

The Status Gap: Female Faculty in the Legal Academy

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Abstract

Status in the legal academy can mean two things. The first is one's rank, with the highest status being a tenured, full professor. The second is the prestige of one's home institution in the law school rankings. Women have been graduating from law schools in significant numbers for more than thirty years. However, they continue to be underrepresented in the high status position of full professor as well as underrepresented on many of the nation's more prestigious law faculties. This paper offers three reasons for this status gap: 1) the ancient association of "scholar" with the masculine; 2) disproportionate institutional service by women faculty; and 3) gender schemas that distort student expectations about how women faculty should serve them. When these three factors are combined with the fact that law schools are "gendered organizations" that valorize masculine norms, the metrics used to measure status, while neutral on their face, produce outcomes that disadvantage women faculty.

Introduction

Women continue to lag behind in the most prestigious positions in American law schools and they are not well represented on many of the nation's more prestigious law faculties. This is despite the fact that there are sufficient women in the tenure-track pipeline.¹

Statistics collected by the Association of American Law Schools (AALS) . . . demonstrate that while women have made continuous progress on law school faculties, they still occupy a disproportionate percentage of the lower-paying,

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1. WOMEN'S BAR ASS'N OF D.C., CREATING PATHWAYS TO SUCCESS: ADVANCING AND RETAINING WOMEN IN TODAY'S LAW FIRMS 25 (2006) ("[W]omen have been graduating from law schools at levels of 40% or higher since 1985.").

lower-status jobs. From academic year 1998–99 to academic year 2007–08, the percentage of women law school deans rose from 10.4% to 19.8%. The proportion of full professors grew from 20% to 29.3% of the population. Unfortunately, however, women represent 61.3% of lecturers and 65.4% of instructors. In contrast, men represent the vast majority of high-paying and high-prestige positions, 80.2% of deans, 70.7% of full professors, but a minority of low-paying and low-prestige positions, 38.7% of lecturers and 34.6% of instructors.²

Law schools are parts of a larger academic whole—the university. The university is a place where teachers and students gather to create, share, and transmit knowledge. Universities were constructed around gendered norms where men taught other men, few of whom were primary caregivers for others. Not surprisingly, the slow progress of women in legal academia mirrors that of women in American universities generally. The American Association of University Women (AAUW) has concluded that “women have made remarkable strides in academia” in the last twenty years, but that “[d]espite these gains, women remain underrepresented at the highest echelons of higher education. . . . On average, compared to men, women earn less, hold lower-ranking positions, and are less likely to have tenure.”³

In order to understand the resistance to women ascending to positions of prestige and authority in modern academia, one must look briefly to the origins of the modern university and its monastic heritage. In addition, one must look to the criteria for tenure at most American universities and law schools which include a tripartite model of teaching, scholarship, and service. Most law schools give greater de facto weight to scholarship in evaluating merit. However, women faculty tend to do a disproportionate amount of the institutional service. Finally, one must look to cultural gender norms among students whose evaluations of women faculty reflect differing expectations in terms of being accessible to student needs.

2. For the most comprehensive article explaining the impact of the subtle norms in legal academia on women faculty, see Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 102-03 (footnotes omitted) (citing, among other sources, ASS’N OF AM. LAW SCH., STATISTICAL REPORT ON LAW FACULTY: 2007–2008, at 18 (2008), available at <http://www.aals.org/statistics/report-07-08.pdf>; *Statistical Report on Law School Faculty and Candidates for Law Faculty Positions: 2005–2006*, ASS’N AM. L. SCH., http://www.aals.org/statistics/0506/0506_T2A_tit4_8yr.html (last visited Feb. 20, 2013)).

3. AAUW EDUC. FOUND. & AAUW LEGAL ADVOCACY FUND, TENURE DENIED: CASES OF SEX DISCRIMINATION IN ACADEMIA 1 (2004), available at <http://www.aauw.org/learn/research/upload/Tenuredenied.pdf>.

1. *The Marginal Role of Women as Scholars in the University*

Universities first arose in Europe during the later Middle Ages (c. 1150–1500). The *universitas* was a corporation or guild of masters (professors) and scholars (students). Western civilization was developing rapidly at the time. The birth of this new and uniquely Western institution resulted from a combination of powerful societal trends. Briefly, these trends were the revival of mercantilism, growth of cities and the urban middle class, and bureaucratization, along with the 12th-century intellectual renaissance. As European society became more complex, the universal Roman church, secular governments, and municipalities required educated priests, administrators, lawyers, physicians, and clerks for business. Fulfilling this social demand were the universities, which were clearly oriented toward teaching and the learned professions.⁴

The golden age of learning in philosophy, rhetoric, and law developed by the Greeks and the Romans was followed by the Dark Ages in which “[t]he barbarian invasions destroyed the schools of the Roman Empire[,] . . . the darkest [period] in the intellectual history of Europe.”⁵ The resulting intellectual drought “gave rise to the monastic and Cathedral schools which served the needs of the church.”⁶ During the Dark Ages, “Benedictine monasticism created almost the only homes of learning and education, and constituted by far the most powerful civilizing agency in Europe until it was superceded as an educational instrument by the growth of the universities.”⁷ Thus, the original image of a “scholar” was derived from a singularly male figure keeping knowledge alive as a scribe in an isolated monastery during the Dark Ages.

During this period, monasteries had limited communication with town centers and the Catholic Church facilitated much of that communication.⁸ Thus, this communication had very little effect on the broader society.⁹ This began to change as a result of the rise of the cathedral schools, which were created

4. John C. Scott, *The Mission of the University: Medieval to Postmodern Transformations*, 77 J. HIGHER EDUC. 1, 6 (2006).

5. Marthellen R. van Scoyoc, *Origin and Development of the University*, 39 PEABODY J. EDUC. 322, 323 (1962).

6. *Id.*

7. *Id.* (quoting 1 HASTINGS RASHDALL, *THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES* 27 (1895)).

8. Charles Homer Haskins, *The Spread of Ideas in the Middle Ages*, 1 SPECULUM 19, 20-23 (1926).

9. *See id.*

by the church to educate the clergy.¹⁰ Monasticism and the cathedral schools preceded the evolution of the university as an institution.¹¹ This evolution began in earnest in the twelfth century with a great influx of knowledge from the Arab and Byzantine worlds (including much of the ancient Greek philosophy as we know it).¹² The first medieval universities were founded in the wake of this influx of heretofore unknown knowledge.¹³

One of the most prominent medieval universities was the University of Paris.¹⁴ An institution that had begun as a cathedral school became a university that served as a model for other universities.¹⁵ The University of Paris evolved from an institution managed by individual professors to one managed by a “small oligarchy of officials.”¹⁶ In addition to this institutional shift, universities began to grant licenses (with approval from the state or church) to their graduates to credential them to teach elsewhere.¹⁷ As a result, these early universities trained the professoriate that went on to staff other educational institutions across Europe.¹⁸

Oxford was one of the other major medieval universities.¹⁹ Unlike the University of Paris, Oxford’s early existence was more closely connected to political concerns than to religious ones.²⁰ Thus, unlike other universities that evolved from the cathedral schools, university officials at Oxford were linked more directly to the school itself, and it operated in a manner more akin to that of a modern-day school administration.²¹

From those early days, the university as an institution has consistently excluded women as students and professors. In the evolution of the medieval to the modern university, women always had a marginal

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10. *See id.*
 11. *See van Scoyoc, supra* note 5, at 323.
 12. *Id.* at 324.
 13. *See id.* at 324-25.
 14. *See id.* at 325-26, 328.
 15. *Id.* at 326, 328.
 16. *Id.* at 326.
 17. *See id.* at 327-28.
 18. *See id.*
 19. *See id.* at 328-31.
 20. *See id.* at 331.
 21. *See id.* at 328.

role. This was in part a result of the different curriculum that girls were allowed in primary education, a curriculum that did not prepare them to attend university.²² It was also a result of views on the proper sphere for women—the private rather than the public sphere.²³ That view was significant in terms of encouraging the sex segregation of caregiving, and that segregation in turn creates a practical barrier to women’s full participation in the university even today.

During the Renaissance, female education was limited in two significant ways: (1) it focused exclusively on the study of grammar, neglecting any formal reasoning; and (2) women were taught in local languages, denying them the ability to learn Latin—the formal language of most universities.²⁴ As a result, even if their families had allowed it, they were not prepared to attend universities.

For example, education was based around the teaching of the Trivium (language based subjects) and Quadrivium (number based subjects).²⁵ The traditional Trivium was composed of grammar, logic, and rhetoric.²⁶ Male students were exposed to all three of these areas with a particular focus on logic.²⁷ Female students were taught almost exclusively on grammar.²⁸ Rhetoric and logic were seen as unnecessary to a woman’s primary duty of educating children, and might have a negative effect on the traditionally female virtues of chastity, silence, and obedience.²⁹ As a result, women were not prepared to discuss the source material used in universities, e.g., Aristotle or Cicero.³⁰

Not only was female education limited to grammar study, women were rarely allowed to study Latin since it was used in the public sphere, and the proper sphere for women was in the private sphere as care-

22. See Joan Gibson, *Educating for Silence: Renaissance Women and the Language Arts*, HYPATIA, Spring 1989, at 9, 10.

23. See *id.* at 12.

24. See *id.* at 10-12.

25. *Id.* at 10.

26. *Id.*

27. *Id.* at 11.

28. See *id.*

29. See *id.* at 12.

30. See *id.* at 10-12.

givers.³¹ Thus, it was deemed unnecessary to teach women Latin. Since university classes were taught entirely in Latin, women were not prepared to attend.³²

Thus, the different primary curriculum for girls and boys had a deleterious effect on the number of women who would be able to enroll in universities and this, in turn, translated into a dearth of women as university professors.³³

Renaissance pedagogical theorists believed that a woman should acquire learning appropriate to her expected adult role. This usually meant two things: first, most educated girls came from the middle and upper classes. Second, a girl normally acquired vernacular reading and writing skills sufficient for her expected role as virtuous and practical wife and mother, but no more. Since she could not attend university or have a public role, she did not receive Latin schooling. . . .

But there were exceptions. A few girls, often with strong paternal support, received Latin humanistic educations. Such girls did not have an easy time of it, because they had acquired skills inappropriate to their sex. A male with Latin humanistic schooling could go on to the university and enjoy a public career where he could use his learning. A woman with a Latin education could only hope to be recognized through a literary exchange with male humanists.³⁴

The private sphere of caretaking in the home was still the proper place for women, not the public space of the university. So, as we can see, the role of “scholar” is itself highly gendered and in the context of the ancient origins of the workplace we inhabit—the university and the law school within it—it is associated with the masculine. This gender schema persists to the current day in universities and the law schools within them.

2. *Women and Institutional Caregiving in the Modern University*

Even when women began to become members of the university as students and faculty in the late nineteenth and twentieth centuries, the teaching and service functions were viewed as more appropriate to

31. *See id.* at 12.

32. *See id.* at 10-12.

33. *See id.*

34. Paul F. Grendler, *Schooling in Western Europe*, 43 *RENAISSANCE Q.* 775, 784-785 (1990) (citations omitted).

women since they connoted caregiving—the activity that women were involved in in the private sphere. Women were not associated with the masculine image of scholar, passed down from the original monastic scholars who preceded the modern university. To this day, in American universities teaching and service is often associated with the feminine and research with the masculine.³⁵ As noted above, in the university norms adopted by law schools, research is clearly the most salient factor in tenure, promotion, and pay decisions.³⁶

Academic merit has been based on norms that are historically male, with publishing having the dominant role in pay and promotions. There is substantial research demonstrating that women publish less than men for a number of reasons, including more time with students, family obligations, and other external limits on their time.³⁷ One of the primary reasons they publish less is that they struggle more with the dominant and unquestioned model in law schools – the unified model of teaching and research. This “ideal” - that valorizes the integration of both teaching and scholarship in law schools - puts a disproportionate burden on women.

35. See Shelley M. Park, *Research, Teaching, and Service: Why Shouldn't Women's Work Count?*, 67 J. HIGHER EDUC. 46, 51 (1996) (“In treating teaching and service as undifferentiated activities, the argument for prioritizing research utilizes a technique commonly used to devalue women’s work and, thus, rationalize the unpaid or underpaid status of that work. It assumes that there is no difference between good and bad teaching (and service) or, that if there is, this difference is unaccounted for by levels of skill, because these are activities that are *instinctual* or *natural* for those who perform them.”).

36. See *id.* at 50 (“Why should research be the primary criterion for tenure and promotion? One line of argument, which focuses on research as an indicator of faculty merit, goes something like this: ‘Research separates the men from the boys (or the women from the girls). Teaching and service won’t serve this function because everyone teaches and does committee work.’ A variation on this theme argues that ‘[t]eaching and service won’t serve this function because there is no satisfactory way of evaluating teaching and service.’ According to the first line of reasoning, research performance is the only factor that *differentiates* faculty presumed to be equal in other respects. According to the second line of reasoning, research performance is the only factor by which faculty members can be *objectively* evaluated, even if they are unequal in other respects.” (footnote omitted)).

37. See *id.* at 47. The author writes:

Current working assumptions regarding (1) what constitutes good research, teaching, and service and (2) the relative importance of each of these endeavors reflect and perpetuate masculine values and practices, thus preventing the professional advancement of female faculty both individually and collectively. A gendered division of labor exists within (as outside) the contemporary academy wherein research is implicitly deemed “men’s work” and is explicitly valued, whereas teaching and service are characterized as “women’s work” and explicitly devalued.

Id.; see also CHARMAINE YOEST, PARENTAL LEAVE IN ACADEMIA 2 (2004), available at <http://faculty.virginia.edu/familyandtenure/institutional%20report.pdf> (noting that even when an institution officially attempts to accommodate family obligations, “anecdotal responses provide some evidence that stigma is a factor” to parental leave policy use).

Women work a second shift at home.³⁸ In addition, they are expected to do the caregiving at work as well—putting them in a teaching and governance capacity exacerbates these demands. Not only do women provide the bulk of caregiving to children and elderly, they do the disproportionate share of the “housework” in the workplace itself, including within the faculty governance structure of the university. As noted above, as the university evolved, the idea that faculties should self-govern became the norm. However valid that idea may be in terms of preserving academic freedom, it has costs for women who attempt full participation in the professorial ranks:

[W]omen in the academy play domestic, supportive roles. Even when hired into positions that are equal in name and title to men, women law faculty perform the “housework” of the law school. This work includes service on hard-working, low-status committees in the law schools.

. . . Internal work seems to be less important to the prestige of the school and, concomitantly, to the career of the faculty member. Many men seem to focus more on their scholarship and reap the benefits of doing so. Law faculties tend to emulate the family’s gender divide. That is, women tend to do the housework—the committee work and other internal work at the law school—men tend to do the outside work—more scholarship, more travel, more self-promotion, more blog entries and other “scholarly” career work.

This problem is not merely a phenomenon of law schools. A recent study at the University of California, Irvine found that women do much more of the service work at the university and that service work is generally of lower status than research and teaching and is not rewarded by the system. This problem was especially acute for women who were post-tenure because they were no longer shielded from service work.³⁹

³⁸ See, e.g., Press Release, Bureau of Labor Statistics, American Time Use Survey—2011 Results (June 22, 2012), available at <http://www.bls.gov/news.release/pdf/atus.pdf>. The survey by the U.S. Department of Labor states that “[o]n an average day, 19 percent of men did housework—such as cleaning or doing laundry—compared with 48 percent of women. Forty percent of men did food preparation or cleanup, compared with 66 percent of women.” *Id.* at 2. With regard to childcare, “[o]n an average day, among adults living in households with children under age 6, women spent 1.1 hours providing physical care (such as bathing or feeding a child) to household children; by contrast, men spent 26 minutes providing physical care.” *Id.* at 3; see also Press Release, Bureau of Labor Statistics, Married Parents’ Use of Time, 2003–06, at 1 (May 8, 2008), available at <http://www.bls.gov/news.release/pdf/atus2.pdf> (stating that “[m]arried mothers employed full time were more likely to do household activities and provide childcare on an average day than were married fathers employed full time”).

³⁹ McGinley, *supra* note 2, at 150-51 (footnotes omitted) (citing, among other sources Kristen Monroe et al., *Gender Equality in Academia: Bad News from the Trenches, and Some Possible Solutions*, 6 PERSP. POL. 215, 220, 229-30 (2008)).

Another study of forty professors (twenty men and twenty women) at four major research universities found that sixteen of the twenty women (eighty percent of the female subjects), as opposed to five of nineteen men (twenty-six per-

Some scholars have argued that the slow progress of women to tenured, full faculty positions is the result of a choice by women, and individual choice is not something that the university as an institution should have to respond to. But as we can see from societal structures themselves, women who have full time jobs at home and who provide more carework in the workplace—when their lives are viewed as a whole—are not really responding to autonomous choice as much as being squeezed onto a path that is the result of this imbalance. While the job description of a professor seems gender neutral on its face, when looked at through the narrow lens of the workplace it can be seen that it is not neutral in the context of the complete picture of women’s work.

McGinley challenges the assertion that the disparity in progress is simply a matter of individual choice. She notes that women have made up almost 50% of law school classes for the past twenty-five years so it is not a pipeline problem:

Some might argue that these stark statistical differences [in the disparity between the number of women graduating from American law schools over the past twenty-five years and the number of women in tenured, full professorships and deanships] result from choice or a lack of interest on the part of women lawyers to serve as law professors, but in a comprehensive study of women in male-dominated jobs, law professor Vicki Schultz demonstrated that women’s “choice” is often shaped by the work environment and employment policies. Moreover, Schultz’s empirical and qualitative research indicates that women react to opportunities and conditions at work in determining the types of work they desire. . . . Unfortunately, Schultz’s study demonstrated that workplaces often create barriers to women’s entry and success. As Schultz noted, there are “powerful disincentives for women to move into and to remain in nontraditional occupations.”⁴⁰

Women who engage in committee service are clearly burdened with greater expectations and fewer rewards.⁴¹

cent of the males), noted that they had experienced significant increases in institutional service responsibilities that detracted from their “scholarly learning.”
Id. at 151-52.

40. *Id.* at 103-04 (footnotes omitted) (quoting 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, 1816 (1990)).

41. *See* Park, *supra* note 35, at 53-54.

3. Cultural Gender Norms Affect How Students Evaluate Women

Women who teach are expected to caregive for students far more than their male counterparts. McGinley notes that while “[e]mpirical studies by Merritt, Reskin, and Kornhauser, and the statistics collected by the AALS identify important inequalities that women professors face as employees in law school settings,”⁴² these studies do not identify the structures and norms that create such inequalities. Students who view faculty through a gender lens expect women faculty to be more supportive, respond more quickly to requests for meetings and to spend more time hand-holding. If women do not meet these expectations, they are punished. A student evaluation that asks whether a professor is “accessible” is going to reflect the fact that a student’s definition of accessible for her male professors may be quite different from her definition of accessible for her female professors. So facially neutral structures and processes can result in women spending more time with students, to the detriment of their scholarship, and students reacting poorly to women faculty who do not respond to this expectation.⁴³ So women may respond to these negative evaluations by putting more time into caregiving and class preparation and less time into scholarship. This, in turn, results in less prestige according to the metrics used by law schools. It can also then result in fewer lateral moves up the prestige ladder in terms of law school rankings.

Conclusion

Universities and the law schools within them reproduce cultural norms in society and women are marginalized in these institutions as much as they are in other social institutions. Facially gender neutral norms that measure merit in terms of metrics like the quantity of one’s publications result in distorted outcomes for women faculty. They tend to reproduce gender hierarchies and reify the devaluation of women faculty within institutions. Gender schemas about who fits the definition of a “scholar” remain embedded in universities. Women work two full-time jobs at home and at work and do a disproportionate

42. See McGinley, *supra* note 2, at 104.

43. See *id.* at 139-40.

amount of the institutional service work in law schools. And student evaluations are not considered in the context of cultural gender norms that reflect different student service expectations. As long as these conditions persist, women will continue to earn less both in terms of monetary compensation and respect as scholars, “even when they hold the same rank as men,”⁴⁴ and the status gap in legal academia will continue.

44. Paula A. Monopoli, *In a Different Voice: Lessons from Ledbetter*, 34 J.C. & U.L. 555 (2008) (quoting MARTHA S. WEST & JOHN W. CURTIS, AM. ASS’N OF UNIV. PROFESSORS, AAUP FACULTY GENDER EQUITY INDICATORS 2006, at 12 (2006), available at <http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf>).