courses, critics are quick to find a problem. A course is devalued, Kornhauser asserts, by being taught disproportionately by women,<sup>43</sup> especially if its content is perceived as gendered to begin with. Women who teach such courses can find “professional advancement more difficult.”<sup>44</sup> Similarly, she suggests, female students will infer that some courses are gendered female and be discouraged from entering other fields.<sup>45</sup> And male

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37. *Id.* at 324; see also Margaret V. Sachs, *Women in Corporate Law Teaching: A Tale of Two Generations*, 65 MD. L. REV. 666, 689 (2006) (discussing the need for women to themselves steer clear of inherently “female” subjects and instead teach such “male” courses as corporate law).

38. See Kornhauser, *supra* note 35, at 327.

39. *Id.*

40. *Id.* at 328 (quoting Merritt and Reskin).

41. *Id.*

42. Women make up a disproportionate number of those teaching military law (9%), antitrust law (12%), juvenile law (60%). See Minna Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the “Top-Ten” Law Reviews*, Brooklyn Law School Legal Studies Research Papers, at 66, 70-72 (July 13, 2009).

43. See Kornhauser, *supra* note 35, at 325.

44. *Id.* at 326.

45. *Id.*

professors will lose opportunities to be “enriched by experiences and views of the opposite sex” and find themselves stereotyped.<sup>46</sup>

Strong language again, but is there anything to it? Are those who teach juvenile law in fact tenured at a lower rate or paid less than those who teach contracts or products liability? Kornhauser does not say. And does it *really* matter whether men or women are teaching corporations, corporate finance, sales, and negotiable instruments? An informal review of registration rosters in my own classes and those of a few colleagues, for what it is worth, shows that rarely has one of us had a class lacking a substantial representation by both sexes. Is such evidence not enough to dispel the idea that a teacher’s gender has a deleterious impact on students identifying with the teacher’s field of interest? Or to dispel the idea that teachers suffer from a gender imbalance among their students? In any event, very little empirical evidence suggests that women students perform better with a female than with a male instructor.<sup>47</sup>

It is said that there is no “problem” if there is no solution (i.e., imaginable solution); there is only a fact of life. It seems telling that Kornhauser offers no vision of a solution to the “problem” she poses. Not only do women professors’ voices resound throughout the halls of law schools, but women law students also can find hundreds of role models in all the major categories of legal careers. Do we want deans to ram courses down faculty throats to right gender imbalances? Or perhaps, to force students, as a condition of graduation, to take an equal number of courses taught by men and women?

Would even this make McGinley happy? Recall her recommendation that law schools attempt to hire more “women at the

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46. *Id.* at 325-26.

47. The only published study I have found is of questionable value here. See Morrison Torrey, *Yet Another Gender Study? A Critique of the Harvard Study and a Proposal for Change*, 13 WM. & MARY J. WOMEN & L. 795, 811 (2007), which cites *Study on Women’s Experience at Harvard Law School*, at 26, 72 (Feb. 2004). In first-year courses at Harvard taught by men, 11.4% of the men earned “A’s” and 7.6% of the women, while in courses taught by women the relative performance was virtually identical. Working Group on Student Experiences, *Study on Women’s Experience at Harvard Law School* app. XXVIII, at 72 (Feb. 2004), available at <http://www.law.harvard.edu/students/experiences/FullReport.pdf>. The problem with deriving any lessons about women students’ performance based on the sex of the teacher is that in courses taught by women a nontrivial larger percentage of first-year men earned an “A minus” than did women. *Id.* Torrey also cites LINDA HIRSHMAN, *THE WOMAN’S GUIDE TO LAW SCHOOL* (1999) for the proposition that law school women do better academically with women instructors. See Torrey, *supra*, at 812 n.132 and accompanying text. No page number to Hirshman’s book is cited and I have not been able to find any listing of the study. It was, presumably, never published.

top.”<sup>48</sup> Achieving the parity McGinley wants, however, might be interpreted to mean applying lower standards for women than for men. Do competent and proud women at this point in our history want to undermine their claims to respect by explicit acknowledgment of a gender advantage in hiring? Should law schools create advantages for women to remedy a well understood disadvantage?<sup>49</sup> If so, this should be made explicit. As things stand now, a call for gender preferences must be heard as just cant.

### C. Legal Writing

The most elaborate critique of contemporary life for legal academics centers on the status of legal writing faculty, a group that is paid less than doctrinal faculty, and usually lacks attendant benefits such as tenure and sabbaticals.<sup>50</sup> The argument here is that the legal writing faculty, made up often of full-time employees, is as trained and productive as doctrinal faculty and thus merits equal rewards.

How valid is this claim? Militating against mandating parity for legal writing faculty, 70% of whom are women,<sup>51</sup> is that scholarship is the coin of the academic realm. Scholarship, law school administrations seem to believe, is the only way for professors to prove their competence as experts, and thus gain credibility, and also to have the greatest impact.

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48. See McGinley, *supra* note 6, at 153.

49. What should law schools do to encourage mothers with caretaking responsibilities to apply for faculty positions? Toll the tenure clock? Lower the research standard for advancement? How long should the tolling go on? None of the articles examined herein provides answers. Presumably, critics do not want a “gender advantage” to be formalized. But in the absence of even tentative answers to these questions, are complaints warranted?

50. Among these critiques, perhaps the most persuasive is by Ilhyung Lee, *The Rookie Season*, 39 SANTA CLARA L. REV. 473 (1999). Starting his academic career as a legal process teacher, Professor Lee moved on to the doctrinal faculty. *Id.* at 500. From this vantage point he reflected on his earlier work, referring to legal process (i.e., legal writing) as “the single most important course in today’s law school,” *id.* at 494, and to the work involved as “overwhelming,” and as leaving “no time to conduct independent research or to produce a scholarly work.” *Id.* at 487-88. A substantial number, if still a distinct minority, of legal writing directors are entitled to a sabbatical. See ASSOCIATION OF LEGAL WRITING DIRECTORS LEGAL WRITING INSTITUTE: 2008 SURVEY RESULTS ¶ 64, at 50, available at [http://www.alwd.org/surveys/survey\\_results/2008\\_Survey\\_Results.pdf](http://www.alwd.org/surveys/survey_results/2008_Survey_Results.pdf) [hereinafter ALWD REPORT]. Presumably, few if any legal writing instructors enjoy this benefit.

51. Women make up about 71% and men 29% of legal writing teachers. See ASSOCIATION OF LEGAL WRITING DIRECTORS ANNUAL LEGAL WRITING SURVEY iii (2010), available at <http://www.lwionline.org/uploads/FileUpload/2010Survey.pdf>.

Legal writing professors, in contrast, are not required to write,<sup>52</sup> and as a result do not. This last point would make the job perfect for someone who, for whatever reason, does not want the responsibility, the commitment, and the pressure of scholarship.<sup>53</sup>

Holding that this line of argument does not explain the actual workings of the two-tier system, Professor Kathryn Stanchi has noted that some legal writing faculty do write while some of the doctrinal faculty do not, and that the gap in benefits is still wide.<sup>54</sup> There is no fully satisfying answer to this point. In the case of unproductive doctrinal faculty, the law schools have made some unsuccessful bets, and tenure (if it is to mean anything) precludes pay cuts. This theory does not explain why those legal writing faculty who do publish have not caught up. Professor James Boland, director of a legal writing and research program, may have part of the answer when he suggests that “scholarship by legal writing professionals has in fact not been particularly intellectual.”<sup>55</sup>

A second argument, or perhaps group of arguments, in support of the status quo—though, understandably, sensitive academics are reluctant to make it explicitly—is that legal writing work requires less rigor than doctrinal teaching work, and that legal writing faculty come to the academy less well prepared.<sup>56</sup>

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52. A minority of legal writing *directors* are required to “produce scholarship” (an awful phrase), see ALWD REPORT, *supra* note 50, ¶ 62 at 49, and a much smaller fraction of legal writing teachers are required to do so. *Id.* ¶ 81 at 62. A recent ad for a legal writing teacher at my school yielded twice as many women applicants as men and thus was consistent with the employment datum above. The premium paid by law schools for scholarship can perhaps be usefully approximated. As I calculate it—and I will not provide raw numbers here—an adjunct professor at my school teaching a standard load of four courses a year would earn one-sixth of what a full time faculty member earns (taking into account fringe benefits). Even if the latter is devoting an equal amount of time and effort to committee work and other school service, it seems fair to conclude that two-thirds of his or her income is for scholarship.

53. There is evidence that women are choosing jobs at non-research institutions precisely because such positions are more compatible with having children. Kelly Ward & Lisa Wolf-Wendel, *Feminist Perspectives, in Work and Family in UNFINISHED AGENDAS: NEW AND CONTINUING GENDER CHALLENGES IN HIGHER EDUCATION* 260 (Judith Glazer-Raymo ed., 2008).

54. Stanchi, *supra* note 8, at 483.

55. James M. Boland, *Legal Writing Programs and Professionalism*, 18 ST. THOMAS L. REV. 711, 716 (2006). Boland goes on to say that until legal process faculty show “doctrinal” skills in their writing, they will not be treated equally. *Id.* at 716, 735. Not having read enough scholarship in the legal writing area, I cannot evaluate this claim.

56. Robbins calls this “discrimination on the basis of perceived intellect.” See Robbins, *supra* note 10, at 111. Peter Brandon Bayer also complains about this discrimination, calling the two classes of teachers “equally credentialed.” *A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics*, 39 DUQ. L. REV. 329, 390 (2001).

There can be little doubt that teaching legal writing, when done properly, is consuming in time and effort. To what extent legal writing teachers are less well prepared intellectually for the academy is the only real question. To get at this matter, Professors Susan Liemer and Hollee Temple recently wrote an article provocatively titled, "Did Your Legal Writing Instructor Go to Harvard?"<sup>57</sup> Among their findings: 28% of legal writing professors who responded to their survey reported that they got their primary law degree from a top-twenty law school;<sup>58</sup> 67% reported that they had law review experience;<sup>59</sup> 20% had written a law review article before being hired.<sup>60</sup> In twenty-three legal writing classrooms around the country, the authors announce, the teacher got her or his degree from Harvard.<sup>61</sup>

A response to Liemer and Temple is that, as they themselves acknowledge, a survey ten years ago had shown that 66% of tenure-track hires had received their primary law degree not from a top-twenty but from a top-twelve law school.<sup>62</sup> Assuming one's law school is important actually or symbolically, a question I come back to, the situation of legal writing teachers does not seem unfair.

That a large fraction of legal writing survey respondents had law review experience raises a more difficult issue, for it is hard to imagine that a larger fraction of tenure-track hires have such experience.<sup>63</sup> The point may well be that equality of credentials in the law review realm is not as compelling an issue as the need for equality in another one. A strong critic of the two-tier system, Marina Angel, admits that at Temple Law School the minimum requirement for hiring is "one or two substantial articles published after law school in major law reviews."<sup>64</sup> This is a standard that seems not unlike that of my own school. In the aggregate, only 12.2% of white men enter the legal professoriate without

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57. Susan P. Liemer & Hollee S. Temple, *Did Your Writing Instructor Go to Harvard?: The Credentials of Legal Writing Faculty at Hiring Time*, 46 U. LOUISVILLE L. REV. 383 (2008).

58. *Id.* at 418.

59. *Id.* at 420.

60. *Id.* at 435.

61. *Id.* at 430. The ABA reports that there are over 49,000 first-year students in American law schools. *Legal Education Statistics*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_1.authcheckdam.pdf) (last visited Apr. 9, 2011). If 40,000 of them are taking a legal writing course, and if the average load for a legal writing professor is twenty students, this suggests that legal writing is being taught in 2000 classrooms. This would mean only that slightly over 1% of students have a Harvard professor. This in and of itself hardly supports Liemer and Temple's overall argument.

62. *Id.* at 395.

63. I certainly did not. Does it show?

64. See Angel, *supra* note 8, at 169, 173-74, 174 n.27 and accompanying text.



a publication to their credit, according to James Phillips, compared to 27.8% for white women, 28.6% for minority men and 32.4% for minority women.<sup>65</sup> As reported, however, only 20% of legal writing teachers come into the professoriate with any article.<sup>66</sup>

Perhaps we can agree that two people who graduate from Prestige U with exactly the same grades and other school experience do not necessarily deserve the same compensation, much less to be CEOs. Their pay and status should and will depend on what they do after school. In the law school world today, as suggested, publishing is what counts most. In this context, emphasis on published scholarship to get an academic job is not on its face unreasonable;<sup>67</sup> there is arguably no better way available to assess the quality of a job candidate's mind and his or her drive to go on doing good academic writing. Women would seem to be at no disadvantage in the realm of writing, hence no androcentric bias results from subjecting them to the same standards. Whether the writing requirement cuts off too many potentially good scholars is another story, also reserved for the next section.

Surely, the central weakness in Liemer and Temple's argument is that their study of the legal education of law teaching candidates is not sufficiently focused at the micro level. No unfairness is manifest when candidates qualifying for tenure-track jobs at Fourth-Tier U receive only a legal writing job offer at Yale. Promising to pay a good salary to a tenured faculty member for twenty to thirty years, whether he or she produces first-class scholarship, is an extraordinary commitment that should be made with great care. Accordingly, Yale is acting perfectly reasonable in choosing to invest substantial resources only in those candidates who have proven themselves up to their own scholarly standards. In other words, what Liemer and Temple need to do to nail down the case of bias is to show that at a variety of schools the credentials of legal writing professors and tenure-track faculty are indistinguishable, and that when tenure-track jobs are available, women are shunted into legal writing.<sup>68</sup> For all the hand-wringing about the two-tier system, no one, as far as I know, makes such an argument.

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65. See Phillips, *supra* note 31 and accompanying text.

66. See Liemer & Temple, *supra* note 60 and accompanying text.

67. This, too, is a hurdle I myself did not face. But the fact that I would not get a job in the present environment is no more persuasive than the argument that college professors in the liberal arts should not be required to hold a Ph.D. because their predecessors once needed only a master's degree.

68. It is not enough to argue that some women qualify for tenure-track jobs, but because of geographical limitations due to a spouse's career must settle for a lower-status position. A law school, indeed any school, cannot be required to create a position for such a person.



Indeed, I have never heard of a legal writing teacher claiming a greater right to tenure-track job than a doctrinal teacher hired by her school at the same time.

One could reasonably respond that schools do not ordinarily hire with tenure—that there is a tenure-track period during which the academic can show what she can do—and that a new faculty member can be dismissed for underperformance. The problem is that a vast network of regulation exists to protect women and minorities from dismissal. Is it unreasonable for a faculty member to conclude that it is not worth taking *any* chances in this domain?

The foregoing is no defense of the status quo in hiring. In judging candidates for academic positions, there seems to be no empirical basis for supposing that (1) going to a top-twelve law school makes you a better bet for a teaching job ten years later; (2) or writing an article before joining a law school faculty, under pressure of getting a teaching job, is an *especially* good measure of a scholarly temperament; or, conversely, (3) spending your time in practice, gaining skills and insights, will not make you a desirable teacher and scholar. Nor is there any reason why legal writing faculty should not, in appropriate circumstances, enjoy the protection of tenure. It is not as if legal writing jobs will be obsolete in the years ahead.

Even if the hiring structure of the legal academy is not altogether rational, and some adjustment is necessary, one thing again seems clear. The sex of our legal writing teachers should concern us no more than the sex of those teaching trusts and estates. We need not, that is, follow Howard Law School's plan of action—finding male candidates for legal writing positions to “balance . . . the females . . . in place,”<sup>69</sup> or, as McGinley put it, to “hire more men at the bottom.”<sup>70</sup> If, moreover, for family or cultural reasons highlighted by McGinley above, many more women than men apply for legal writing positions, it is hard to see how the academy would be doing women applicants a favor in favoring male applicants. If I am wrong, and women generally are ready to sacrifice themselves by accepting a hiring disadvantage in this regard, here again, they need to speak up.

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69. See *supra* note 28 and accompanying text. A colleague suggests that women seek men for legal writing positions not on socio/psychological grounds, but rather because schools with men in those positions pay higher salaries to all legal writing faculty. I have not found any evidence to that effect.

70. See McGinley, *supra* note 6, at 153.

#### D. *Emphasis on Scholarship*

This discussion leads to an issue that is entangled with that of legal writing: whether the contemporary academic emphasis on scholarship makes sense. Without explicitly downplaying the importance of scholarship, McGinley and others argue that it is precisely because of legal writing's caretaking function—one-on-one contact with students—that teaching writing is devalued.<sup>71</sup> Emphasizing (abstract) scholarship, these critics not only encourage men to avoid contact with students, but also allow them to play competitive male games rather than build community.<sup>72</sup>

In challenging the existing paradigm, critics are on more solid ground. Readers will likely agree that virtually all of what legal writing teachers do is valuable and that, conversely, too much scholarship by doctrinal teachers does not pay its way. Dubious? Professor Richard Neumann has recently calculated the cost of an article by a senior law professor at a high-wage school to be \$100,000.<sup>73</sup> Is this article worth that?

If we law teachers can screw up our courage and admit that we are writing too often for raises, status, and self-gratification and that most of this work is not important, then the next step should be clear: righting the balance between teaching and writing. Among other things, this would help law students develop much-needed research and writing skills. It is harder, to be sure, to measure effective teaching than effective writing—which to a cynic is the real reason for the scholarship standard—but that does not mean that law schools must not try.

If, on the other hand, we believe that our scholarship is important, there is no reason why legal writing (and other faculty) should not be strongly encouraged to write and be promoted on the basis of the quality of their scholarship. Opening up this track should result in more qualified applicants for legal writing positions. If that complicates matters for tenured faculty who may have to vote against promotion of their colleagues because their articles are not good enough, then they will have to adjust. To be foreclosed from rising in an organization

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71. *Id.* at 128-31. "As a symbol for nurturance, caring, compassion, and mothering, teaching and all of its behaviors, activities, and performances, is a sign of the relational, a symbol of femininity." Ana M. Martinez Aleman, Faculty Productivity and the Gender Question, in UNFINISHED AGENDAS: NEW AND CONTINUING GENDER CHALLENGES IN HIGHER EDUCATION, *supra* note 53, at 147.

72. See McGinley, *supra* note 6, at 148.

73. See Karen Sloan, *Legal Scholarship Carries a High Price Tag*, NAT'L L.J. (Apr. 20, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202490888822&rss=nlj&slreturn=1&hbxlogin=1>.

because of an inflexible two-tier system is unfair, psychologically and organizationally damaging, and for what it is worth, un-American.<sup>74</sup>

### III. RETENTION

#### A. *Inferior Teaching Evaluations*

As a result of the academy's androcentric values that are picked up by students, according to McGinley, women will receive inferior teaching evaluations by their students and this will inevitably hurt their careers.<sup>75</sup>

The notion that students show bias towards faculty women in law teaching evaluations is, however, highly dubious. Yes, there are passing suggestions of such bias<sup>76</sup> and the author of the *only* empirical study of student evaluations at law schools—fifteen years ago and at only one school—found that students reacted differently to women, making comments, for example, about their physicality and lack of control over the classroom.<sup>77</sup> Even in this case, however, the author made her bottom-line message very “clear”: “[W]hat I am saying is that evaluations of women professors are less positive than those of male professors, not that evaluations of women professors are on the whole negative. . . . They may be quite positive overall, they are just not as positive as men's.”<sup>78</sup> At my own law school, in any event, some women

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74. In the end, because women make up virtually one-half of tenure-track hires and because it cannot (yet) be proven that credentials for legal writing teachers are comparable, the solution to the legal writing issue will almost certainly not be moral but economic. Full equalization of rewards could cost law schools hundreds of thousands of dollars per year. If law schools perceive the market as already supplying enough good legal writing teachers, and if equalization would force reduction in existing salaries or increases in already sky-high tuition, such equalization is not going to happen.

75. McGinley, *supra* note 6, at 115. “White faculty have . . . noted the possibility of bias in their student evaluations, particularly based on their gender, appearance or political ideology.” Deborah Jones Merritt, *Bias the Brain, and Student Evaluations of Teaching*, 82 ST. JOHN'S L. REV. 235, 236 (2008) (claiming more forcefully that minority teachers are most likely to get inferior evaluations).

76. Chamallas, *supra* note 3. See also Adrienne D. Davis & Robert S. Chang, *An Epistolary Exchange Making up is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J.L. & GENDER 1 (2010).

77. Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 334-38 (1996).

78. *Id.* at 336 n.17. A workshop colleague insists that in the absence of studies of student evaluations by sex of the law professor, I am required to make reference to studies outside the legal academy. I do not see this requirement as self-evident. First, law students receive special training in the art of presentation, so they may well be better at it than others upon graduation. Second, the goal I set for myself at the outset is not to prove the case that there is no sexism, but only to show

get top evaluations both in terms of numbers and relative to the great majority of men.

### B. *Promotion and Tenure*

If there are concerns about advancement of women faculty in law school, they are misplaced; women seem to be moving up as quickly as, if not faster than, men.<sup>79</sup> Indeed, for the 1996-97 entering cohort of assistant and associate professors, we learn, 53.8% of the men but 58.9% of the women, had been promoted after seven years.<sup>80</sup> Here is another hole in the culture of masculinity theory.<sup>81</sup>

To be sure, 70% of full professors are still men.<sup>82</sup> In an environment of equal or favorable rates of promotion and tenure for women, however, that is likely a function of earlier favoritism of men. Here again we could ask whether adoption of an affirmative action program for full professorships, as Laura Kessler seems to want,<sup>83</sup> would be desirable, or whether would it primarily lead to challenges of women's qualifications.

It is conceivable, of course, that women faculty are more productive than men and thus should have advanced even faster. In her study, however, Professor Kotkin points out that only 20.4% of articles published in "elite" law reviews are written by women, while women make up 28.6% of the "tenure/tenure-track" law school faculties at the

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that it has not been proven. Nevertheless, those wanting evidence of the essential sex-based equality in evaluations outside of the law school setting can consult John C. Ory, Faculty Thoughts and Concerns About Student Ratings, in *TECHNIQUES AND STRATEGIES FOR INTERPRETING STUDENT EVALUATIONS* 3, 6 (Karron G. Lewis ed., 2001) and also Michael Theall & Jennifer Franklin, Looking for Bias in All the Wrong Places: A Search for Truth or a Witch Hunt in Student Ratings of Instruction, in *STUDENTS RATING DEBATE: ARE THEY VALID? HOW CAN WE BEST USE THEM?* 50 (Michael Theall et al. eds., 2001). For confirmation of this finding, see Deborah Maranville, *Classroom Incivilities, Gender Authenticity and Orthodoxy, and the Limits of Hard Work: Four Lenses for Interpreting a 'Failed' Teaching Experience*, 12 WM & MARY J. OF WOMEN & L. 699, 713-16 (2006).

79. Kotkin, *supra* note 42, at 8. "Elite" is defined as top fifteen for this purpose. *Id.* at 4.

80. *Id.* at 6 n.11 (citing RICHARD WHITE, THE PROMOTION, RETENTION, AND TENURING OF LAW SCHOOL FACULTY: COMPARING FACULTY HIRED IN 1990 AND 1991 TO FACULTY HIRED IN 1996 AND 1997, at 5 tbl.2c (2004), available at <http://www.aals.org/documents/2005recruitmentreport.pdf> (last visited Apr. 19, 2011)).

81. To be sure, if women had started at a lower rank than men, promotion might have come easier.

82. 2007-2008 AALS STATISTICAL REPORT ON LAW FACULTY, *supra* note 32, at 18.

83. See Laura Kessler, *Keeping Discrimination Theory Front and Center in the Discourse over Work and Family Conflict*, 34 PEPP. L. REV. 313, 330 (2007). Would such a program at a public university pass mid-level scrutiny?

elite schools.<sup>84</sup> Although she acknowledges the possibility that for a variety of reasons women may “write less, or less of what these law reviews want to publish,” Kotkin rejects this hypothesis,<sup>85</sup> concluding that at least in part these journals likely disfavor women authors on a theory that “women are simply less adept at legal scholarship and critical thinking.”<sup>86</sup> She urges an overhaul of article acceptance procedures, including blind screening,<sup>87</sup> while simultaneously calling for women to exercise “audacity” by aiming high in their search for publishers.<sup>88</sup>

Far be it from me to oppose blind reviewing. My point is that, notwithstanding Kotkin’s rejection of the idea, there is reason to believe that women *do* write fewer articles than men—indeed far fewer. Examining a substantial cohort of newly minted law academics in the mid-to-late 1980s, and taking into account the numbers of men and women, Deborah Jones Merritt and Barbara Reskin found that on average white men published almost 44% more articles than white women; black men published 38% more than black women.<sup>89</sup> Offering no suggestion of discrimination against women authors, they reported that writing was rated “slightly less important” by the women than by the men, although they held that the differences were not statistically significant.<sup>90</sup>

No one, apparently, has done a global gender study of law writings published in the last fifteen years, although academic men generally seem to publish much more than women.<sup>91</sup> If white men—to extrapolate from Merritt and Reskin’s older figures—are actually *writing*

84. See Kotkin, *supra* note 42, at 6, 8.

85. *Id.* at 6.

86. *Id.* at 60.

87. *Id.* at 63.

88. *Id.* at 62. Citing Kotkin’s work, Jonathan Gingerich has called even more forcefully for blind reviewing. Jonathan Gingerich, *A Call for Blind Review: Student Edited Law Reviews and Bias*, 39 J. LEGAL EDUC. 269, 270-71 (2009).

89. White men had on average published 5.89 articles; white women 4.10 so white men published 1.79 more articles than women. 1.79 divided by 4.10 yields 44%. Men of color (Merritt and Reskin’s category) published 4.56 articles; women of color 3.31 so the former published 1.25 more articles than the latter. 1.25 divided by 3.31 yields 38%. Deborah Jones Merritt & Barbara F. Reskin, *Moving into the Legal Academy, Challenges and Achievements for Women* ¶ VIII, available at <http://aals.org/profdev/women/merritt.html> (last visited July 28, 2010). With respect to the top-twenty law reviews, the authors found, black and white men were even more disproportionately prolific relative to black and white women. *Id.* Importantly, notwithstanding these gaps, an article by a man and one by a woman could be expected, on average, to be cited the same number of times. *Id.*

90. *Id.*

91. See KINGLEY BROWNE, *BIOLOGY AT WORK: RE THINKING SEXUAL EQUALITY* 80 (2002). See also JACK SCHUSTER AND MARTIN FINKELSTEIN, *THE AMERICAN FACULTY: THE RESTRUCTURING OF ACADEMIC WORK AND CAREERS* 86, 90, 91, 99 (2006).



44% more articles than white women, and if white men's articles today—to extrapolate from Kotkin's current figures—appear 40% more often than white women in *top ten* law reviews,<sup>92</sup> then white women are not obviously disadvantaged in the latter.<sup>93</sup> Is the attack on scholarship, a psychologically aware scholar must at least speculate, a function of defensiveness on the subject of scholarly productivity?

In any event, it is hard even to imagine a sound theory of discrimination here when, as Kotkin herself acknowledges, law reviews at second-tier schools publish women's articles in proportion to their population on the tenure-track faculty.<sup>94</sup> This latter correspondence suggests that women at the elite schools may well not, as Kotkin hypothesizes, be aiming high enough.<sup>95</sup> But more important, if (a big *if* to be sure) women have continued to publish proportionately far less than men, and yet, as previously reported,<sup>96</sup> they are promoted at rates that are equal to those of men, then far from being oppressed in our law schools, as is claimed, women in this critical respect would seem to be favored, indeed, wildly favored. Herein lies one possible—and too often unexamined—answer to the question, “Are law schools mistreating women faculty?”

### C. Service Work

As for the argument that women do most of the heavy lifting of service work, McGinley cites a 2001 article by Nancy Levit.<sup>97</sup> Levit, herself, however offers only a tentative view of the subject and calls for a major study, calling her own evidence “rudimentary.”<sup>98</sup> Looking at the school where she teaches, she points out that while 30% of the tenure-track faculty was female,<sup>99</sup> 65% of the Ad Hoc Academic Support

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92. Recall Kotkin's findings: tenure-track women produce 20.4% of the articles in the top while representing 28.6% of the faculty. See Kotkin, *supra* note 42, at 6, 8. Dividing 8.2% (28.6% minus 20.4% ) by 20.4% yields 40%.

93. I acknowledge that my first extrapolation is speculative. And in the absence of data on rates of writing and rejection, I recognize the possibility that women who are writing may not be getting their articles accepted. Jones and Merritt do not make this argument and I myself know of few such cases.

94. See Kotkin, *supra* note 42, at 8. Indeed, Kotkin uses this datum to support her thesis that women are submitting their work at rates equal to that of men. *Id.*

95. *Id.* at 62. She calls this the “audacity factor.” *Id.* at 61.

96. See *supra* notes 31, 84, and 89 and accompanying text.

97. Nancy Levit, *Keeping Feminism in its Place: Sex Segregation and the Domestication of Female Academics*, 49 U. KAN. L. REV. 775 (2001) (cited by McGinley, *supra* note 6, at 150).

98. *Id.* at 784-85. Levit is a professor of law at the University of Missouri-Kansas City Law School. *Id.* at 775 n.1.

99. *Id.* at 786.



Committee was female. Crucially, however, she does not say that this committee had heavier burdens than other committees.<sup>100</sup>

With respect to the outsiders she consulted, Levit does not tell us how many people responded to her letter of inquiry. She had, moreover, specifically asked these outsiders whether they “had observed differences in assignment or performance of committee or other service responsibilities by gender.”<sup>101</sup> Asking the question in this way signaled readers what Levit was after and was likely to ensure that she got what she wanted.

One of Levit’s respondents told her that she was asked by her dean to serve on the Appointments Committee because the only other woman had refused.<sup>102</sup> While this might be interpreted as evidence of the dean’s determination to have crucial hiring decisions made without gender bias, for Levit, this proves only that women are overburdened.<sup>103</sup> Although it is not the whole story, it is worth noting that the burden of this hard-working committee must have been on males up until that point, a situation for which Levit shows no sympathy.<sup>104</sup> For these reasons, because Levit’s finding is not consistent with what I find at my own school, and also because the major study she calls for has not taken place, fair-minded observers should be dubious about Levit’s and McGinley’s claims.

#### IV. DEANSHIPS

Women make up only 23% of the dean population,<sup>105</sup> a datum that raises questions for all of us who care about equity in law schools. What is the problem? Might I suggest that it is probably not a culture of masculinity that best explains this phenomenon.<sup>106</sup> It is rather, as

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100. *Id.* at 787. Levit does say that women worked at double their proportionate rate as advisors to organizations, and journals, and competitions, but she does not say whether credit was given for this work by assignment to fewer committees or to committees with lesser burdens. *Id.* at 789. And, for what it is worth, she admits that membership on the Ad Hoc Academic Support Committee may have come from self-selection. *Id.* at 787.

101. *Id.* at 785.

102. *Id.* at 788-89.

103. The irony here is that the impulse to have a woman on important committees had likely come from the women in question.

104. *See* Levit, *supra* note 96.

105. Touro’s reference librarian, Leslie Wong, came up with this statistic based on 46 out of 201 first names of deans at AALS member and fee-paid schools.

106. Where the pool of potential candidates for this position is 70% male, i.e., the group making up full professors, *see* Abdullina, *supra* note 82, it stands to reason that application for deanships would not be balanced in gender terms.

McGinley herself points out, the needs of family<sup>107</sup> and, let me suggest further, of organizational life. I ask the reader's patience as I work through the analysis.

It is hard to imagine why anyone who accepts responsibility to care for a family would choose to travel at night all around the country meeting alumni to solicit money.<sup>108</sup> It is no easier to imagine that a law school would want a forty-hour dean, instead of a seventy-hour one. A comment by Andrew Carnegie is revealing. Presumably responding to continuous requests for advice on making it, he wrote that to succeed in life you need to "put all your eggs in one basket and . . . *watch that basket*."<sup>109</sup> The seventy-hour dean will do a better job of doing that.<sup>110</sup> Are we really ready to dismiss efficiency as an atavistic male virtue?

Does hiring a forty-hour dean make sense even in terms of gender equity? To be sure, that choice would allow many more women to benefit from career opportunities at the law school. But it would simultaneously create another equity problem. It would be unfair to women not burdened with responsibility for caretaking who are willing to work long hours to develop the full range of skills necessary to "grow" the enterprise.<sup>111</sup> We could theoretically solve this problem by Lochnerizing the workplace.<sup>112</sup> But would women themselves favor an upper limit on work hours? We can get at the answer by asking whether women investors would prefer a seventy-hour male manager for their own hard-earned money to a forty-hour female one, all other things being equal. We sometimes forget in our ivory tower scholarship that

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107. McGinley, *supra* note 6, at 121.

108. I have tried to get data on applications by women for dean positions but so far, to no avail; the specter of litigation hangs over law schools as well as other institutions. I do know from my own review of the files that my own school's last dean search yielded thirty-one male and three female applicants.

109. Andrew Carnegie, *How to Succeed in Life*, PITTSBURGH BULLETIN, Dec. 19, 1903, available at <http://wwwFOUNDATIONSmag.com/carnegie.html> (emphasis added). Some attribute the quote to Mark Twain. *Notes on the Origin of 'Watch the Basket,'* available at [http://herbison.com/herbison/broken\\_eggs\\_watch.html](http://herbison.com/herbison/broken_eggs_watch.html) (last visited Dec. 31, 2010).

110. It has been suggested that a person's marginal work product after, say, fifty hours is zero, or maybe negative. But if this is so, why would sensible law firms and their sensible clients pay big bucks for the incremental hours?

111. A not insignificant "feminist" literature holds that accommodating mothers at work is unfair to non-mothers. See Mary Anne Case, *How High the Apple Pie? A Few Questions about Where, Why, and How the Burden of Child Care Should be Shifted*, 76 CHICAGO-KENT L. REV. 1753, 1759-60 (2001) and Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181 (2001).

112. See *Lochner v. New York*, 198 U.S. 45 (1905) (holding unconstitutional a New York statute setting a ceiling on the number of hours bakery employees could work). Some scholars want to do just this. See Janet C. Gornick & Marcia K. Meyers, in *GENDER EQUALITY: TRANSFORMING FAMILY DIVISIONS OF LABOR* 3-64, and esp. 32 (Erik Olin Wright ed., 2009).

the marketplace is a brutally competitive environment in which constructive destruction is a daily event.

That we do not have more women deans may have explanations that go deeper than family responsibilities and organizational needs. “Authority,” says psychiatrist Anna Fels, “has become insidiously mixed up with dominance,” a notion that “makes women queasy—unless they have a penchant for whips, stilettos and leather”—because it leads to “fear of being desexualized.”<sup>113</sup> A shortage of women in high position probably arises, prominent psychologist Phyllis Chesler suggests, from a fear of competing, and losing.<sup>114</sup> This is all, to be sure, speculation. But the very large, albeit controversial, literature suggests that women are predisposed by nature or culture to be nurturers and to seek cooperation while men seek dominance.<sup>115</sup> A dean often has to assert dominance by favoring some over others with raises, promotions, travel allowances and the like. If “difference” feminists are right, it is doubtful that men and women will show anywhere near equal interest in deanships.

Exploring the possibility that men and women are driven in different directions on the job, Susan Pinker, a college teacher for twenty-five years, describes a world in which many women opt out. Sometimes they quit entirely; frequently, they seek either part-time work or work that is more meaningful, though less prestigious and remunerative.<sup>116</sup> The real wage gap between men and women, according to Pinker, is that: “Women who choose fields that pay less as if saying, ‘This is the work I want to do. This is the schedule I need.

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113. ANNA FELS, NECESSARY DREAMS: AMBITION IN WOMEN’S CHANGING LIVES 155-56 (2004). A recent acknowledgment I received from the Yale Journal of Law & Feminism helps illustrate the point: “As a feminist journal, we pride ourselves on the non-hierarchical nature of our decision making process, which entails every member of our journal reading and voting upon article finalists.” E-mail from Yale Journal of Law & Feminism to Dan Subotnik, Professor of Law, Touro College, Jacob D. Fuchsberg Law Center (Jan. 6, 2010) (on file with author).

114. Women must learn, as men do from sports activities, that “competing head-on for the gold is desirable; that if they lose one day, they won’t die, it’s not all over, they may very well win the next day; that falling down, getting bruised, getting dirty won’t kill them.” PHYLLIS CHESLER, WOMAN’S INHUMANITY TO WOMAN 480 (2001).

115. See, e.g., DEBORAH TANNEN, YOU JUST DON’T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1990); ROBIN WEST, CARING FOR JUSTICE (1997). The “central insight of feminist theory of the last decade has been that women are ‘essentially connected,’ not ‘essentially separate,’ from the rest of human life, both materially . . . and existentially, through the moral and practical life.” Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2 (1988).

116. SUSAN PINKER, THE SEXUAL PARADOX: THE REAL GENDER GAP 70 (2008). As if speaking on the very issue under consideration here, Pinker highlights the case of Donna, who had been a professor in a computer science department. *Id.* at 69. After sixteen years of research and teaching, when her kids were school-age and she had domestic help, Donna gave it up. *Id.* Instead of doing her own research, she moved to a different university where she presumably found greater happiness in helping people develop skills to do their own research. *Id.*

And it's worth less to get it.”<sup>117</sup> Among the most prominent public figures to take this position, perhaps, is Anna Quindlen, a former columnist for the *New York Times*, who quit her job to raise a family and write novels.<sup>118</sup>

Understandably, any such renunciation hurts some women, especially those who compete with men at the highest ranks for power and money. Indeed, Linda Hirshman not long ago wrote a book, *Get to Work*, which excoriates women drop-outs because they undermine the career plan of career women.<sup>119</sup> Whether or not women have an obligation to womanhood is not at issue here. The point is that however painful it may be to acknowledge the Anna Quindlens, any academic analysis of unfairness at the highest levels of the workplace must accept the reality that they exist.

To be sure, a world in which women are disadvantaged in reaching their career goals, such as becoming law school deans, especially when they have children and do not want to leave rearing of the children to outsiders, is unfair. But the most effective way out seems clear—and that solution does not involve regulation from on high. Career women have to negotiate with their spouses for a more balanced distribution of family and career responsibility. “As long as women do everything,” i.e., the work in the home at home, “men will let them,” writes Susan Smith Blakely in a new book on women lawyers; it is “really up to women to end this pattern and demand equality in this situation.”<sup>120</sup>

That solution is, of course, easier to announce than to realize. For one thing, there is the heavy weight of tradition.<sup>121</sup> But another, as Smith herself tells us, is that “[w]omen will always be the primary

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117. *Id.* at 61. It is well documented, Pinker reports, that women in science leave much more frequently than men—and this happens “at every age and stage of life, whether or not they have families.” *Id.* at 64.

118. “[M]any more women put on the camouflage to get by, 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.” See ELIZABETH MCKENNA, *WHEN WORK DOESN’T WORK ANYMORE: WOMEN, WORK AND IDENTITY* 240 (1997) (quoting Anna Quindlen).

119. LINDA HIRSHMAN, *GET TO WORK: A MANIFESTO FOR WOMEN OF THE WORLD* (Viking 2006).

120. SUSAN BLAKELY SMITH, *BEST FRIENDS AT THE BAR: WHAT WOMEN NEED TO KNOW ABOUT A CAREER IN THE LAW* 53 (2009).

121. In a private communication to me, indeed, a workshop colleague says that mine is “an absolutely ludicrous solution” because “the societal norm makes this woman begin bargaining from an inferior baseline of negotiation, both because it is ‘expected’ that women will take a disproportionate share of the domestic load and because women are ‘judged’ on this in a way that men are not. Meanwhile,” she adds, “men are ‘judged’ when they choose greater childcare or domestic roles than the baseline norm.” Memorandum from workshop colleague to Dan Subotnik, Professor of Law, Touro College, Jacob D. Fuchsberg Law Center (on file with author).

caretakers, with relatively few exceptions, and, quite honestly, most women prefer it that way.”<sup>122</sup> We are not talking about slavery here; women’s bargaining position today is as good as or better than it has ever been; there is no reason why they should not be able to negotiate a more even balance of home care responsibilities.<sup>123</sup>

In any event, no one has suggested an alternative to the need for a seventy-hour dean. Will women be able to fill it? Not when they give the highest rank to prospective mates who can provide well for them and for their children<sup>124</sup> and, it would appear, want this support to continue after marriage so that husbands have to be seventy-hour employees. In a recent major study of “well-off” wives, the author found that “*none . . .* would have *dreamed* of having her high-achieving husband cut back on his hours or earning potential.”<sup>125</sup> In this setting something may have to give.

Anyone qualified can be a dean, but the possibility that anyone can “have it all” remains unproven. Indeed, the hope for such a possibility may well be Utopian. Hopefully, we can agree then that the fact that women make up only 23% of law school deans does not support the gender bias claim.

## V. CONCLUSION

After many years of invisibility, women are now prominent in all domains of law school life. They represent more than two-thirds of legal writing faculty and an ever-increasing percentage of deanships, now 23%.<sup>126</sup> More important, they make up 49% of new tenure track faculty

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122. See Smith, *supra* note 121, at 57-58.

123. Even before the recent economic crisis, in 2007, for example, 22% of women out-earned their spouses compared to 4% who did so in 1970. *The Family in Figures: Men and Marriage*, THE ECONOMIST, Jan. 30, 2010, at 39. It seems like working wives, in contrast, now do 70% of family housework. See JUDITH WARNER, PERFECT MADNESS, MOTHERHOOD IN THE AGE OF ANXIETY 249 (2005).

124. In a recent study published in the Proceedings of the National Academy of Sciences women were found to be drawn to material wealth and the expectation of security with prospective mates, unlike men, who were drawn to good looks. AsiaOne, *Men and Women Look for Different Qualities in a Mate: Study*, Sep. 4, 2007, <http://news.asiaone.com/print/News/AsiaOne%2BNews/World/Story/A1Story20070904-24102.html> (last visited July 7, 2010). This, notwithstanding that in questionnaires women expressed preferences for those who matched them in terms of attractiveness and status. *Id.*

125. See Warner, *supra* note 123, at 253. Joan Williams reports on a study of New York law firms that found that “women did not urge their husbands to cut back [on] their hours despite the burden . . . [that it] placed on them as wives.” See Williams, *supra* note 11, at 30.

126. See *supra* note 105 and accompanying text.



(a rate equal to their proportion as law school graduates),<sup>127</sup> and apparently even have a substantial edge over men with equal credentials in getting these jobs.<sup>128</sup> Thereafter, women faculty members are promoted at a rate that may be higher than that of men.<sup>129</sup>

Do these data support the claim that for “both new and senior women faculty, gender bias is still a major fact of life”<sup>130</sup> and should it concern the rest of us that, as Professor Richard Neumann has lamented, “women will not make up 40% of the professoriate until 2017 given the slow rate of women’s gains in law school employment”?<sup>131</sup>

In evaluating this last question, the alternatives are worth considering. Should faculty men be pushed out to make room for women? Should men be removed from hiring pools?<sup>132</sup> Those unhappy with current state of affairs dare not face the obvious implications. Some commentary may therefore be helpful. Firing faculty men, however beneficial in terms of gender proportionality, would start a war from which the academy would never recover. All-out struggle is, admittedly, not necessarily a bad idea. But is that what critics want? Giving a woman a leg up, moreover, is unfair to the innocent man searching for his own toe hold and is of no use to the woman who reached for the ladder twenty years ago only to have it pulled away.<sup>133</sup> It will also raise troublesome questions about the qualifications of women who get tenure-track jobs. If there is no realistic alternative, would it not be better to allow law schools the freedom to decide who belongs on top and who on the bottom based on their own notions of merit?

Apparently not, if we accept what feminist critics report about the structure of the workplace, which presumably includes law schools. “When job competence is intertwined with masculinity,” writes perhaps the leading authority on workplace discrimination Joan Williams in her latest book, “women find it harder to establish themselves as competent. As a result, women find themselves having to work twice as hard to achieve half as much, an aphorism confirmed by a quarter-century of social science.”<sup>134</sup> If, contrary to what we have found here, women are

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127. See *supra* note 32 and accompanying text.

128. See Zhu, *supra* note 33, and accompanying text.

129. See *supra* note 80 and accompanying text.

130. See *supra* note 3 and accompanying text.

131. See Neumann, *supra* note 6, at 325 (a growth of ten percentage points from the current figure of 30%). Neumann republishes this prediction in his statistical update. See Neumann, *supra* note 13, at 427.

132. I have heard the suggestion that only scholars without sons take this position.

133. See Chang and Davis, *supra* note 29, at 1 (calling for more women to be hired).

134. JOAN WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE*, 93 (2010).



indeed *more* valuable to law schools than men, fairness and efficiency would seem to require that men be pushed out and that women be hired and promoted until they come to control law school life.

We should not be too hard on Williams and other gender critics here. Manipulating the body politic in the struggle for power is just human nature.

[U]nless inhibited, every person and group will tend toward beliefs and practices that are self-aggrandizing. This is certainly true [not only] of those who inherit a dominant status. . . . Surely one of the most striking features of human dynamics is the alacrity with which those who have been oppressed will oppress whomever they can once the opportunity presents itself.<sup>135</sup>

“Manipulating,” to be sure, is a strong word. Suggesting a bending of the truth for some accepted larger purpose, the word should be used with caution. This being the case, the charge needs to be explicitly tested; is it unfair? I don’t think so. Professor Williams is candid and unabashed about her motives. “[M]y goal,” she announces, “is not to deliver the truth but to inspire social change.”<sup>136</sup>

Here is the core of the problem—and, as Kennedy suggested, it is not unique to feminism. “Like all belief systems and religious and art forms,” writes best-selling Australian critic Helen Garner, “feminism has a tendency to calcify, to narrow and harden into fundamentalism.”<sup>137</sup>

We law professors can and must do better than to let identity activism subordinate the pursuit of truth to that of power, i.e., to sell out to one or more “isms.” The stakes are higher than who controls the legal academy. Consider this: if academic opinion is as reckless on the issue of gender equity in law school as has been shown here, is it likely that it has been less so—and produced less noxious results—in such contentious areas as abortion, pornography, and workplace discrimination generally?<sup>138</sup> And would not the same be true of writings

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135. Randall Kennedy, *My Race Problem—and Ours*, ATLANTIC MONTHLY, May 1997, at 65, available at <http://www.theatlantic.com/past/docs/issues/97may/kennedy.htm>.

136. See WILLIAMS, *supra* note 11, at 244.

137. See Garner, *supra* note 5, at 228.

138. For recent claims of anti-woman bias in the hard sciences, see Bo Han, *Mentoring Policies to Increase Women's Participation in Commercial Science*, 12 N.Y.U.J. LEGIS. & PUB. POL'Y 409 (2008-09) and Lucy M. Stark, *Exposing Hostile Environments For Female Graduate Students in Academic Science Laboratories: The McDonnell Douglas Burden-Shifting Framework as a Paradigm for Analyzing the "Women in Science" Problem*, 31 HARV. J.L. & GENDER 101 (2008). What are we to make of these claims given that women in the top 100 schools make up only 9% to 16% of tenure-track professors? A new, empirically robust study would seem to be required reading. Written by two Cornell psychologists, a man and a woman, the authors reject

on race, where the damage to the social fabric can be even greater?<sup>139</sup> Obviously the quality of “identity” scholarship generally cannot be addressed here.

If academics do not show a stiff-necked commitment to the truth, one wonders, who will? Restoring truth to its rightful position requires that readers be reminded that the presumption in favor of complainants discussed at the outset relates, strictly speaking, only to litigation costs; it has nothing to do with the merits of a plaintiff’s cause. For that purpose, he or she still has to prove the case based on a preponderance of the evidence. In terms of the specific subject of this article, holding to traditional standards of proof requires living with the possibility, pace the authors examined here, that law school is a natural habitat for women faculty.

If a natural habitat for women law faculty is only a *possibility*, what are the implications for gender relations on campus today? Its contingent nature aside, a natural habitat does not denote an absence of real enemies. How to live under these circumstances? Can we lay down our fears and live as if law school were an *ideal* setting?

I bring good news, and from a venerable source. Not mandating simply that we love our enemies,<sup>140</sup> —a pill that gender critics discussed here would surely find hard to swallow—Jewish tradition is both pragmatic and morally transformative. It suggests that if women faculty can only agree that the moral standing of their male colleagues is at worst, *ambiguous—at this point*—, love can and perhaps should fill our law schools. Love? Yes, love. “Better,” Jewish tradition teaches, “to love in error than to hate in error.”<sup>141</sup>

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claims of discrimination and the policies they have engendered: “[T]he ongoing focus on sex discrimination in reviewing, interviewing, and hiring represents costly, misplaced effort. . . . The current initiatives direct energy towards solving past problems rather than current ones.” Stephen J. Ceci & Wendy M. Williams, *Understanding the Causes of Women’s Underrepresentation in Science*, at 1, available at [www.pnas.org/cgi/doi/10.1073/pnas.101487110](http://www.pnas.org/cgi/doi/10.1073/pnas.101487110). Indeed, Ceci and Williams hold, “women in math-intensive fields are interviewed and hired slightly in excess of their representation among PhDs applying for tenure-track positions.” *Id.* at 5. The most important contributors to women’s underrepresentation in these fields, the authors conclude, are women’s fertility decisions and lifestyle choices. *Id.* Attention should be given to those factors explicitly, rather than to blunderbuss charges of gender bias.

139. This is the primary subject of my book, *TOXIC DIVERSITY: RACE, GENDER AND LAW TALK IN AMERICA* (2005).

140. “Love thine enemies.” *Matthew* 5:44.

141. A fuller but perhaps less elegant translation, “Better I should err on the side of baseless love, than I should err on the side of baseless hatred.” This adage, attributed to Rabbi Kook (first Chief Rabbi of the State of Israel) is surely tied to another one: “If we were destroyed, and the world with us, due to baseless hatred, then we shall rebuild ourselves, and the world with us, with baseless love (*ahavat chinam*).” *Orot HaKodesh* vol. III, at 324.

