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Ann C. McGinley

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Reproducing Gender on Law School Faculties

Ann C. McGinley*

This Article demonstrates that there is a gender divide on law school faculties. Women work in inferior sex-segregated jobs and teach a disproportionate percentage of female-identified courses; more than eighty percent of law school deans are men. Men teach the more prestigious male-identified courses. Women suffer from differential expectations from colleagues and students and often bear the brunt of their colleagues' bullying behaviors at work. Using masculinities studies and other social science research to identify gendered structures, practices, and behaviors that harm women law professors, this Article provides a theoretical framework to explain why women in the legal academy do not enjoy status equal to that of their male colleagues. Many of these practices appear to be gender-neutral, but tacitly perpetuate stereotypes and segregation that is harmful to women. This Article makes visible the gendered nature of these structures and practices and challenges the notion of natural difference or "choice" as a cause of the disparity between men and women law professors. It concludes that only by making these gendered practices visible will women attain equal status on law school faculties.

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I. INTRODUCTION: THE REPRODUCTION OF GENDER IN LAW SCHOOLS

Scholars have published a number of articles examining the influence of gender in law schools.¹ Only a few studies, however, deal with gender and the employment relationships of law school faculties. In their groundbreaking empirical study, Deborah Jones Merritt and Barbara Reskin found that women, particularly women of color, are at a distinct disadvantage in hiring and rank in the most prestigious schools in legal academy.² In a comprehensive 2004 empirical study, Marjorie Kornhauser concluded that occupational

1. Many of these articles examine law school performance of men and women students, or perceptions that women students and faculty have regarding the male-dominated atmosphere in law schools. In elite law schools, some studies demonstrate that men outperform women, either in class participation or in academics overall, even where the men and women had equal academic indicators entering school. *See also* Dan Subotnik, *The Cult of Hostile Gender Climate: A Male Voice Preaches Diversity to the Choir*, 8 U. CHI. L. SCH. ROUNDTABLE 37, 40 (2001) (finding that the students at Touro Law School contradicted many of those in the Penn study). *But see* Marsha Garrison et al., *Succeeding in Law School: A Comparison of Women's Experiences at Brooklyn Law School and the University of Pennsylvania*, 3 MICH. J. GENDER & L. 515, 520 (1996) (finding that although women participated in class less and expressed more discomfort with their class performance, more anxiety, and more depression, they earned grades and honors in proportion to their numbers at Brooklyn Law School). *See generally* Marina Angel, *Women in Legal Education: What It's Like to be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799 (1988) (explaining ostracism of female law students); Allison L. Bowers, *Women at the University of Texas School of Law: A Call for Action*, 9 TEX. J. WOMEN & L. 117 (2000) (discussing the performance gap between men and women at University of Texas); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 21 (1994) (demonstrating inferior academic performance of women at the University of Pennsylvania Law School); Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 313 (1994) (discussing a study of gender at nine law schools in Ohio, which concluded that women's progress was impeded by differences in perception and treatment based on gender); Catherine Weiss & Louise Melling, Essay, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988) (documenting the experiences of women at Yale Law School); Claire G. Schwab, Note, *A Shifting Gender Divide: The Impact of Gender on Education at Columbia Law School in the New Millennium*, 36 COLUM. J.L. & SOC. PROBS. 299 (2003) (discussing women at Columbia Law School). Sociologist Timothy Clydesdale's analysis of a broad empirical study administered by the Law Schools Admission Council found that although women do not perform as well as men on the LSAT, they performed better than men in law school, even when they were subject to overt discrimination. Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY 711, 747 (2004). This is particularly true of white women. *See id.* at 745.

2. Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 237-38 (1997).

segregation by gender is widespread in the legal academy and continues to grow as women enter the academy.³

Statistics collected by the Association of American Law Schools (AALS) confirm Professor Kornhauser's results and demonstrate that while women have made continuous progress on law school faculties, they still occupy a disproportionate percentage of the lower-paying, lower-status jobs.⁴ From academic year 1998–99 to academic year 2007–08, the percentage of women law school deans rose from 10.4% to 19.8%.⁵ Their proportion of full professors grew from 20% to 29.3% of the population.⁶ Unfortunately, however, women represent 61.3% of lecturers and 65.4% of instructors.⁷ 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

3. Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293, 295 (2004); see also Nancy Levit, *Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics*, 49 U. KAN. L. REV. 775, 775 (2001) (arguing that women law faculty members are “domesticated”). See generally Ann C. McGinley, *Discrimination in Our Midst: Law Schools’ Potential Liability for Employment Practices*, 14 UCLA WOMEN’S L.J. 1 (2005) (demonstrating that many of the employment practices surrounding the hiring and treatment of legal writing faculty may potentially expose law schools to liability for sex discrimination under Title VII of the 1964 Civil Rights Act).

4. PATTI ABDULLINA, AALS STATISTICAL REPORT ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS 18 (2007–08); RICHARD A. WHITE, AALS STATISTICAL REPORT ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS PRELIMINARY TABLES 2005–2006, at tbl.2A (2005–06), available at http://www.aals.org/statistics/0506/0506_T2A_tit4_8yr.html; see also ASSOCIATION OF LEGAL WRITING DIRECTORS/LEGAL WRITING INSTITUTE, 2008 SURVEY RESULTS, at iii–iv, 2–3, available at <http://www.lwionline.org/uploads/FileUpload/2008Surveyresults.pdf> (finding that the average salary of legal research and writing faculty was \$66,302 in academic year 2007–08, seventy-five per cent of responders were female, and that only a small minority of legal writing faculty programs offered tenure track jobs to legal writing professionals). In contrast, salaries of Assistant Professors who ordinarily have fewer years teaching in law school are considerably higher. See Raleigh Hannah Levine, Society of American Law Teachers, 2007–08 SALT Salary Survey, 1 SALT EQUALIZER 1, 1–3 (2008), available at http://www.saltlaw.org/files/uploads/SALT_salary_survey_2008.pdf (listing faculty salaries for Assistant, Associate and Full Professors; the middle range of Assistant Professors is approximately \$80,000 to \$95,000 annually).

5. ABDULLINA, *supra* note 4, at 18; WHITE, *supra* note 4, at tbl.2A.

6. ABDULLINA, *supra* note 4, at 18; WHITE, *supra* note 4, at tbl.2A.

7. ABDULLINA, *supra* note 4, at 18. The percentages of women in the ranks of Associate Professors and Assistant Professors rose slightly to 46.8% (from 43.4% in Academic Year (AY) 1998–99) and 53.9% (from 48.5% in AY 1998–99), respectively, in AY 2007–08. ABDULLINA, *supra* note 4, at 18; WHITE, *supra* note 4, at tbl.2A.

low-paying and low-prestige positions, 38.7% of lecturers and 34.6% of instructors.⁸

Although the numbers demonstrate that extreme gender segregation occurs on law school faculties,⁹ this segregation does not result from a lack of qualified women or a lack of interest. While women have represented nearly 50% of law school graduation classes for the past twenty-five years,¹⁰ men continue to dominate the more powerful law school faculty and dean positions. Some might argue that these stark statistical differences 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.¹¹ 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.¹² While some women may initially choose the female-dominated jobs, many of these women would move out of those jobs into better paying, male-dominated jobs if the conditions made it attractive to do so. Unfortunately, Schultz's

8. ABDULLINA, *supra* note 4, at 18. In 2007–08, women of color represented 12.8% of women law school deans, 17.2% of women full professors, 16.3% of women lecturers, and 14.5% of women instructors. *Id.* at 23. Professor Marina Angel notes that women lawyers of all colors are being steered into contingent positions in law schools and law firms. *See generally* Marina Angel, *Women Lawyers of All Colors Steered to Contingent Positions in Law Schools and Law Firms*, 26 CHICANO–LATINO L. REV. 169 (2006).

9. *See* Levit, *supra* note 3, at 775. *See generally* Kornhauser, *supra* note 3.

10. *See* LSAC, Volume Summary Matriculants by Ethnic & Gender Group, <http://members.lsac.org/Public/MainPage.aspx> (last visited Jan. 15, 2009) (presenting data of students matriculated in law schools from 1997–98 to 2007–08 which demonstrates that over the ten-year period covered, women have represented approximately 46–48% of law students). There is no reason to believe that women do not graduate in about the same proportions as men.

11. *See* 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, 1815–39 (1990) [hereinafter Schultz, *Telling Stories*] (demonstrating through qualitative sociological studies that women's choices and aspirations of the type of work they will do are shaped by structures of mobility and rewards and the work cultures of traditional male jobs, and arguing that courts have applied the lack of interest defense to women's lawsuits erroneously); *see also* Vicki Schultz & Stephen Petterson, *Race, Gender, Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1082 (1992) (finding that courts are "more likely to credit the lack of interest defense in sex discrimination cases than in race discrimination cases," but also a drop in success against the defense in race discrimination claims since 1977).

12. Schultz, *Telling Stories*, *supra* note 11, at 1822–24.

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."¹³ There is no reason to believe that women lawyers faced with an opportunity to move into the academy would choose female-dominated jobs that are less remunerative and of lower status in lieu of male-dominated, higher-paying, higher-status academic jobs throughout their careers, absent a cause in the academy itself.

These statistics also reflect the reality in disciplines in higher education other than law. Women predominate in institutions with less status and pay like community colleges and in jobs that are either part-time or not on the tenure track.¹⁴ Moreover, even when controlling for the types of schools and the disciplines that women teach, they continue to earn 4.2% less than men do, resulting in a \$3,100 salary gap.¹⁵

Empirical 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. But the numbers do not tell the whole story, nor do they attempt to define the causes of the disparities. By using masculinities studies and scholarship on social role congruity, leadership, and bullying, this Article posits that the causes of many of these inequalities include masculine structures and everyday, ordinary practices that reproduce gender on law school faculties.¹⁶ While a host of structures and practices exist that may account for the differential between the careers of men and women on law faculties, this Article will focus on hiring and initial rank, the structure of the tenure track, the segregation of women into positions that are gendered female, the

13. *Id.* at 1822–24.

14. Judith Glazer-Raymo, *The Feminist Agenda: A Work in Progress*, in UNFINISHED AGENDAS: NEW AND CONTINUING GENDER CHALLENGES IN HIGHER EDUCATION 1, 5–9 (Judith Glazer-Raymo ed., 2008).

15. Paul D. Umbach, Gender Equity in College Faculty Pay: A Cross-Classified Random Effects Model Examining the Impact of Human Capital, Academic Disciplines, and Institutions 9 (unpublished paper presented at the 2008 Annual Meeting of the American Educational Research Association, N.Y. (Mar. 24–28, 2008)), available at <http://www.education.uiowa.edu/crue/publications/documents/Umbach2008.pdf>.

16. These practices may also harm individual men who do not participate in practicing masculinities because men who do not practice masculinities may be considered not sufficiently masculine by the group.

gendering of jobs, gendered course assignments, students' gendered expectations, the proliferation of masculine practices that harm women, gendered service assignments, and the feminization (and degradation) of service work of the law school and the university.

Many of these structures and practices appear to be gender-neutral, but this Article attempts to make visible their gendered nature; it challenges the notion of natural difference or "choice" as a cause of the disparity between men and women law professors' careers. It applies the prism of social science research to construct a theoretical account of women's failure to become full equal partners in the legal academy.¹⁷ Thus, it fits within the category of feminist standpoint theory in sociology, which uses the perspective of the less powerful person to describe the behavior of the more powerful.¹⁸ In so doing, it analyzes social science research conducted primarily in corporations and applies that research to the law school environment to suggest that many of the same dynamics that appear in corporations create gender inequities on law school faculties. While some inequalities in law schools may be due to intentional, conscious discriminatory attitudes of male law professors, most inequalities result from hidden unconscious bias or structures that appear to be gender-neutral, but that have a disparate effect on women. This Article focuses on those invisible law school structures and practices that have a disparate effect on women faculty members, and it concludes that law schools must work to eliminate structures and practices causing these impacts.

Part II introduces the social science literature that provides the theoretical framework for analyzing the working conditions at law

17. When I presented this paper at a panel at the 2008 AALS Annual Meeting, there was a dramatic response from those present. Approximately fifty women and a handful of men attended. I received many comments after the presentation, in person, by e-mail, and by telephone from women with whom my descriptions and research struck a very familiar chord. While this group may not be representative of all women faculty members, it suggests that my descriptions are accurate. Certainly, from the standpoint of many women, there are gender problems in the legal academy. I offer this Article as my best attempt to describe the problems, to explain their causes, and to make some suggestions for change.

18. See DOROTHY E. SMITH, *THE EVERYDAY WORLD AS PROBLEMATIC: A FEMINIST SOCIOLOGY* 83–86, 98 (1987) (proposing the use of feminist standpoint theory to remedy sociology's failure to recognize its own masculinist assumptions); Patricia Yancey Martin, *'Mobilizing Masculinities': Women's Experiences of Men at Work*, 8 *ORG.* 587, 593 (2001) [hereinafter Martin, *Mobilizing Masculinities*] (using feminist standpoint theory to provide the perspective of women in high positions talking about male counterparts in privileged positions).

schools. It analyzes masculinities studies, social science research on gender roles and leadership, and bullying research as they apply to workplaces.

Part III examines structures and practices that reproduce gender in law school working relationships and applies social science research to demonstrate that although these structures and practices appear to be gender-neutral, they often create disparities in treatment of law school professors based on gender. While much of the social science research regarding masculinities, bullying, gender roles, and leadership has taken place in corporate environments, this work is applicable to law faculties. Law faculties may be even more reluctant to recognize gender issues because they usually support equal employment opportunity and find it difficult to believe that they may be participating in discriminatory practices. It is important to note, however, that many of the practices appearing in corporations also take place at law school and other higher education faculties. Moreover, I make no claim that law schools intentionally discriminate against female faculty members. Rather, the argument, supported by the social science research, is that the structures and practices unintentionally create barriers to the careers of women faculty members.

Finally, the Article concludes that law schools must engage in serious self-examination with an eye toward eliminating gender segregation, gendered structures, and gendered practices in law school faculties. Only with this attention can law schools serve as models to the community of lawyers.¹⁹ The conclusion offers specific suggestions for improving the gendered atmosphere and structures in law schools.

19. I rely on empirical studies by Professors Reskin, Merritt, and Kornhauser, and the AALS data to describe hiring, status, and segregation of women on law school faculties. I do not attempt to provide empirical evidence supporting the bullying and other behaviors described as occurring in law schools. Many of the facts regarding women's treatment and status in law schools are drawn from my experience and observation, and from stories of women faculty members that I have heard and read during my nineteen years in law teaching. Other information comes from empirical and qualitative studies performed in the academy in general. I will leave to a later project subsequent qualitative or empirical studies of law school working conditions that should further confirm the behaviors described here.

II. MASCULINITIES THEORY AND OTHER SOCIAL SCIENCE RESEARCH ON GENDER

This Part provides the theoretical background that sets the stage for the discussion in Part III of masculine practices and structures that appear in law schools. Subsection A explains that gender is embedded in organizations and evaluates masculinities research that will help the reader understand the gendered nature of the behaviors and structures discussed in Part III. Subsection B discusses social role theory and leadership studies that analyze how perceptions of women as leaders derive from societal expectations of the role of women. This research is applicable to the response that women faculty in law schools receive from students, other faculty, and alumni. Subsection C analyzes the social science literature on bullying, with an emphasis on the newer feminist research that posits that bullying is often a gendered phenomenon. Subsection D explains why the masculinities, bullying, and leadership studies apply to analyze the law school environment.

A. Gender and Masculinities Theory

Gender is embedded into the structure of organizations,²⁰ and is enacted in varying and complex ways through organizational behavior. Assumptions about gender inform the way that work is organized. For example, much work is structured around the assumption that the worker has “a flow of family work” at home that men have but most women do not. This structure requires women often to choose between work and family while men can ordinarily have both.²¹ The organization assigns genders to certain jobs; the expectations of persons doing the jobs are built upon deeply held (and often, unconsciously held) stereotypes about the proper roles

20. See, e.g., Patricia Yancey Martin, “Said and Done” Versus “Saying and Doing”: *Gendering Practices, Practicing Gender at Work*, 17 GENDER & SOC’Y 342, 344 (2003) [hereinafter Martin, *Said and Done*].

21. JOAN WILLIAMS, UNBENDING GENDER 71 (2000).

and behavior of men and women.²² This division of labor reflects and reinforces the traditional roles of men and women in the family.²³

Masculinities studies posit that the normative masculinity in the American workplace includes aggression, competition, and anxiety.²⁴ Although numerous masculinities exist in tension with one another, the powerful hegemonic masculinity is ordinarily white, middle class, and heterosexual.²⁵ White middle-class men with power are rewarded by our culture as they compete with other men to prove their masculinity.²⁶ These men exclude women from power because they lack masculinity and exclude men from power who do not live up to the normative definition of masculinity.²⁷ Masculinity as anti-femininity “lies at the heart of contemporary and historical conceptions of manhood, so that masculinity is defined more by what one is not rather than who one is.”²⁸ Masculinity involves a flight from the feminine and a fear of homosexuality.²⁹ Men constantly attempt to prove their masculinity to other men in order to gain acceptance. This effort is a “homosocial enactment” that requires men to test themselves in order to prove their masculinity to other men.³⁰ For most men, this is a dangerous and relentless competition, which is often unachievable.³¹ Men use women as trophies and symbols of the men’s success. Women also serve as mediators and refuges. Women are not direct competitors, but an underclass in this competition.³²

22. See, e.g., Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 583 (2002); Alice H. Eagly et al., *Transformational, Transactional, and Laissez-Faire Leadership Styles: A Meta-Analysis Comparing Women and Men*, 129 PSYCHOL. BULL. 569, 571–73 (2003).

23. See WILLIAMS, *supra* note 21, at 71–76 (explaining that part-time work is ordinarily marginalized and that because women often find it difficult to relocate their husbands they cannot always move up in the corporation).

24. Michael S. Kimmel, *Masculinity As Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in FEMINISM & MASCULINITIES 182, 183–84 (Peter F. Murphy ed., 2004). For a more thorough discussion of masculinities research, see Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359, 364–78, 380–83 (2004).

25. See Kimmel, *supra* note 24, at 184.

26. *Id.* at 184–85.

27. *Id.*

28. *Id.*

29. *Id.* at 185, 188–89; see also R.W. CONNELL, MASCULINITIES 78 (2d ed. 2005).

30. Kimmel, *supra* note 24, at 186–87.

31. *Id.* at 184–87.

32. Joseph H. Pleck, *Men’s Power with Women, Other Men, and Society: A Men’s Movement Analysis*, in FEMINISM & MASCULINITIES 57, 63–64 (Peter F. Murphy ed., 2004).

While masculinities research explains that gender is embedded in workplace structures and examines behavior in light of the need to prove one's masculinity, research by psychologists and organizational behaviorists helps explain why men and women unintentionally apply different standards to women and men who work in "male" jobs. The following subsection gives a short summary of this research.

B. Social Role Theory, Organizations, and Leadership Studies

Scores of studies demonstrate that gender bias and stereotyping form as an automatic response to cognitive categories that are "shortcuts" that the brain establishes to make sense of the world.³³ Additionally, newer studies tend to demonstrate that besides the cognitive shortcuts, the affect, or emotion, is also involved in forming stereotypes.³⁴ While many stereotypes are not harmful, women working in a "man's job" must run the gamut of biased responses to their ability to do the job. "Goldberg" studies demonstrate the bias that women experience, whether conscious or unconscious. In "Goldberg" studies, a participant evaluates resumes reflecting equivalent education and experience designated with men's and women's names. When the job is identified as requiring "male" characteristics, participants consistently rank the men's resumes higher than the women's, even though the resumes are identical.³⁵

Social scientists conclude that gender roles and social incongruity explain these results.³⁶ Gender roles are widely held beliefs about the attributes of men and women and the roles they play in society.³⁷ They are based on both descriptive and injunctive norms.³⁸ The descriptive norms describe how women and men behave; the injunctive norms are consensual expectations about how a certain group of persons—men or women—should behave.³⁹

33. See generally VIRGINIA VALIAN, *WHY SO SLOW?: THE ADVANCEMENT OF WOMEN* (1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 *STAN. L. REV.* 1161, 1200-01 (1995); Ann C. McGinley, *¡Viva la Evolución!: Recognizing Unconscious Motive in Title VII*, 9 *CORNELL J.L. & PUB. POL'Y* 415 (2000).

34. See McGinley, *supra* note 33, at 422-25.

35. Eagly & Karau, *supra* note 22, at 582.

36. *Id.* at 582-83.

37. *Id.* at 574.

38. *Id.*

39. *Id.*

Research demonstrates that people embrace injunctive norms about male and female behavior.⁴⁰ The more common a behavior actually is found to exist in women or men, the more we judge that behavior as appropriate for that sex only. “It thus appears that people tend to think that women and men ought to differ, especially in those behaviors that are associated with larger sex differences.”⁴¹ Most descriptive and injunctive norms about the sexes pertain to communal and agentic behavior.⁴² Women are described as communal and are expected to act in delicate, sensitive, sharing, communal ways.⁴³ Men are considered to be agentic and are expected to exhibit assertive, controlling and confident behavior such as aggression, ambition, dominance, independence, and self-confidence.⁴⁴

Role congruity theory considers congruity (or incongruity) between the social (gender) role and other roles, especially leadership roles.⁴⁵ Studies demonstrate that people see leadership roles as primarily agentic, and therefore requiring “masculine” traits.⁴⁶ Thus, women are typically at a disadvantage when applying for or working in leadership positions.⁴⁷ Male group members evaluate women’s work as less competent than that of men, even when the work is equally competent.⁴⁸ Moreover, women receive less attention at work for the same idea expressed the same way as men do.⁴⁹ In fact, assertive women are viewed negatively.⁵⁰

When there is clear evidence that a woman is a good leader, observers acknowledge that she is successful,⁵¹ but she is at a

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *See id.*

48. *See* Martha Foschi et al., *Gender and Double Standards in the Assessment of Job Applicants*, 57 *SOC. PSYCHOL. Q.* 326, 335, 337 (1994).

49. *See* VALIAN, *supra* note 33, at 131.

50. *See* Dore Butler & Florence L. Geis, *Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations*, 58 *J. PERSONALITY & SOC. PSYCHOL.* 48, 54 (1990) (explaining that women who speak at mixed-gender meetings receive more negative non-verbal responses than men do); Alice H. Eagly et al., *Gender and Evaluation of Leaders: A Meta-Analysis*, 111 *PSYCHOL. BULL.* 3, 16 (1992).

51. *See* Eagly & Karau, *supra* note 22, at 575.

disadvantage because there is a conflict with the injunctive norm associated with the gender role.⁵² Studies show that even when women are perceived as successful in jobs that are identified as male, both men and women judge women as less likeable based on their success at a “man’s job.”⁵³ This result does not occur in jobs that are gendered female, a result that demonstrates that it is the violation of the stereotypic norm that causes the social rejection of the women.⁵⁴ While both women and men who are successful but disliked suffer consequences in their ability to move up in the ranks of the organization,⁵⁵ only women are disliked for their success in a male-identified job.⁵⁶ It is not success in and of itself that causes the women’s social penalties, but only success in male jobs, a success that “implies that gender-stereotypic norms have been violated.”⁵⁷ This penalty has serious implications for women’s ability to move up in organizations.⁵⁸

The prejudices relate to both descriptive and injunctive norms. The descriptive norm holds that women are not leaders and are therefore not considered appropriate to fill leadership positions.⁵⁹ The injunctive norm holds that women should not behave in agentic ways; women who do behave agentially are rated worse than men who engage in the same behavior as leaders.⁶⁰ Women in leadership roles often provoke negative reactions, such as lack of trust and dislike, especially if their “[agentic] style entails exerting control and dominance over others.”⁶¹

Finally, gender roles influence organizational behavior “not only because people react to leaders in terms of gendered expectancies and leaders respond in turn, but also because most people have

52. *Id.*

53. *Id.* at 576; see Madeline E. Heilman et al., *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks*, 89 J. APPLIED PSYCHOL. 416, 426 (2004).

54. See Heilman et al., *supra* note 53, at 423.

55. *Id.* at 425.

56. *Id.* at 426.

57. *Id.*

58. *Id.*

59. See Eagly & Karau, *supra* note 22, at 576.

60. See *id.* at 576–90.

61. See Eagly et al., *supra* note 22, at 573.

internalized their gender roles to some extent.”⁶² Because of gendered social identities, women and men may expect different behaviors of themselves depending on their gender. “Self-definitions of managers may thus reflect an integration of their managerial role and gender role, and through self-regulatory processes, these composite self-definitions influence behavior, thereby shading the discretionary aspects of managerial behavior in gender-stereotypic directions.”⁶³

C. Bullying and Gender

Bullying, as defined by early bullying scholars, includes a repeated set of negative behaviors in the workplace and a victim who has difficulty defending him or herself.⁶⁴ The behaviors include acts that repeatedly and persistently torment a person. These acts may harm a victim’s reputation or ability to relate to co-workers or to perform the job.⁶⁵ They include social isolation at work, exclusion, devaluation of the work the person does, teasing, insulting remarks, ridicule and gossip, giving the person tasks that are too simple, and exposing the person to physical violence or threats of violence.⁶⁶ Because bullying perpetrators and victims are both men and women, many early bullying scholars considered bullying not to have a gender component.⁶⁷

Newer feminist scholarship posits, however, that while not uniformly performed by men against women, bullying can be, and

62. *Id.* at 572 (citing Alice H. Eagly et al., *Social Role Theory of Sex Differences and Similarities: A Current Appraisal*, in *THE DEVELOPMENTAL SOCIAL PSYCHOLOGY OF GENDER* 123 (Thomas Eckes & Hanns M. Trautner eds., 2000)).

63. *Id.* at 572.

64. Ståle Einarsen et al., *Bullying and Harassment at Work and Their Relationships to Work Environment Quality: An Exploratory Study*, 4 *EUR. J. WORK & ORG. PSYCHOL.* 381, 383 (1994). Denise Salin, who combines European and U.S. research on bullying, defines bullying as “repeated and persistent negative acts towards one or more individual(s), which involve a perceived power imbalance and create a hostile work environment.” Denise Salin, *Ways of Explaining Workplace Bullying: A Review of Enabling, Motivating and Precipitating Structures and Processes in the Work Environment*, 56 *HUM. REL.* 1213, 1214–15 (2003); see also Pamela Lutgen-Sandvik et al., *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree, and Impact*, 44 *J. MGMT. STUD.* 837, 838 (2007) (using Salin’s definition).

65. See Ståle Einarsen, *Harassment and Bullying at Work: A Review of the Scandinavian Approach*, 5 *AGGRESSION & VIOLENT BEHAV.* 379, 383 (2000).

66. See *id.*

67. *Id.* at 381–84; Einarsen et al., *supra* note 64, at 387.

often is, gendered.⁶⁸ In a comprehensive study in Great Britain, sociologist Helge Hoel and her colleagues found that women in senior management experienced significantly more bullying than their male counterparts.⁶⁹ The authors concluded that as women progressed higher within organizations, they became more vulnerable to negative behaviors than their male counterparts. The authors posited that men who feel threatened by women in traditional male jobs may bully women in order to drive them out of those positions.⁷⁰

In addition, women who occupy leadership positions are not protected from bullying by virtue of their positions. In the Great Britain study, the harassment of women supervisors was more often accomplished by peers rather than by supervisors or subordinates.⁷¹ Another type of harassment, contra-power harassment, occurs in workplaces where subordinates harass their woman supervisors.⁷² This “contra-power harassment” or “bullying up” as I call it, belies earlier views of organizational scholars like Rosabeth Moss Kanter that organizational power is sufficient to protect a person from harassment from those who are their inferiors.⁷³ In fact, where there is social role incongruity, the social gender role may be more important than the organizational power.⁷⁴ In other words, the

68. The original bullying theorists defined bullying as behavior that was not sexual in nature. See Ann C. McGinley, *Creating Masculine Identities: Harassment and Bullying “Because of Sex,”* 79 U. COLO. L. REV. 1151, 1167–74 (2008) [hereinafter McGinley, *Creating Masculine Identities*]. These more recent studies raise questions about whether those definitions properly excluded sex or gender as a motivating factor in the behavior. *Id.*

69. Helge Hoel et al., *The Experience of Bullying in Great Britain; The Impact of Organizational Status*, 10 EUR. J. WORK & ORG. PSYCHOL. 443, 449 (2001) (finding that 15.5% of women senior managers reported bullying over a five year period but only 6.4% of men senior managers reported bullying over the same period); see also Ann Carey Juliano, *Harassing Women with Power: The Case for Including Contra-Power Harassment Within Title VII*, 87 B.U. L. REV. 491 (2007) (arguing that contra-power harassment, by men of women superiors, should be recognized as illegal harassment under Title VII); Noreen Tehrani, *Bullying: A Source of Chronic Post Traumatic Stress?*, 32 BRIT. J. GUIDANCE & COUNSELING 357, 360 (2004) (finding that women managers were bullied at a rate of 43% whereas men were bullied at a rate of 30%).

70. See Hoel et al., *supra* note 69, at 461–62; see also Juliano, *supra* note 69, at 505 (explaining that the sociocultural model accounts for contra-power harassment as a way to “negate [women’s] higher organizational status”).

71. Hoel et al., *supra* note 69, at 459–60.

72. See Juliano, *supra* note 69, at 497–98.

73. See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 200 (1977).

74. See Juliano, *supra* note 69, at 505.

organizational power of the woman does not protect her from bullying because of her inferior gender role.

Similarly, a study of higher education in Great Britain concluded that bullying is gendered.⁷⁵ Bullies with more organizational power subverted the mentoring systems that were established to protect and support the staff; they abused the systems to bully or intimidate the victims. Men who bullied used the concept of strong managerial control to mask bullying.⁷⁶ The study's authors concluded that even when not engaged in bullying behavior, men are less likely to recognize bullying and may be more reluctant to intervene on behalf of victims.⁷⁷ This, according to the authors, occurs because some men view bullying as an organizational technique.⁷⁸

The authors of the study argue that "managerial prerogative" over decision-making is a masculine discourse that is based on power and control.⁷⁹ Gendered assumptions appeared in faculty members' performance reviews because they were linked to "masculinist concerns with personal power and the ability to control."⁸⁰ In addition, the authors conclude that both men and women can "invest their sense of being in masculinist discourses."⁸¹ Some women, rather than challenging the masculinist discourse, conform to it and employ bullying tactics themselves. The authors state, "while, irrespective of gender, much bullying involves the abuse of power, such behaviour cannot be divorced from gender considerations."⁸²

Thus, bullying, a practice that is common in many workplaces, can often be attributed to gender. Women and men define and react to bullying behaviors differently, and women, especially those in leadership positions, are more vulnerable to bullying than men. This is due to women's lower gender role status that invites bullying by

75. Ruth Simpson & Claire Cohen, *Dangerous Work: The Gendered Nature of Bullying in the Context of Higher Education*, 11 GENDER, WORK & ORG. 163, 164-66 (2004).

76. *Id.* at 171-77.

77. *Id.* at 180. Women are more likely to seek social support or to report to their manager than to go to personnel management. They use a more "avoidance/denial" coping strategy, which may be counterproductive because it may encourage the bully to escalate the bullying over time. *Id.* at 180-81.

78. *Id.* at 179-80.

79. *Id.* at 182.

80. *Id.*

81. *Id.*

82. *Id.*

subordinates even though the women may have more organizational status.

D. Applying Social Science Research to Law Schools

Masculinities, leadership, and bullying research is useful in exploring the complex relationships on law school faculties. The hegemonic masculinity of white, upper-middle-class values often appear on law school faculties in the form of aggressive self-promotion, competition and, in some cases, bullying. Moreover, women's work is often devalued, perhaps due to role incongruity. Both men and women on law school faculties may engage in this behavior as individuals or in groups that attempt to secure more power in the institution. This behavior occurs, according to gender scholars, in order to protect the masculinity of the job and those who occupy it.⁸³ Social science data on social role theory and role congruity theory supports the view that gender is at least partially responsible for harsher evaluations of tenured and tenure track women than their male colleagues in the law school community.⁸⁴

Both faculty colleagues and students engage in this harsh evaluation. Because women faculty members in tenure track positions perform a job that is gender identified as male, women may be deemed less competent than similarly effective male faculty members. Even when women law professors perform up to the expectations of male behavior, they are often criticized and disliked. In essence, studies demonstrate that women who occupy "male" leadership roles either are competent and not likeable or incompetent and likeable.⁸⁵ In the law school environment, this dynamic sometimes plays out when competent women assert themselves and make their voices heard on appointments and promotion and tenure committees. They are often labeled "troublemakers," even though their intent is to improve the process. Thus, aggressive behavior toward women on law faculties can be

83. See Patricia Yancey Martin, *Gender, Interaction, and Inequality in Organizations*, in *GENDER, INTERACTION, AND INEQUALITY* 208, 217 (Cecilia L. Ridgeway ed., 1992) (arguing that men attempt to exclude women peers because of fears that women will undermine the masculinity requirements of the job and lower its status and pay); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683, 1687 (1998).

84. See *supra* Part II.B.

85. See Heilman et al., *supra* note 53, at 425–26.

explained by a combination of masculinities, bullying, and social role theory.

III. GENDERED STRUCTURES, PRACTICES, AND EXPECTATIONS IN LAW SCHOOLS

While there are myriad structures and practices that reproduce gender in law schools, this Article analyzes hiring and initial rank, the structure of the tenure track, the segregation of women into positions that are gendered female, the gendering of jobs, gendered course assignments, students' gendered expectations, the proliferation of masculine practices that harm women, gendered service assignments, and the feminization (and degradation) of service work of the law school. Many of these structures and practices are gendered, but often their gendered nature is invisible. Masculinities, feminist theory, gender and bullying research, cognitive bias data, and other social science theories help explain why these practices and structures, applied to law schools, are gendered.

A. Gender in Law School Hiring and Initial Rank

At least one empirical study of law school hiring found that women, especially women of color, were at a disadvantage in hiring, the assignment of rank,⁸⁶ and course assignments. Merritt and Reskin studied the hiring patterns of the sixteen most prestigious law schools to determine whether affirmative action imposed a heavy burden on white men in law faculty hiring.⁸⁷ They concluded that, when controlling for credentials and experience, white women and men of color experienced a very slight advantage over white men in hiring. Women of color did not enjoy any advantage.⁸⁸ Their study also demonstrated that white women and women of color suffered bias in both the rank at which they were hired⁸⁹ and in their course assignments.⁹⁰ Moreover, there was significant gender bias in favor of men in rank at hiring and course assignments.⁹¹ Because women of

86. By "rank" I refer to whether the person is hired as an Instructor or Lecturer, Visiting Professor, Assistant Professor, Associate Professor, or full Professor.

87. Merritt & Reskin, *supra* note 2, at 236–37.

88. *Id.* at 251.

89. *Id.* at 252–58.

90. *Id.* at 258–73.

91. *Id.* at 258–67.

color did not enjoy any benefit in hiring and also encountered a disadvantage in rank and course assignment, the study demonstrated a particularly harsh effect in these schools on women of color who suffered from both race and gender effects.⁹²

According to Merritt and Reskin, women started their faculty careers at lower rank than men with the same credentials. “Women were significantly more likely to begin tenure-track teaching as assistant professors, while men with comparable ages, credentials, and work experience were more likely to begin their tenure-track careers as associate or full professors.”⁹³ Furthermore, having a non-employed domestic partner separately increased the chance of appointment at a higher rank.⁹⁴ Because very few women law professors in the population had non-employed domestic partners, women “suffered a double disadvantage in obtaining initial appointments as associate or full professors.”⁹⁵

92. *Id.* at 238. White men filled 62.3% of the entry-level jobs at the top sixteen schools; white women filled 27.9% of those jobs; men of color filled 8.2% of the jobs and women of color filled only 1.6% of the positions. *Id.* When the authors used a regression analysis, they found “that the coefficients for sex, race, and the sex-race interaction all failed to reach statistical significance.” *Id.* at 245. They concluded, however, that being a white woman or a person of color “did not significantly raise the odds of appointment at a top-sixteen [law school].” *Id.* at 246. They also found that men of color benefited slightly from their race and status when it came to the status of the institution in which they taught, and that white women benefited slightly, but even less than men of color. Women of color, however, did not enjoy any benefit from race or gender or their interaction. *Id.* at 250–51.

93. *Id.* at 254. Neither race nor the interaction between race and sex had a statistically significant effect on the rank at the time of hire. *Id.*

94. *Id.* at 256–57.

95. *Id.* at 258. Merritt and Reskin’s study also shows that besides race and gender, a variety of factors affected rank and hiring. For example, the older the candidate, the less likely he or she would be hired by the sixteen most prestigious institutions; older professors were hired disproportionately by the less prestigious institutions. *Id.* at 250. The “inbred factor,” defined as the top sixteen schools’ preference to hire their own graduates over equally qualified candidates from similarly prestigious schools, also affected hiring. *Id.* at 248–49. Candidates who used the AALS Faculty Recruitment Conference were less likely to be hired by the most prestigious institutions. Rather, these institutions may rely on more informal processes to identify candidates for hiring. *Id.* at 241. Candidates who imposed geographical limitations on the search were less likely to be hired by the most prestigious schools. *Id.* at 241–42. So, too, were candidates with a “previous appointment to a nontenure-track position, experience as a law firm associate, [or] a teaching package that included a skills course.” *Id.* at 249–50.

All of these factors separately correlated with the individual’s ability either to attain a tenure track position at a high prestige school or a higher rank than that of assistant professor. Although these factors are gender-neutral, alone or combined, they may create a disparate impact on women in the market for law teaching jobs. Title VII of the 1964 Civil Rights Act, as amended by the 1991 Civil Rights Act, holds employers liable for discrimination if the employers use neutral policies or practices that create a disparate impact on a protected group

This study debunked the myth that law schools refused to hire qualified white men in the name of affirmative action. It demonstrated that affirmative action gave a very slight advantage to men of color and white women in hiring, but it also showed that white men were employed at higher initial rank than their female counterparts.⁹⁶ Moreover, it confirmed that a number of factors correlating to being a female law professor were disfavored in hiring at the most prestigious schools. The literature on social role congruity may explain this difference, showing that women applying for male-identified jobs will unconsciously be judged more harshly.⁹⁷

B. Gendered Terms and Conditions of Law School Employment

Besides hiring and initial ranking of faculty members, law schools reproduce gender in the terms and conditions of employment. The conditions of employment include structures that have a disparate impact on women faculty as well as practices that harm women in general and may also harm individual men.

1. Gendered structures: the tenure track

Workplaces and individual jobs are structured according to gender. Workers do not arrive at work “infected” by gender; rather, paid work “springs from and is shaped by gendered conceptions.”⁹⁸ Workplace structures and practices create and reproduce gendered relationships among workers. As a site of gender reproduction, the workplace not only reinforces the stereotypical gendered order but also creates gender in the workplace itself.

By reproducing gender through structures and practices, workplaces elevate certain groups of persons over others, creating opportunities for some and barriers for others. Much of this structuring is invisible⁹⁹ because society, in general, accepts the

unless the employer proves that the neutral factor is consistent with business necessity and job-related. 42 U.S.C. § 2000e-2(k).

96. The study is more than a decade old and should be updated. Moreover, it would be useful to perform a new empirical study that includes a broader range of law school hiring.

97. See *supra* Part II.B.

98. See Martin, *Said and Done*, *supra* note 20, at 344–45.

99. See Patricia Yancey Martin, *Practicing Gender at Work: Further Thoughts on Reflexivity*, 13 GENDER, WORK, & ORG. 254, 255 (2006) (noting that only women and people “with less human capital” at work are aware of gender dynamics that are invisible to those who are most powerful); see also Susan B. Apfel, *Gender and Invisible Work: Musings of a*

stereotypical workplace structure as the definition of “work” and does not realize that there are plausible alternative structures that may have less of a gender effect.

For example, the organization is constructed around the reproductive processes of men.¹⁰⁰ Women are granted access to entry-level, white-collar jobs traditionally held by men, but have difficulties earning promotions because they do not enjoy the same “access to a flow of family work from a spouse, and the kind of mentoring and social contacts that still follow the social patterns of masculinity.”¹⁰¹ For many jobs, the organization is structured to work most efficiently in a world where men are the primary or sole breadwinners. The invisible gendered premise is that workers should be available to work at all hours and be ready to move geographically. Underlying this concept is the implicit assumption that the worker has a male body incapable of bearing children and a partner or wife who deals with his every outside need—bearing and rearing their children, buying and preparing their food, purchasing and washing their clothing, maintaining their home and other possessions, and organizing their social life.¹⁰² While some of this “home” work can be accomplished by one or more paid employees, much of it is not transferable.

This kind of structure has a negative effect on women. For although workplaces do not ordinarily dictate the desired sex of their upper managers, women, rather than men, more frequently make the “choice”¹⁰³ to stay home and support another’s career by taking care

Woman Law Professor, 31 U.S.F. L. REV. 993, 994–95 (2007) (explaining that women bear the brunt of the “invisible work” in law schools).

100. CONNELL, *supra* note 29, at 73.

101. WILLIAMS, *supra* note 21, at 66. Women have even less access to blue collar jobs. The machinery is designed for the norm of the male worker’s body, a fact that disproportionately excludes women workers; overtime expectations often require access to a spouse’s work at home that is available to many men but few women, and women workers are subjected to sexual harassment. *Id.*

102. *See id.* at 64–68. Williams explains that while women in white collar jobs have access to jobs, they suffer from lack of promotions whereas women are not hired to work in blue collar jobs because of the masculine norms that include equipment that is designed to fit male bodies and not female bodies. *Id.* at 66–68.

103. I use the word “choice” in quotation marks to indicate that often the decision to stay at home with children full time and to forgo a career is not entirely free. Because of the work structures that make it difficult both to work and to care for one’s children and the lack of flexible work arrangements in many workplaces, and because of the social pressures for women to act as caregivers and for fathers to act as breadwinners, many women sacrifice their careers. For an excellent description of this phenomenon see *id.* at 14–39.

of the family. The structure does not necessarily follow natural gender instincts, but instead benefits the careers of men more often than those of women and imposes harmful effects on the careers of women.¹⁰⁴ This is due to social roles, discrimination in society, the identification of masculinity with breadwinner status,¹⁰⁵ and the identification of middle-class femininity with child-rearing status.¹⁰⁶

In academic workplaces, the structure differs from the white-collar office, but it is still gendered. Most universities and law faculties have tenure-earning and non-tenure-earning jobs. Academic tenure track jobs are more prestigious, and an employee holding tenure is less vulnerable to replacement at the whim of the employer. But prestige and security have a price, as the tenure-earning jobs place a heavy burden on persons who are new to the academy. Ordinarily, the first five or six years' teaching, scholarly publications, and service determine whether the candidate earns tenure. If the faculty member is not granted tenure, he or she will be terminated by the employer after a one-year non-renewable contract.

This pre-tenure period, which occurs typically between the ages of twenty-seven and thirty-seven, rewards the male body and lifestyle.¹⁰⁷ The use of a trial period early in a man's career benefits the traditional white-collar man with a wife who takes care of the children and the home. The wife's labor grants the husband the opportunity to focus on his career. Moreover, the man's socially constructed self-concept of "breadwinner" allows him to feel that he

104. The discrimination, however, can go the other way. Men who prefer to serve as child rearers or nurturers will be constrained from doing so. See Sue Shellenbarger, *Men on the Daddy Track Find a Place of Their Own at Home*, WALL ST. J., Nov. 8, 2007, at D1 (noting that at-home dads pay a higher career price than moms in the same position). The biological fact is that women, not men, get pregnant and bear the children and it is women's milk that sustains the newborn baby. Assuming that the rest of child care behavior is women's work, however, is a social construct. It is not necessarily natural for men to work long hours at the office and for women to stay home and care for the children.

105. WILLIAMS, *supra* note 21, at 26–30.

106. See *id.* at 30–36.

107. The age is significantly higher for persons in disciplines other than law that require PhD degrees and postdoctoral studies. See Robin Wilson, *The Laws of Physics*, 52 CHRON. HIGHER EDUC., Nov. 11, 2005, at A10, A10–12 (noting that universities have created postdoctoral researchers in sciences, that more than half of the PhDs in physics in 2000 and 2001 went to work on postdoctoral studies, and that the postdoctoral years often conflict with a woman's childbearing years); Nicholas H. Wolfinger et al., *Alone in the Ivory Tower: How Birth Events Vary Among Fast-Track Professionals* 3 (Nov. 21, 2007) (unpublished manuscript), available at http://www.ipia.utah.edu/workingpapers/2008_5_19.pdf (stating that the median recipient of a PhD is typically thirty-three or thirty-four years old).

is doing the right thing by working extremely hard to take care of his family, even if working long hours causes him to neglect his loved ones.¹⁰⁸

The opposite is true for women, however, who are disfavored by a trial period between the ages of twenty-seven and thirty-seven. These are prime child-bearing years for women. Because of the extreme physical, emotional, and time demands of raising a family, this schedule disproportionately harms women who have children.¹⁰⁹ Moreover, a woman's socially constructed self-concept of "child caregiver" places her at the opposite extreme of the man whose identity is that of "breadwinner." While society rewards a man who spends all his time at work for being a good family man (based on his ability to be a good "breadwinner"), society views a woman who spends the same amount of time working as harmful to the family.¹¹⁰ In heterosexual relationships, women with equally demanding jobs are expected to spend more time with their families, and studies show that working women spend significantly more time working in the home than their male partners.¹¹¹ At the same time, employers often view a woman who struggles to accommodate both the needs of her family and those of her workplace as not committed to work.¹¹² Professor Laura Kessler explains that mothers at work suffer from the "motherhood penalty." When controlling for productivity, studies demonstrate that mothers are rated as less competent and committed and more deserving of lower salaries than fathers. In fact,

108. Jean E. Wallace & Marisa C. Young, *Parenthood and Productivity: A Study of Demands, Resources and Family-Friendly Firms*, 72 J. VOCATIONAL BEHAV. 110, 111 (2008).

109. See *id.* at 112. Women in academia are at a distinct disadvantage if they are married and wish to have children. See Mary Ann Mason & Marc Goulden, *Marriage and Baby Blues: Re-Defining Gender Equity* 3-5, 9-10 (2003), <http://ucfamilyedge.berkeley.edu/marriagebabyblues.pdf> (finding that women in academia who have babies in the first five years after their PhDs are less likely to be successful while men are not harmed by birth of babies during this time period and also finding that women who are successful in academia—those who earn tenure—are more likely than men to regret not having as many babies as they would have liked).

110. See WILLIAMS, *supra* note 21, at 70.

111. ARLIE HOCHSCHILD, *THE SECOND SHIFT* 8-10, 271-78 (1989); see also Wallace & Young, *supra* note 108, at 117 (finding in a study of lawyers in Alberta, Canada, that women lawyers without children report higher numbers of billable hours than men with or without children and that women with children report lower billable hours than men with children); Nicholas H. Wolfinger et al., *Problems in the Pipeline: Gender, Marriage, and Fertility in the Ivory Tower*, 79 J. HIGHER EDUC. 388, 390 (2008) (stating that women professors spend more time on domestic chores than their male colleagues).

112. See WILLIAMS, *supra* note 21, at 70.

fathers often benefit at work from being fathers.¹¹³ When a mother finally gives up by deciding to stay home for a few years, the society attributes her “decision” to her “choice” and “nature.”

The woman’s “choice” is clearly informed by her options, but those options are not derived from her nature.¹¹⁴ If she is in a relationship with a man who works fifty to sixty hours a week and they have children, someone has to take care of the children. The majority of men choose to work in large part because they have internalized the societal message of their role of “breadwinner”. Also, men who stay home with children pay an even higher career price than women who do so, and men seem to take more time returning to their careers.¹¹⁵ In this way there may be an economically sound reason for women to remain at home and care for the children while the man works.¹¹⁶ Recent studies demonstrate that men with babies entering their households within five years of receiving their PhDs are thirty-eight percent more likely than their women counterparts to receive tenure.¹¹⁷ Moreover, only one in every three women who takes a tenure track university job before having children will ever become a mother.¹¹⁸ Women with tenure are twice as likely as their male colleagues to be single twelve years after receiving their PhDs, and women who are married when they

113. Laura T. Kessler, *Keeping Discrimination Theory Front and Center in the Discourse Over Work and Family Conflict*, 34 PEPP. L. REV. 313, 318–19 (2007).

114. See Wolfinger et al., *supra* note 107, at 394, 396, 398 (finding that marriage and the presence of children under six years of age separately reduce the likelihood that a woman will obtain a tenure track job and that women are 21% less likely than their male counterparts to achieve tenure and 21% less likely to be promoted to full professor, but these differences are not related to the presence of children).

115. See Shellenbarger, *supra* note 104.

116. Joan Williams explains that women executives are at a distinct disadvantage vis-a-vis their male counterparts because up to 90% of men who are executives have wives who stay home with their children. Only approximately 30% of women executives have children, as compared to 90% of men. The vast majority of women executives who are married, moreover, have spouses with equally high-powered jobs who do not have the time to dedicate to home or children. Thus, women executives must pay the price of choosing between a high-powered job and having children, a choice that men executives do not face. See WILLIAMS, *supra* note 21, at 71–72.

117. Mary Ann Mason & Marc Goulden, *Do Babies Matter (Part II)? Closing the Baby Gap*, ACADEME, Nov.–Dec. 2004, at 11, available at <http://www.aaup.org/AAUP/pubsres/academe/2004/ND/Feat/04ndmaso.htm>.

118. *Id.* at 12.

begin their academic careers are much more likely to be divorced or separated from their spouses than their male counterparts.¹¹⁹

The postmodern family, of course, often does not look like the “traditional” family. Families formed by lesbian and gay partnerships are growing; single mothers and fathers who must work but who have no partners with whom to share child-rearing or home-caring responsibilities are also growing. While academia can be more tolerant of non-traditional lifestyles and of two-career families, the tenure track structure is unforgiving and disparately impacts women. The ability to do research at home draws many who have child care and home care responsibilities, but the tenure track forces those who have these responsibilities to work on a short and inflexible timetable that clashes with the biological clock of many women. Women exclusively bear children, and they are disproportionately represented among primary parents and child care-givers.

Men who would otherwise choose to spend more time with their children are also at a disadvantage as a result of this gendered system. While social stereotypes accept the fact that women spend time away from work caring for children, men who do so are considered odd, making it even more difficult to return to the workforce after staying home to care for their children.¹²⁰

2. *Gender segregation: gendered jobs, gendered workers*

In most workplaces, work is highly segregated according to the gender of the workers.¹²¹ Segregation occurs both horizontally and

119. *Id.*

120. See Kari Palazzari, *The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels*, 16 COLUM. J. GENDER & L. 429, 465–66 (2007) (explaining that fathers who take time off to care for children are often considered failures as fathers and as workers); see also Shellenbarger, *supra* note 104.

121. See NANCY LEVIT, *THE GENDER LINE* 57–63 (1998); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003) [hereinafter Schultz, *The Sanitized Workplace*] (arguing that institutional structures cause unequal treatment of women and that the most salient of these structures is segregation of women); Schultz, *Telling Stories*, *supra* note 11 (arguing that business organizations and practices shape women’s job choices); see also JUDITH LORBER, *PARADOXES OF GENDER* 195–213 (1994) (demonstrating the extreme gender segregation in the paid U.S. workforce—60 to 70% of men or women workers would have to change occupations to reach equality); William T. Bielby & James N. Baron, *Men and Women at Work: Sex Segregation and Statistical Discrimination*, 91 AM. J. SOC. 759, 759 (1986) (noting that job segregation by sex is the principal source of gender differences in labor market outcomes); Naomi Cassirer & Barbara Reskin, *High Hopes: Organizational Position, Employment Experiences, and Women’s and Men’s Promotion Aspirations*, 27 WORK &

vertically. Vertical segregation exists where women are concentrated in jobs at the lowest rung of the organization, typically with male supervisors.¹²² Horizontal segregation occurs where certain jobs are considered to be the near-exclusive domain of men or women.¹²³ In a typical company, there is both vertical and horizontal segregation. While some have argued that women occupy the lower-status and lower-paid jobs by choice or that women respond to natural or biological¹²⁴ needs when they take these jobs, the better view is that women's opportunities are shaped and limited by organizational structures and societal pressures.¹²⁵

AALS statistics demonstrate that there is severe gender segregation and stratification in the legal academy. While men predominate in the high status jobs, representing 80.2% of deans and 70.7% of full professors, women, who make up 61.3% of lecturers and 65.4% of instructors, occupy the majority of less prestigious jobs.¹²⁶

3. Gender characteristics of male and female jobs

a. Gender identity of jobs. One result of sex-segregated jobs is that jobs themselves acquire a gender identity or status. In comparison to jobs that are gendered female, white collar jobs¹²⁷ that are gendered male ordinarily demand more formal education, have greater status, require or are perceived as requiring more intellectual work, provide the worker with an assistant or secretary who helps with the job, entail more decision-making ability, offer greater pay and upward mobility, and provide a modicum of privacy. White (pink) collar jobs that are gendered female, in comparison to jobs that are gendered

OCCUPATIONS 438, 440 (2000) (citing to strong empirical support for the proposition that "segregation concentrates the sexes in different and unequal jobs").

122. Schultz, *The Sanitized Workplace*, *supra* note 121, at 2141.

123. *Id.* at 2141.

124. See, e.g., KINGSLEY R. BROWNE, *BIOLOGY AT WORK: RETHINKING SEXUAL EQUALITY* 4–10, 117–29 (2002); Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 973, 977–79 (1995) (arguing that biology accounts for differences in temperament and behavior that result in the glass ceiling and the gender gap in wages).

125. See WILLIAMS, *supra* note 21, at 37–39; Schultz, *Telling Stories*, *supra* note 11, at 1815–43.

126. ABDULLINA, *supra* note 4, at 18.

127. Because law school faculty jobs are closer to white collar than blue collar jobs, my focus in this Article is on the characteristics of white collar employment.

male, demand less formal education, confer lower status, require or are perceived as requiring less intellectual work, entail more “emotional labor,”¹²⁸ subject the holder of the job to interruptions, require the employee to serve another person of greater status, involve less decision-making ability and more willingness and ability to take direction, have lower salaries and less upward mobility, and, because they do not ordinarily have offices, provide little or no privacy during work or in the workspace.

Jobs that are gendered female engage skills that are modeled after the stereotype of woman as mother and caregiver. They reinforce the masculinity of the boss by sustaining feminine dependence and reinforcing the power of the boss over the subordinate workers.¹²⁹ They require emotional labor of the jobholder to soothe, comfort and empathize with the boss, assess the mood swings of the manager and to act as buffer or gatekeeper between the manager and others by smoothing relationships and relieving stress.¹³⁰ The role of a subordinate as a soother who mediates conflicts, answers telephones, takes messages and reschedules meetings, requires passivity and a willingness to sacrifice one’s own emotional needs in order to further those of the manager and of the organization.¹³¹

Jobs that are gendered male, in contrast, involve rational behavior and a tight control on one’s emotions, and an individualized, competitive, aggressive orientation. This suppression of intimacy, however, does not replace emotion, but may lead to a build-up of emotions that are often expressed by men at work in a more virulent and violent form, such as anger and rage.¹³² When the manager expresses anger, the masculine manager appeals to the dependent feminine caregivers whose role is to comfort the male leader and restore emotional stability to his damaged masculinity.

128. “Emotional labor” is a term coined by Arlie Hochschild and has been used by other social scientists. ARLIE RUSSEL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 6–7 (1983). “Emotional labor” refers to an expected component of the work that requires one to manage others’ emotions and to deny one’s own emotions. JENNIFER L. PIERCE, *GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS* 7 (1995).

129. See Deborah Kerfoot & David Knights, *Managing Masculinity in Contemporary Organizational Life: A Man’agerial Project*, 5 *ORG.* 7, at 8–9.

130. See *id.*

131. See *id.*

132. See *id.*

These caregivers are most often subordinates such as secretaries, assistants, clerical workers, and other support staff.¹³³

b. Expectations of men and women occupying jobs that are not gender appropriate. Ordinarily, men occupy jobs that are gendered male and women work in jobs that are gendered female. But what happens when women work in male jobs and men work in female jobs? The gender identity of the job does not always dictate how a person occupying the job will be treated. Even when a job is gendered male or female, the expectations of the person holding the job may vary depending on whether the job holder is a man or woman. Research demonstrates that women who occupy leadership roles that are gendered male are often considered to be less effective than men at the job even when performing the same quality of work.¹³⁴ Women who do not conform to stereotypical norms of femininity are judged to be too aggressive or too masculine in their behavior even in jobs that expect or require aggressive or stereotypically masculine behavior from a man holding the job.¹³⁵ These assessments place women in a “double-bind.” If they act in too feminine a manner, they are not qualified to do the job, which has already been defined as requiring masculine characteristics; if they act too masculine, they are ostracized because they do not conform to stereotypical expectations of how women should behave.¹³⁶

Even when performing a job that is gendered female, men need not exhibit the same amount of care giving as women. For example, one study shows that female paralegals absorbed the emotional outbursts of their male bosses, soothed their ruffled feathers, and communicated with the clients.¹³⁷ The female paralegals’ job evaluations depended in large part on their demeanor and ability to treat others pleasantly even in very stressful situations.¹³⁸ Besides

133. *See id.*; *see also* PIERCE, *supra* note 128, at 86–102 (describing the emotional labor performed by female paralegals for attorneys).

134. *See* Eagly & Karau, *supra* note 22, at 588–89.

135. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding, in part, that discrimination against a woman because she fails to live up to the stereotypical norms of femininity is sex discrimination under Title VII).

136. *Id.* at 251 (“An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.”).

137. PIERCE, *supra* note 128, at 86–102.

138. *See id.* at 9, 93–98.

alleviating the anxieties of attorneys, witnesses, and clients, the female paralegal must express gratitude for the attorney to others and act as the interpreter of the moods and feelings of the attorney to be considered among the best paralegals.¹³⁹

Male paralegals received different and better treatment from their bosses and from outsiders. Male paralegals acted as political advisors or providers of gossip or political information, but were not expected to absorb the boss's anger or to soothe him.¹⁴⁰ They had different responsibilities,¹⁴¹ and were often mistaken by outsiders and clients for attorneys.¹⁴² By virtue of their masculinity, male paralegals had greater access to power and authority than the female paralegals and were presumed to be on their way to law school.¹⁴³ Female paralegals and lawyers, in contrast, were mistaken for secretaries, and in some instances were asked to type documents for other attorneys.¹⁴⁴

Women who occupy male jobs often bump up against the "glass ceiling," which makes it difficult for women to rise to the very top of the organization.¹⁴⁵ In contrast, men doing jobs that are gendered female often ride the "glass elevator."¹⁴⁶ They are promoted out of the job into "male jobs," or otherwise made the supervisor of their women colleagues.

139. *Id.* at 98-99; see also MARY F. ROGERS & C.D. GARRETT, WHO'S AFRAID OF WOMEN'S STUDIES?: FEMINISMS IN EVERYDAY LIFE 26 (2002) (noting that women are expected to be nice and often live in circumstances that inhibit expressions of anger).

140. PIERCE, *supra* note 128, at 147-50.

141. See *id.* at 98-99.

142. See *id.* at 145.

143. See *id.*

144. See *id.*

145. David A. Cotter et al., *The Glass Ceiling Effect*, 80 SOC. FORCES 655 (2001) (demonstrating through an empirical study that a "glass ceiling" does exist for women); see also Judith Newmark, *Women in Theater: Add It All Up*, ST. LOUIS POST-DISPATCH, Oct. 12, 2003, at C3 (noting the difficulties women have in theater); *Some Things Better, Some Worse for Working Women, Survey Finds; Hourly Wage Nearly Equals That of Men, But Not Salary*, BALTIMORE SUN, Oct. 1, 2003, at 1D (noting that women's hourly salaries are approaching those of men but that women earn an average yearly salary of \$36,716 to men's \$52,908); Anne Summers, *Glass Ceiling Needs A Bit Of Leverage*, SYDNEY MORNING HERALD, Oct. 13, 2003 (arguing that private industry's discrimination against women in Australia, despite anti-discrimination laws, accounts for the low rate of women executive managers (8.8%) in Australia's top 200 companies).

146. See David J. Maume, Jr., *Glass Ceilings and Glass Elevators: Occupational Segregation and Race and Sex Differences in Managerial Promotions*, 26 WORK & OCCUPATIONS 483 (1999) (finding in an empirical study that white men in female-dominated professions tend to get promoted out of female-dominated jobs much faster than white women, black women, or black men).

c. Gendering of law faculty jobs. The “job” of the law school faculty member varies depending on rank, status, pay, courses taught, whether the person holds an administrative position, committees upon which the faculty member serves and his or her role on the committees, other service obligations of the faculty member, whether the faculty member occupies a chair or has an endowed professorship, whether the faculty member has sufficient administrative support, whether the faculty member has sufficient time to engage in scholarly research, and myriad other factors. I use the term “status” to denote not only the salary and job security, but also the respect of one’s colleagues and relative power a person has to shape the institution.

Law school faculty members are hired for jobs on the tenure track or for jobs governed by short-term or long-term contracts. Faculty members who are not hired onto the tenure track are usually clinical, library, legal writing, or academic support faculty. These jobs suffer from lower status, are occupied predominately by women, pay less, and are gendered female. Even when legal writing and clinical faculty are on tenure track or tenured, the jobs have lower status and are often gendered female. To illustrate this concept, I analyze below the expectations of legal writing faculty who occupy a “woman’s job.”

d. A case study of gendering jobs: legal writing. Like the positions of paralegals and secretaries, the jobs of legal writing professors¹⁴⁷ are gendered female.¹⁴⁸ Jobs that are gendered female on law school faculties are more interruptible, require much more student contact, and perform a high degree of emotional labor. Emotional labor is not recognized as work because it appears to come from inherent qualities of the person, rather than requiring an effort to present a

147. I use the term “legal writing professor” or “legal writing faculty member” to include the group of faculty members who teach writing and research in law schools. The status of these professionals varies considerably among law schools. Some are instructors or lecturers. Others are hired on specialized tenure tracks or on long-term contracts, while others still are hired onto the tenure track. The movement toward tenure track hiring of legal writing professors represents an improvement of status for this group of faculty members. Nonetheless, even where the faculty member is on a tenure track or tenured, there is stigma attached to the teaching of legal writing and research, and the job continues to be gendered female.

148. Much of this analysis applies to other faculty members who are hired on contracts. For example, faculty in charge of externships, academic support faculty, library faculty, and some clinical faculty face many of the same conditions. For a discussion of legal writing as a woman’s job, see generally Pamela Edwards, *Teaching Legal Writing As Women’s Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN’S L.J. 75 (1997).

patient and caring response.¹⁴⁹ Because legal writing professors teach in small groups and have twice or three times the number of office hours with students as doctrinal faculty, the administration and other faculty members expect them to be more personally connected to their students, and they often take on a counseling role.¹⁵⁰

Legal writing faculty are expected to act as mini-psychologists and emotional soothers for their troubled students.¹⁵¹ Their role, which resembles the behavior of a mother in a traditional family, is not only to teach, but also to guide with a gentle hand, to listen to complaints, to solve problems and to be available to respond to the students' emotional concerns about legal writing, law school and, at times, life in general. Because legal writing is typically the first course from which anxious first year students receive grades and/or feedback, students often express frustration and complaints about legal writing and their other law school courses to their legal writing professor.¹⁵² The feedback legal writing faculty give students is provided early and throughout the semester and is "far more extensive, personal and troubling" for students accustomed to doing well and unaccustomed to extensive written criticism from faculty.¹⁵³ Students resent the continuous time demands of legal writing assignments, and many of them see low grades for the first time in years in their legal writing papers.¹⁵⁴ Moreover, legal writing professors note that students come to their offices to discuss their legal writing papers, but often conclude by discussing other

149. See Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 162 (1997) (explaining that legal writing faculty must perform emotional labor).

150. *Id.* (comparing the legal writing class to the "home room" of law school).

151. See *id.* at 158-62 (noting that the qualities needed for legal writing teachers include sense of humor, good people skills, ability to work collaboratively, good listening skills or empathy, enthusiasm, accessibility, niceness, caring, patience, and creativity and that legal writing teachers should not be arrogant, egotistical, rigid, inflexible or short tempered); Melissa Weresh, *Form and Substance: Standards for Promotion and Retention of Legal Writing Faculty on Clinical Tenure Track*, 37 GOLDEN GATE U. L. REV. 281, 313 (2007) (noting that promotional standards for legal writing faculty requiring a "soft touch" may be discriminatory).

152. Maureen Arrigo-Ward, *How to Please Most of the People Most of the Time: Directing (or Teaching in) a First-Year Legal Writing Program*, 29 VAL. U. L. REV. 557, 571, 579 (1995).

153. Jan M. Levine, "You Can't Please Everyone, So You'd Better Please Yourself": *Directing (Or Teaching In) A First-Year Legal Writing Program*, 29 VAL. U. L. REV. 611, 615 (1995).

154. *Id.* at 616.

problems.¹⁵⁵ One legal writing director concludes that patience and enthusiasm are important qualifications for legal writing teachers.¹⁵⁶ She advises that her legal writing faculty members keep tissues in their offices because it is likely that they will have students crying at least a few times a semester in their offices.¹⁵⁷ Imagine the reaction that tenured faculty teaching substantive courses would have if they were told to keep tissues in their office for crying students!

As the female legal writing faculty member serves the students, she must suppress her own emotions even when the student acts in an insulting manner toward the instructor.¹⁵⁸ In some schools this role is explicit, whereas in others it is implicit.¹⁵⁹ This emotional labor increases the time and energy spent teaching legal writing, time spent from which the tenure track faculty and the administration reap benefits. The administration benefits from having legal writing faculty provide counseling services that would ordinarily be the job of the Dean of Students. While most faculty do some mentoring of students, the majority of the mentoring seems to fall on women faculty members.¹⁶⁰ The counseling that legal writing faculty do relieves the burden on tenured and tenure track faculty to take on additional service work as mentors and advisors. Furthermore, the school benefits from the public relations function served by the emotional labor that legal writing faculty perform because students whose emotions are soothed have better memories of law school after they graduate.¹⁶¹

Unlike the full professor teaching doctrinal courses who may ask students to make appointments or who sets up specific office hours when students may ask questions, legal writing faculty are often expected to have “open door” policies so that students can visit with

155. *Id.* at 590.

156. *See* Arrigo, *supra* note 149, at 162.

157. *See* Arrigo-Ward, *supra* note 152, at 587. She also makes sure that her legal writing faculty have telephone numbers of local mental health professionals in case students need referrals. *Id.* at 592–93.

158. *Id.* at 595.

159. It has been reported to me that at a faculty meeting in the early 1990s, the dean of an AALS law school noted that he believed that the school was paying a lot for full-time legal writing instructors instead of hiring adjunct professors. One reason he was willing to pay more for full-time faculty was that he expected full-time legal writing faculty members to offer comfort to distressed first-year law students. Adjunct faculty members would not have the time to spend with the students to perform this service.

160. *See* Apel, *supra* note 99, at 999–1001.

161. Arrigo, *supra* note 149, at 165.

them whenever the students have questions or personal issues.¹⁶² The legal writing professor, like the mother in the traditional family who disrupts her own sleep to respond to her children's cries, is eternally interruptible. These interruptions come at the expense of other work such as class preparation or scholarly pursuits, and can also invade leisure time.¹⁶³

Contrast these expectations to those encountered by tenure track faculty members who teach substantive courses. It is often expected that the doctrinal faculty member on a tenure track should limit interruptions by students due to the necessity to engage in scholarship, which is often given a higher value than teaching in law schools. When the tenure track faculty member does this, he or she engages in the behavior of the ideal father in a traditional family. While the mother deals with the children's emotional and physical concerns, the father's job is to assure that the family's economic needs are met. Because of the father's burden, the mother understands how weary the father must be when he arrives home at his "castle" and protects him from interruptions by the children.

While there is no question that it takes blocks of uninterrupted time to produce valuable scholarship and that scholarship is crucial to a vital law school, I make these comments to emphasize the gender difference between the jobs performed by the faculty whose primary role is teaching and by those who have scholarship responsibilities as well. Because of the platonic concept of men as intellectual beings and women as corporal beings, the jobs of tenure track faculty who engage in the higher order of scholarship are gendered male.

162. I recently visited a law school that had a sign posted on the stairs leading to the tenure track faculty offices. It warned students that they were not permitted upstairs unless they had made an appointment with a faculty member.

163. During the six years I taught legal writing, students spoke to me about their fears that they would not be able to graduate from law school, their relationships with their spouses, children and parents, their illnesses, and a host of other concerns. While the legal writing faculty member should not step beyond her expertise into therapy, she can help students get beyond those rough first year self-doubts and experiences and/or direct the student to a professional. From my discussions with colleagues during those years, I know that my experiences were not the exception. It was common knowledge that students often discussed professional and personal concerns with their legal writing teachers. This is a valuable role that legal writing faculty play at a time when their students are very vulnerable, but this work is time consuming and invisible. To a lesser extent, I still play this role for some of my first year Torts students, but they visit my office much less frequently, seem to view our relationship much more formally, and consume much less of my time than my legal writing students did. Even so, tenured women and untenured women on the tenure track appear to bear an inordinate amount of student counseling in law schools. See Apel, *supra* note 99, at 996-97, 999-1001.

Women's jobs are about taking care of the here and now—law students' questions—and not about high theory. Thus, by segregating legal writing or other law faculties from the doctrinal faculty, law faculties replicate the traditional relationship of husband and father and wife and mother, the status they hold vis-a-vis one another and the responsibilities they have to one another and to their children.

The experience of legal writing and other contract faculty, however, may not be uniform across gender lines. An interesting and important empirical project, which is beyond the scope of this Article, would address whether other faculty, the administration, and students hold men and women in legal writing positions to similar expectations regarding gendered behavior. While I have not conducted a comprehensive empirical study, I created a questionnaire that I sent to two listservs¹⁶⁴ that are directed at legal writing faculty. I received thirteen responses that provided anecdotal evidence. The anecdotal evidence suggests that, at least in some schools, either unconsciously or consciously, other faculty, administrators, and students have different expectations regarding gendered work done by male and female legal writing instructors.¹⁶⁵

164. A listserv is software for managing e-mail transmissions to and from a list of subscribers. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 726 (11th ed. 2007).

165. To gather this anecdotal information, I posted a questionnaire to two listservs, one for legal writing professors (LRWPROF-L@listserv.iupui.edu) and one for legal writing directors (dircon@lists.washlaw.edu) on December 2, 2007. The questionnaire stated:

1. Do **other faculty** (tenure track) and **administrators** treat men and women legal writing professionals differently or have different expectations of them?

Examples: They expect men to stay in the jobs temporarily and to use the job to move into a tenure track job, but no such expectation exists for women; They give men more opportunities to teach substantive courses than they give women; They fund or encourage men's research more than women's; They expect men to do less hand-holding than women, and the men are not evaluated on this criterion but the women are (or perhaps the emotional labor that men are expected to do is different from that of the women); They are more collegial with male legal writing teachers: more close friendships, more lunch invitations, more opportunities to talk about law school issues; They grant male legal writing faculty members better pay, better raises, better schedules, more opportunities to teach substantive courses (for more money?), better committee assignments, more mentoring on their scholarship or teaching; They complain less about a male's class "taking too much time away from more important courses" NB: These are just examples. If you have any other different examples, I welcome them.

2. Do **students** expect different behavior from female and male legal writing instructors based on their gender? If so, what is it?

This evidence suggests that tenure track faculty more frequently consider male legal writing faculty members than females to be in the job temporarily as a means to an end.¹⁶⁶ Moreover, it suggests that other faculty members accept the male legal writing professors as equals more than they accept their female counterparts as equals.¹⁶⁷ It also appears that at least some deans are uncomfortable paying male legal writing professors the low salaries earned by the women in the same jobs,¹⁶⁸ that faculty and administrators offer to mentor male

3. Do expectations of male and female legal writing instructors differ depending on the sexual orientation or gender identity of the legal writing faculty member? If so, how?

4. If there are different expectations and/or treatment, do they result at all from different behaviors on the part of male and female legal writing teachers? (example: research demonstrates that men negotiate for higher starting salaries much more than women do).

5. What problems do male legal writing faculty encounter that women who teach legal writing not encounter?

I received thirteen responses to this questionnaire, ten from women and one from a man (two women responded twice). The man and one woman said they did not see any differences in treatment and expectations of male and female legal writing faculty. One woman said there were few differences, if any, in her school, but she said that she thought her school was atypical. Nine women emphatically and definitely had observed differential treatment and expectations of male legal writing faculty. Because the response rate is low, I treat this as anecdotal evidence and would encourage an empirical study on this issue that would reach a larger percentage of the legal writing faculty.

166. Six of the women's responses noted that the school either considered the male to be in the job temporarily or that it at least expected the man to be more interested in research and in moving to another job.

167. Three of the responses stated that other male faculty invited the male legal writing faculty member to lunch often, but did not invite the women, and that the male faculty members were more collegial with the male legal writing faculty members. During the editing process, one of the student editors asked that I acknowledge that male tenure track faculty members may fail to invite female legal writing faculty to lunch because the male faculty members may be married and may want to avoid the appearance of impropriety. It seems that it would be possible to have a group lunch that would include the women and would not create these concerns. Moreover, even if the reason is to avoid the appearance of impropriety, it is not a gender-neutral or non-discriminatory reason for their behavior. This decision frames women as sexual beings and as temptations to engage in sex. This attitude toward women at work causes them to suffer professionally from the stereotype of sex symbol. *See* McGinley, *supra* note 24, at 395–96 (explaining that this type of behavior creates barriers to women's advancement at work); Martin, *Said and Done*, *supra* note 20, at 348.

168. One response stated that a man with no experience was hired to teach legal writing and the salary had been set for the position. Shortly before hiring him, the Dean asked the other two female legal writing faculty members if they approved of his giving the same pay to the inexperienced man as to the experienced women. The women had from eight to ten years of experience teaching legal writing. Another response stated that the only male legal writing faculty member negotiated for a salary that was considerably higher than the salaries of his female counterparts. The Dean refused to consider the female's complaints when they

legal writing faculty members more often to do research,¹⁶⁹ and that, on at least two occasions, the male legal writing professors were granted research stipends that had been previously unavailable to the women occupying the position.¹⁷⁰ Finally, there is some anecdotal evidence that students expect less “mothering” and hand-holding of male legal writing professors and are more comfortable with more direct, businesslike behavior from the men than from the women.¹⁷¹ These anecdotes are consistent with the ethnographic study by Jennifer Pierce of the expectations of male and female paralegals in a large law firm and the law office of a corporation.¹⁷² Like teaching legal writing, the job of paralegal is gendered female. Even in the less prestigious job that is gendered female it may be that women are held to a different standard.

The academy generally characterizes the work of the legal writing professors as less intellectual than and, therefore, inferior to the work of the doctrinal faculty member. Doctrinal faculty members defend this characterization by noting that they develop subject matter expertise that legal writing faculty lack. Especially if a tenure track faculty member researches, writes, and teaches in a particular subject

confronted him with this information. Eventually, the school’s executive committee forced the Dean to raise the women’s salary to assure equal treatment.

169. Three responders specifically mentioned that the doctrinal faculty encouraged the male legal writing faculty to do research and assisted them by mentoring their research opportunities.

170. In both cases, the female legal writing faculty members either were not permitted to get research grants or their applications for research grants had been denied. The new male legal writing faculty members applied for research grants and they were given research stipends. It appears that in both of these cases the women were then permitted also to get research stipends. This result suggests that hiring male legal writing faculty may benefit women in the job.

171. Four responses stated that the men were expected to do less mothering or hand-holding than the female legal writing faculty. Two more stated that men were accepted by students as having more credibility and being more expert in their fields than the women. One more stated that male faculty (legal writing and doctrinal) were able to tell saltier jokes and use swear words in class, while students were horrified if a female faculty member used one swear word in class. She also mentioned that she was told to “smile” in the halls frequently. She had never heard any of her male colleagues being told to “smile.” In contrast, another woman wondered why the female legal writing faculty members who were slightly more masculine in their presentations were accepted more by the students. Finally, a number of respondents noted that they believed that all women faculty members, whether legal writing or not, shouldered the burdens of mentoring students more than their male colleagues. *See also* Apel, *supra* note 99, at 996–97, 999–1001.

172. *See generally* PIERCE, *supra* note 128 (studying men and women paralegals in a law firm and the legal office of a corporation).

area, he or she will develop a deeper understanding of the nuances of the substantive law taught. There is a serious question, however, as to whether the teaching performed by legal writing faculty is necessarily less intellectual or whether it has been defined as less intellectual because it involves teaching styles and requirements that are gendered female. Indeed, the work of the legal writing professor may not necessarily require a deep grasp of a substantive subject matter, but, when combined with research and publication, it has the capacity to involve a deeper understanding of procedure and pedagogy than that required for teaching doctrinal classes. If this is true, it may be that the ideal legal writing teacher's work, when compared to the ideal doctrinal teacher's work, is equally as intellectual. It may also be that the judgment of the legal writing teaching as less intellectual is based on the gender of the job—female.¹⁷³

I would be remiss if I did not recognize the fast-paced change that is taking place in law schools regarding the status of legal writing faculty. In many schools, legal writing professors have more job security and better status than they have ever enjoyed before. Some schools hire legal writing faculty on the full tenure track, while others grant them specialized tenure or long-term contracts. Certainly, any contractual relationship that is short of full tenure track will be regarded as inferior status. Even those who enjoy tenure may not have the same status as other faculty who are not teaching legal writing.¹⁷⁴

173. On faculties where the legal writing faculty member collaborates with a doctrinal faculty member to produce writing problems in a particular substantive area (for example, the legal writing faculty member joins with the Torts professor to create problems for the Torts class), the legal writing faculty member may have a subservient position to the doctrinal faculty member, much like the position of wife to husband in the traditional family, or secretary to boss. Although the pedagogical benefits to students would theoretically increase because of the co-teaching, many legal writing directors have avoided this relationship because it is fraught with status issues. In most circumstances, unless both the legal writing faculty member and the doctrinal faculty member are on equal status, the relationship will inevitably reproduce the gendered relationship of superior and inferior. The low status, feminized writing programs in law schools have their counterparts in the universities' English departments. Those who teach first-year writing to undergraduates in universities report that the field of composition has been feminized, that a significant number of these positions are off the tenure track, contingent, and held more frequently by women than by men. See Deirdre McMahon & Ann Green, *Gender, Contingent Labor and Writing Studies*, ACADEME, Nov.–Dec. 2008, available at <http://www.aaup.org/AAUP/pubsres/academe/2008/ND/Feat/mcma.htm>.

174. A number of years ago a law school that granted tenure track status to its legal writing faculty performed a multiple regression analysis on the pay of the faculty. It concluded

Besides legal writing, which has a female gender status, many other courses are gender-identified. The next subpart discusses the staffing of courses along gender lines.

4. *Gendered course assignments*

Course assignments are also gendered in many law schools as women are more likely to teach classes viewed as less prestigious and men are more likely to teach more prestigious courses. Merritt and Reskin's study showed that men were significantly more likely than women to teach Constitutional Law.¹⁷⁵ Women were more likely than men to teach skills courses and Trusts and Estates.¹⁷⁶ White women were significantly more likely than white men, men of color and women of color to teach family law, and white professors, both men and women, were significantly more likely than professors of color to teach tax-related courses.¹⁷⁷ When the authors performed the multiple regression analysis, they found that sex or race bias persisted in the assignment of four of the subject areas after controlling for other variables. Those four included courses related to constitutional law, trusts and estates, skills, and family law.¹⁷⁸

White women and women of color having similar credentials to white men and men of color had fewer opportunities to teach constitutional law courses.¹⁷⁹ Moreover, even where men and women had similar credentials, women were significantly more likely to teach low status skills courses such as Legal Writing, clinics, or Advocacy.¹⁸⁰

that teaching legal writing was the only factor that accounted for a pay disparity. Those who taught legal writing were paid so much less than the other faculty that there was a statistical significance. This study was an internal study and was not published, but the information was communicated to me by a number of faculty members at the law school.

175. See Merritt & Reskin, *supra* note 2, at 258. They explained that Constitutional Law is a high status course. It is sought by many new law professors and considered a "plum" assignment. Moreover, those teaching Constitutional Law had the highest of credentials. *Id.* at 259-60. Interestingly, even controlling for credentials, women teach Constitutional Law less than men do. *Id.*

176. *Id.* at 259 tbl.8.

177. *Id.* at 259. Corporations was the only course studied that did not have a statistically significant race or sex difference, but a higher percentage of men than women taught the course. *Id.*

178. *Id.*

179. *Id.* at 261.

180. *Id.* at 261-62. The skills courses, including legal writing, trial advocacy or clinics are among the least favored courses for tenure track faculty. Faculty members with the most

Trusts and Estates, the authors note, is a low status course,¹⁸¹ and women with credentials similar to those of the men were much more likely to teach the course.¹⁸² The study found that, even when controlling for credentials and experience, white women are ten times more likely than white men to teach Family Law.¹⁸³ Being a person of color, either male or female, also raised the odds of teaching Family Law, but not to the extent that being a white woman did.¹⁸⁴

Merritt and Reskin concluded that

subtle institutional decisions appear to shunt women into some low-status teaching areas while reserving at least one prestigious area disproportionately for men. Indeed, the pattern suggests that women may be able to ‘buy’ full representation on law school faculties only by agreeing to shoulder the most disagreeable teaching burdens.¹⁸⁵

These disagreeable burdens include low status courses that do little to advance one’s career, including skills courses that require significant expenditure of teaching time outside the classroom and that are considered to be less intellectual than the high status courses such as Constitutional Law.

Marjorie Kornhauser conducted a thirteen-year longitudinal study comparing the courses taught by women and men faculty during academic years 1990 to 1991 and 2002 to 2003.¹⁸⁶ Kornhauser explains that most jobs are segregated by gender, and that even when occupations become integrated, the occupation

prestigious credentials do not teach these courses. *Id.* Nonetheless, even controlling for credentials, women teach these courses at a far higher rate than men do. *Id.* at 263.

181. By “low status” courses, I mean courses that faculty members are less interested in teaching and courses that confer less power on the faculty member. Those faculty members with more power in shaping the institution generally do not teach low status courses.

182. Merritt & Reskin, *supra* note 2, at 263. The authors note that Trusts and Estates is a less-favored course of tenure track faculty members. Those teaching this course are ordinarily not found through the network but usually apply in the open market and participate in the AALS recruiting conference.

183. *Id.* at 264. The study showed that Family Law was neither a highly sought after course like Constitutional Law nor a course that had low status like Trusts and Estates. *Id.* at 265. But there is no question that the course, perhaps because of the subject matter, is often identified as a female course.

184. *Id.* at 264–65.

185. *Id.* at 275.

186. Kornhauser, *supra* note 3, at 298–300.

becomes stratified by gender.¹⁸⁷ Her empirical study suggests that the phenomenon of gender stratification has occurred in law schools.¹⁸⁸ While the number of women law professors increased by almost fifty percent during the period studied, there was a concomitant increase in identification of courses as male or female and a trend toward re-segregation by stratification of specialties.¹⁸⁹ Within this stratification, women taught courses in the less prestigious areas.¹⁹⁰

The study concluded that this differential did not occur randomly. Almost eighty percent of the courses had a statistically significant gender disparity, with either a disproportionate number of men or women teaching them.¹⁹¹ Moreover, despite a large increase in the percentage of women law professors, Kornhauser found that the number of courses with a gender disparity increased by more than twenty percent,¹⁹² a finding that contrasts with the logical assumption that the influx of women as law professors would narrow the gender disparity of law courses.¹⁹³ Courses with a gender disparity were usually courses with a “gender identity”—courses identified as having traditionally female or male traits.¹⁹⁴

187. *Id.* at 293.

188. *Id.* at 294.

189. *Id.* at 327.

190. *Id.* at 294.

191. *Id.* at 295.

192. *Id.*

193. *Id.*

194. *Id.* at 296. Professor Kornhauser defines male and female courses as follows:

In this study, a “male” course is defined as having one or more of the following traits: 1) deals with core legal subject matter, such as Evidence or Corporations, 2) is a traditionally prestigious area of the law within the legal academy, such as Constitutional Law, 3) is a prestigious area of the law in practice because it commands high fees, has high intellectual content, high status clients, and/or is in high demand, such as Intellectual Property, and/or 4) involves a lot of scientific and/or regulatory aspects, such as Corporate Finance, Federal Taxation, and Antitrust. A prototypical male course such as Law and Economics, one of the most male-dominated courses, fits many of these criteria. Law and Economics is a prestigious specialty (e.g., a field with many publications in law review articles, theoretical and intellectual), a powerful force in both law and law schools, and is traditionally male in its concern with hard numbers and abstract facts. Under this definition, courses that increased the amount of law and economic analysis in their content would have a more “male” gender identity and could become more male dominated.

A “female” course, in contrast, is one that has one or more of the following traits: 1) involves topics traditionally of interest to women involving relationships

5. Students' gendered expectations of faculty

Social role theory explains why students would have different expectations of female and male faculty members. Because the female gender role is more communal, students would expect female professors to be more caring and communal than their male counterparts and more helpful to students. Moreover, if we consider these expectations to be injunctive norms, students would judge women harshly whose teaching and student contact do not meet their gender roles.¹⁹⁵

There is considerable research demonstrating that student evaluations of faculty members' teaching are infected with unconscious bias. For example, at the college level women and men students generally give lower teaching evaluations to female faculty

among people, such as Family or Juvenile Law, 2) is softer law, such as Poverty or Immigration Law, as opposed to traditional, more doctrinal or hard core subjects such as Contracts, Conflicts of Laws, or Federal Courts, 3) is a traditionally less prestigious area of the law within the legal academy such as Legal Writing and Research or Clinical Law, and/or 4) deals with a less prestigious area of practice, such as Immigration or Poverty Law. A prototypically female course, such as Women and the Law, the most female dominated course, fits many of these criteria.

Id. at 307.

195. See Eagly & Karau, *supra* note 22, at 576. An anecdote illustrates the subtlety of the differential gendered expectations that women and men faculty members experience. In 2002, I was a full professor at Boyd School of Law (where I currently teach), which was in its fifth year of operation. Jennifer, a female student, approached Professor X, a woman professor, to ask her to write a letter of recommendation for a university-based scholarship, which was due in only two days. Because Professor X had written a recommendation for another student, she could not write for Jennifer, but she urged Jennifer to ask one of two male professors for a recommendation. Jennifer responded that the two men were too busy and that she would ask Professor McGinley. This response was ironic because, like the two men, I was working more than full time on my classes and my scholarship as well as toiling to build a budding law school. Unlike the two men, however, I had time-consuming responsibilities at home. I had shared responsibility for three young children with my husband who was also a full-time law professor. One of the men who was "too busy" had two young children, but his wife, who was a full-time homemaker, took primary responsibility for their care. The second male law professor had no children. Ironically, Jennifer had three small children; she had attended law school part-time in the evening and had given birth to her third child while at law school. If anyone understood how busy I was, it was she. Jennifer knew of my family circumstances and of those of the other professors. Therefore, it is likely that her willingness to approach Professor X and me instead of the two male law professors to ask for a recommendation to be delivered in less than forty eight hours was gendered. Because our social gender role was to act in a sensitive, gentle manner, we were expected to write the student recommendation on only two days notice. Our male colleagues, however, were "too busy" and agentic to ask to write the recommendation despite their similar work responsibilities and fewer family responsibilities. Susan Apel records similar events at her law school. For example, she notes that students go to female faculty members for mentoring more often. See Apel, *supra* note 99.

members than to male faculty members.¹⁹⁶ A substantial number of both women and men students believe that women have to prove their competence more than men do.¹⁹⁷ In addition to evaluating women law professors less favorably, the content of the evaluations of women differs. For instance, women receive comments about their appearance and they are accused of not being “man” enough and simultaneously of not being “woman” enough.¹⁹⁸ Even the women who receive positive evaluations do not receive evaluations that are as positive as those of the men.¹⁹⁹

Recent work by Deborah Merritt demonstrates that there is a very strong link between evaluations and non-verbal behavior of the professor.²⁰⁰ Students make judgments within the first minute or two of class based on non-verbal behavior, and once the judgments are made, they are nearly immutable.²⁰¹ Students filter their perceptions of faculty members through social stereotypes. When male and female faculty members engage in identical behaviors, they are interpreted differently.²⁰² For example, men who engage in eye contact are considered to be credible whereas women who use eye contact are considered to be coercive.²⁰³ A man who acts in a relaxed fashion will have credibility and be judged to have legitimate power.²⁰⁴ A woman who acts relaxed will reduce the viewer’s estimate of her power.²⁰⁵ In the law school setting, students may be reacting to the incongruity between the social gender role of a woman and her organizational role of professor—a male identified job.

196. See Deborah A. Ballem, *Affirmative Action: Purveyor of Preferential Treatment or Guarantor of Equal Opportunity? A Call for a Revisioning of Affirmative Action*, 18 BERKELEY J. EMP. & LAB. L. 1, 19–21 (1997).

197. Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 336 (1996) (demonstrating that “forty-eight percent of all women students . . . believe that female professors, more than male professors, must prove their competence”).

198. *Id.* at 336–39.

199. *Id.* at 339.

200. See Deborah J. Merritt, *Bias, the Brain and Student Evaluations of Teaching*, 82 ST. JOHN’S L. REV. 235, 238–39 (2008).

201. *Id.* at 248–49.

202. *Id.* at 239.

203. *Id.* at 265.

204. *Id.* at 266.

205. *Id.* at 267.

6. Practicing masculinities in law school organizations

This subpart examines gender dynamics that occur in many law schools. While these gendered relationships benefit men as a group and harm women as a group, the study of masculinities demonstrates that the results are much more complicated. Many men, for example, are punished because they cannot, or will not, live up to the masculine behavior expected of them, or because they do not join the group masculinities in bullying or harassing women or less masculine men colleagues. Moreover, some women on law faculties adopt masculine practices in order to survive or further their careers. These complications shield the gendered nature of the behavior from visibility and the practices become conflated with work rather than with masculinity. Once this conflation occurs, it is easy to deny that gender is being practiced at work.²⁰⁶

a. Leadership and masculinities in corporate America. Studies on leadership styles of men and women in organizations as well as the study of masculinities are useful in analyzing the behavior and treatment of women and men law faculty members. While in most business organizations there is a clear hierarchy, in law schools there are administrative leaders such as deans and associate deans, whose power is tempered by faculty governance. Individual faculty members and groups of faculty members who do not hold administrative titles can become more powerful than their counterparts in business organizations. These power relations can be either formal or informal. Formal power derives from rank, tenure, the appointment to a professorship or chaired position, and the position of chair (or even member) of certain committees such as appointments and promotion and tenure that are considered to be core to the law school's status in the hierarchy of law schools. Informal power derives from the faculty member's scholarly reputation, relationships with important scholars in the field, positions held in the legal academy outside of the law school, relationships with university administrators and relationships inside the law school with the dean or deans, and individual or groups of faculty members who exercise power in the law school community.

206. See Martin, *Said and Done*, *supra* note 20, at 345, 357 (explaining that characteristics such as competence and leadership are conflated with gender in ways that harm women and benefit men and that often when men are "practicing gender" they have the power to define what they do as work).

David Collinson and Jeff Hearn have identified five masculinities that are practiced in workplaces, all of which occur on law faculties. They are: authoritarianism, paternalism, entrepreneurialism, informalism, and careerism.²⁰⁷

Authoritarianism “celebrates a brutal and aggressive masculinity.”²⁰⁸ It broaches no dissent and requires that subordinates respect power and authority. Managers manipulate their power by bullying and creating fear in subordinates. Collinson and Hearn observe that managers who adopt authoritarianism judge their own success and the success of others by an authoritarian standard, believing that others who do not bully are weak.²⁰⁹

Paternalism is a masculine method of control modeled on the relationship of the father to the traditional family. It relies on personal trust and loyalty of subordinates to enhance the manager’s power.²¹⁰

Entrepreneurialism, a highly competitive management style, values efficiency and managerial control over all other values. It requires subordinates to work long hours, to make themselves available to move geographically, and to meet very tight deadlines.²¹¹

Some men build relationships with other men through informalism, which often results in disempowering women and men who do not conform to gendered expectations. Men use drinking, humor, discussions of sex, sports, women, and cars to build informal relationships and to differentiate themselves from others.²¹² Women and men who do not conform to the informal behavior or who are otherwise outsiders often feel uncomfortable in work settings because of informalism. Whether intentionally exclusive or not, informal behavior, which is built on “homosociability,” the tendency of men to prefer to socialize with other men,²¹³ can lead to

207. David Collinson & Jeff Hearn, *Naming Men as Men: Implications for Work, Organization and Management*, 1 GENDER, WORK & ORG. 2, 13–16 (1994).

208. *Id.* at 13.

209. *Id.*

210. *Id.*

211. *Id.* at 14.

212. *Id.* at 14–15.

213. *Id.* at 15.

accusations that a “boys’ club” exists which excludes women and outsider men from avenues of power.²¹⁴

Careerism is a practice enacted by men whose masculine identities depend on their breadwinner status and upward mobility. It includes working long hours, placing their work ahead of other considerations, and working on tight deadlines.²¹⁵ Men who practice careerism often rely on women’s support in order to be free to work the schedules they work.²¹⁶

Sociologist Patricia Yancey Martin’s²¹⁷ studies revealed that “[c]oncepts that are key to organizational life such as competence, leadership, effectiveness, excellence, rationality, strength, and authority (among others) are . . . *conflated* with the practicing of gender in ways that differentially affect women and men.”²¹⁸ Because some positions at work have more power, persons holding those positions can often admit or deny that gender is being practiced.²¹⁹ While women are often powerless to insist that gender plays a role in

214. See, e.g., Elisabeth Bumiller, *Clinton Retreats on Issue of Men vs. Women*, N.Y. TIMES, Nov. 3, 2007, at A18 (noting that Hillary Clinton told students at Wellesley College that the school had prepared her to deal with the “all-boys’ club of presidential politics”).

215. Collinson & Hearn, *supra* note 207, at 15–16.

216. *Id.* Sociologist Patricia Yancey Martin uses different terms to describe the behavior she observed of male and female employees, but many of the behaviors are similar to those described by Collinson and Hearn. See Martin, *Mobilizing Masculinities*, *supra* note 18, at 603–06 (describing “contesting masculinities,” “affiliating masculinities,” and differentiating the audience that specific masculinities target).

Contesting masculinities are competitive efforts to improve the standing of men in the organization. They include peacocking or vying for attention, self-promoting, dominating or controlling others, and expropriating or taking credit for others’ labor. *Id.* at 601 tbl.1, 603–04. These behaviors are similar to careerist and entrepreneurialist behaviors identified by Collinson. See Collinson & Hearn, *supra* note 207 at 14–16.

“Affiliating masculinities,” similar to the informalism Collinson identifies, see *id.* at 14–15, refer to behaviors that men (or token women) adopt to affiliate with other men, which include visiting with other men in the halls and offices and going out to lunch together, talking about sports, or other “male” activities at work. Martin, *Mobilizing Masculinities*, *supra* note 18, at 602.

217. See, e.g., Martin, *Mobilizing Masculinities*, *supra* note 18. Martin uses feminist standpoint theory to observe workplaces. Feminist standpoint theory uses women’s perspectives to describe men’s behavior at work. This viewpoint provides the perspective of someone who is often in a position of less power at work. *Id.* at 592–93. Martin conducted her research by studying seventeen for-profit organizations; her research included observation and extensive open-ended interviews of workers in operational or managerial settings, taking place between 1992 and 1995. *Id.* at 594. Martin excluded from this article cases where the women believed the men intended to harm them. *Id.*

218. Martin, *Said and Done*, *supra* note 20, at 345 (citations omitted).

219. *Id.* at 357.

the organizational hierarchy, the men's denial that gender is present "does not erase the harm women experience from men's excluding them, making them feel out of place, or requiring them to 'act like men.'"²²⁰ Martin concludes that men's superior power permits them to define what they do as work, even though women would define it as "behaving like men."²²¹

b. Adapting masculinities studies to law schools. Collinson's five characteristics of masculinities in organizations come from his observation of the top-down organizational structure ordinarily found in business rather than the messier organizational reality that exists in law schools. In law schools, the faculty plays a much greater role in making policy and managing the law school than a group of employees in a corporation does. Among other things, the faculty is responsible for designing curriculum, approving the rights inherent in rank and status of non-tenure track faculty, and designing the standards by which to determine whether tenure track faculty should be granted promotion and tenure and applying the standards. Because the managerial structure of law schools differs from that of corporations, Collinson's categories may not exactly fit the design of law school organizational structure. Moreover, there is no question that the power of the dean vis-a-vis the law school faculty varies significantly across law schools. This variation may depend on the culture of the school and the managing style of the dean.

Nonetheless, Collinson's categories are useful in evaluating whether masculine practices dominate in law schools. Moreover, Martin observed masculinist practices in settings where women were in positions of considerable power, several of them holding PhDs and working in research settings.²²² The behaviors she observed were practiced not only by superiors, but also by persons who were in equal, or even inferior positions to the women who reported the behaviors.²²³ These observations seem to confirm the theory that even when women have superior organizational power, their social gender roles deplete some of that power.²²⁴

220. *See id.*

221. *Id.*; *see also* JOYCE K. FLETCHER, *DISAPPEARING ACTS* 89–91 (1999).

222. Martin, *Mobilizing Masculinities*, *supra* note 18, at 595–600.

223. *Id.*

224. *See generally* Juliano, *supra* note 69; McGinley, *Creating Masculine Identities*, *supra* note 68.

Especially with increasing competition among law schools due to fewer resources and the pressure created by the *U.S. News & World Report* rankings,²²⁵ “masculine” traits of hyper-competition and aggression are often displayed on law school faculties.²²⁶ Both women and men faculty members engage in authoritarian, entrepreneurial and careerist behaviors that make the workplace a less-inviting place to work for many. Many law schools require unprecedented numbers of high-quality published articles before hiring entry-level candidates and are ratcheting up the requirements for awards of tenure. Moreover, “[t]he number and percentage of women on tenure track is falling.”²²⁷ Tenure discussions examine not only the teaching, scholarly publications, and service of the individual faculty member, but as part of the scholarship requirement, they also gauge whether the candidate is building a national or international reputation by examining the invitations to present research and the number of citations the faculty member’s work enjoys.²²⁸

This behavior reflects authoritarianism, entrepreneurialism, and careerism as described by Collinson. As in the business world where the pressure comes from an authoritarian boss, in some law schools, an authoritarian dean exerts pressure on faculty members. More frequently in law schools, however, tenured faculty members, both as individuals and in groups, exert pressure on their untenured (and tenured) colleagues. Like the authoritarian boss, certain tenured faculty members may expect loyalty and obedience and broach no dissent from their junior colleagues. For example, a junior colleague’s failure to follow suggested improvements in scholarship may be used against the candidate at tenure time.²²⁹ Moreover, law faculty members who engage in authoritarian behavior may engage

225. See, e.g., *America’s Best Graduate Schools 2008: Top Law Schools*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/grad/law> (last visited Jan. 26, 2009).

226. The description of the masculine practices observed in law schools come from anecdotes told to me by other law faculty members about their law schools. Not all the behaviors are evident in any given law school. But at least some of the behaviors described seem to appear at many law schools. I do not claim to have made an empirical study of these practices in law schools, but such a study would be important and useful.

227. Angel, *supra* note 8, at 173–74 & nn.26–27.

228. See, e.g., Brian Leiter, *Top 35 Law Faculties Based on Scholarly Impact, 2007*, BRIAN LEITER’S LAW SCHOOL RANKINGS, http://www.leiterrankings.com/faculty/2007faculty_impact.shtml (last visited Jan. 26, 2009).

229. See Angel, *supra* note 1, at 831, 833.

in bullying tactics to try to alter the victim's behavior, or in the worst scenario, to force the victims to leave the institution.²³⁰

While the bullying behavior described is often directed at untenured faculty members because of their failure to meet the standards of certain tenured faculty members, it can also be directed at tenured faculty members. Accomplished scholars who do not engage in the bullying tactics, or who actively disapprove of them, can also suffer from bullying.²³¹

Authoritarian behavior is not only a means of enforcing tenure standards by a group of faculty members. It may also be employed to exercise control over appointments and other key decisions at the law school. In order to maintain control over important law school decision making, groups or individual faculty members enhance their power by bullying those with whom they disagree. In turn, they use their power to protect less productive scholars (pre-tenure and post-tenure) in a spoken or tacit exchange for support or silence by the less productive faculty member. While there has not been an empirical study on the subject, anecdotal evidence suggests that the strategy of protecting less productive scholars who support or remain silent in the face of bullying tactics can be especially effective if the less productive scholar belongs to an outsider group because of sex, gender identity, age, or race. The insiders may point to support from the "token" protected individuals to argue that their standards and

230. See, e.g., Levit, *supra* note 3, at 793–95 & nn.67–69 (detailing how feminist scholars have been denied tenure, given lower pay, or treated with hostility). Levit also discusses how women law professors are diminished through the concept of domestication. An aspect of domestication, according to Levit, is the "taming" of women law professors. Professor Levit states:

This is somewhat different from the subtle, almost invisible cultural pressures to assume scripted roles. This aspect of domestication of female law professors is more coercive. It consists of celebrated tenure and promotion battles that serve as examples of punishment for nonconforming women. It includes sharp derision in print of feminist theorists with some of the worst stereotypes applicable to the "F-word." It is a means of controlling incipient rebellion by demonstrating what happens to women who cause trouble. More damaging still are the traditional theorists who have accused some feminists and critical race theorists of "unreason."

Id. at 777. Nancy Levit further notes that domestication of women faculty members includes the struggles that tenure track women, especially women of color and those that do not conform, face inordinately to achieve tenure and promotion. *Id.* at 793–95; see also Robin Wilson, *5 Women to Leave Florida State U. Law Faculty*, CHRON. HIGHER ED., June 4, 1999, at A16.

231. See, e.g., Levit, *supra* note 3, at 793–95.

tactics are gender-, race- and age-neutral, and that the masculine practices do not discriminate against members of outsider groups.²³²

This behavior is a performance of masculinities that disparately affects women. White men as a group benefit from these behaviors, but not all white men engage in this authoritarian bullying behavior and some are harmed by it. Moreover, perhaps in order to shore up their “scholarly chops,” at least some white women and persons of color enact masculine behaviors. In fact, some women and minority law professors may feel even greater pressure to conform to the masculine ideals of competitiveness and adversarial behavior in order to become “one of the guys.” These women and minority law professors may engage in aggressive masculinities in order to achieve the protection, if not the respect, of the most demanding white male colleagues. We all recognize the “type” of woman or minority law faculty member who seems to judge women or minority colleagues more harshly than she judges the white males.

While this behavior may involve a conscious self-protective strategy to align oneself with the more powerful male colleagues, the behavior may also be explained as an unconscious justification of the status quo. Ten years of social science research support a theory of “system justification.”²³³ System justification theory posits that persons who are members of disadvantaged groups engage in more justification of the status quo than would be expected.²³⁴ This reaction is more prevalent when measuring implicit (unconscious) bias as opposed to explicit (conscious) bias. “[M]any recent studies reveal that when intergroup biases are measured at an implicit level, members of low status minority groups (including African Americans) commonly fail to exhibit ingroup bias and show preferences for higher-status outgroups—even when these preferences are soundly rejected at an explicit, conscious level.”²³⁵ As an example, women, even those in an explicitly feminist environment (Yale College), seemed to feel that their work was less valuable than the men’s. When asked what their work was worth, they valued it at

232. See Angel, *supra* note 1, at 831; see also McGinley, *Creating Masculine Identities*, *supra* note 68, at 1174–82 (presenting evidence that harassment because of sex and bullying are inter-related).

233. John T. Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 *POL. PSYCHOL.* 881, 883 (2004).

234. *Id.* at 884.

235. *Id.* at 893.

eighteen percent less than the value that their male colleagues gave to their own work, even though the women's and men's work was of equal quality.²³⁶

In addition to authoritarian behavior, individual faculty members practice careerist behavior, working long hours to produce scholarship that will garnish their reputations so they can earn tenure in their schools and move into more prestigious law teaching jobs as lateral hires. These individuals expect the same of their colleagues. They join together in groups to exercise entrepreneurial behavior that seeks to improve the ratings and rank of the law school through scholarly recognition. These groups see the improvement of the law school reputation as an entrepreneurial effort that values hard work and efficiency and that values publication of scholarly research over the more "feminine" caring values of teaching and building community.

Competition is directed at other law schools, but it may also turn inward as aggressive treatment of law faculty members who, some believe, hinder the school from achieving better rankings because of their failure to produce sufficient scholarship, their failure to publish in prestigious journals, their failure to write in areas that are valued as intellectual, or their failure to vote for a particular person for appointment to the faculty. The rankings have generated fear: fear that one's institution cannot compete, fear that an individual does not possess the necessary background or ability to move to a more highly-ranked institution. This anxiety, in turn, can result in blaming those who presumably stand in the way of individual or institutional achievement. Persons of color and white women are particularly vulnerable to attack because some may believe (perhaps unconsciously) that they stand in the way of the individual white male who deserves to move to a more highly-ranked institution but who cannot compete because of affirmative action.²³⁷ Persons of color and white women may also be perceived as barring the institution from improving its rankings because they are viewed as

236. *Id.* at 905 (citing J.T. Jost, *An Experimental Replication of the Depressed Entitlement Effect Among Women*, 21 *PSYCHOL. WOMEN Q.* 387 (1997)).

237. Deborah Merritt and Barbara Reskin performed their empirical study on law school hiring in order to verify whether the perception that white men could not get hired was true. Their results demonstrated that this viewpoint is mythical. White men were hired at almost exactly the same rate as white women in proportion to their numbers in the qualified pool and were hired more frequently than women of color. Merritt & Reskin, *supra* note 2, at 251.

not writing sufficient quality scholarship, as writing disproportionately in subject areas that are unimportant, either because it is critical outsider scholarship or because it deals with “softer” issues such as discrimination or family law.²³⁸

This behavior, which at times can become blatantly sexist and violent, more often is composed of microaggressions or microinequalities²³⁹ that, when taken as a whole, create a hostile working environment for the person of color, white woman, or white man who does not live up to the normative masculine ideal.²⁴⁰ While women, especially women of color, disproportionately become targets of aggressive behavior, the perpetrator of the behavior is often, but not necessarily, a man. As recent studies on bullying at work suggest, this behavior is often gendered.²⁴¹

Informalism is also practiced on law school faculties, where men, who prefer homosocial relationships, gather in the faculty lounge to discuss sports, TV programs, sex, and other subjects that form a bond between men but exclude others. Examples of informalism may also include the use of gender- and race-based humor that is ostensibly used to “defuse” gender- and race-based conflict. It often has the opposite effect, however, because it can escalate conflict through accusations of racism or sexism and the responses that the accusers have “no sense of humor” or are enforcing a “politically correct” environment.

While aggressive behavior is often visible, the fact that it is masculine behavior or that it occurs because of gender can be lost.

238. See Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 271–73, 279 (1994) (questioning a critique of narrative (a common form of outsider scholarship) as unacademic); Terry Smith, *Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace*, 57 AM. U. L. REV. 523, 529–37 (relating personal experience with treatment of minorities in the legal academy, including hiring and advancement situations); David M. Zlotnick, *The Buddha’s Parable and Legal Rhetoric*, 58 WASH. & LEE L. REV. 957, 1009 (2001) (relating how some traditional legal scholars discount outsider scholarship as not legitimate for tenure purposes).

239. See Peggy C. Davis, *Law as Microaggression*, 98 YALE L. J. 1559, 1565 (1989) (defining microaggressions as “subtle, stunning, often automatic, and non-verbal exchanges which are ‘put downs’” (quoting Carew Pierce et al., *An Experiment in Racism: TV Commercials*, in TELEVISION AND EDUCATION 62 (C. Pierce ed., 1978))).

240. Cf. Mark D. Agars, *Reconsidering the Impact of Gender Stereotypes on the Advancement of Women in Organizations*, 28 PSYCHOL. WOMEN Q. 103 (2004) (concluding that while the effect of individual instances of stereotyping of women is small, substantial discrepancies in gender distributions occur at high levels based on the cumulative effect of stereotyping on women’s career advancement).

241. See *supra* Part II.C.

Masculinities theory, along with the studies of bullying behavior, help us understand these behaviors and how gender is reproduced in the employment relationships of law faculties.²⁴²

7. *Feminization and devaluation of internal work*

In many law schools, committee assignments differ in power and prestige. Ordinarily, committees that make policy about the future of the law school and its faculty have more prestige than those that are related to student affairs. Thus, appointments and promotion and tenure committees usually enjoy more status and power than admissions committees.²⁴³

Historically, women appear to have held fewer positions than their male colleagues on the more powerful committees. This is particularly true of the chairmanship of the committees. In contrast, women have served on and chaired the less powerful committees—admissions, academic standards, and honors—committees that involve intense work that relates to students' needs but do not ordinarily make policy for the law school.

Nancy Levit notes that women 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.²⁴⁴ This work includes service on hard working low status committees in the law schools.²⁴⁵

In schools that are more egalitarian, women are moving into more “high status” positions. They serve as Associate Deans and as Chairs of the more prestigious committees. As this occurs, however, it appears that these previously powerful and prestigious positions are becoming feminized and degraded. 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.²⁴⁶ Law faculties

242. For a discussion of Masculinities theory, *see generally* Martin, *Mobilizing Masculinities*, *supra* note 18; for a discussion of masculinities and bullying, *see generally* McGinley, *Creating Masculine Identities*, *supra* note 68.

243. Levit, *supra* note 3, at 786–87.

244. *See id.* at 777.

245. *Id.* at 786–87.

246. One woman professor who was on the hiring committee of a well known law school commented that if we continue to hire all the men with the very prestigious resumes, “who will be left to clean the toilets?” In her mind, “cleaning the toilets” represented the time-consuming, less intellectual internal committee work that must get done at a law school. Her

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.²⁴⁷ This problem was especially acute for women who were post-tenure because they were no longer shielded from service work.²⁴⁸

The study also found that when a woman held a service or administrative position, the position itself would be devalued. The researchers conducting the study “heard this comment so frequently across all disciplines that [they] coined the term “*gender devaluation*” to refer to

the subtle process by which administrative positions lose their aura of status, power, and authority when held by women. These positions often become treated as service or support roles until they are reoccupied by men. So, for example, being a department chair could be viewed as a position of power or one of service. When a man is department chair, the position confers status, respect, and power. When a woman becomes department chair, the power and status seem diminished, and the service dimension becomes stressed.²⁴⁹

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 percent of the males), noted that

fear, which others have voiced, was that the high achieving men would consider themselves above “cleaning toilets” and would leave the dirty work to the women. *See also* Apel, *supra* note 99, at 1001 (describing community building work that women do that is greater than their male counterparts).

247. 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).

248. *Id.* at 220.

249. *Id.* at 219–20.

they had experienced significant increases in institutional service responsibilities that detracted from their “scholarly learning.”²⁵⁰

One problem is that women appear to value collaborative work and the internal work of the institution more than men do. Moreover, women often take on service work such as committee chair positions or mentoring in order to improve conditions for other women.²⁵¹ This creates a bind for women. If they do these jobs and do them well, they believe it is good for the institution, but generally the institution does not reward the behavior.²⁵² Moreover, if women do the work well, institutions tend to return to women repeatedly to ask them to continue to do the work.²⁵³ The time committed is substantial and may detract from scholarly output. Law schools need to devise a way to decrease the workload while at the same time recognizing the valuable input of the internal labor. They can do this by consciously deciding to shift to the administration all committee work that is not necessarily a faculty function. Law faculty should engage in discussions that determine exactly what work necessarily must be done by law faculty members. When this work is identified, it should be looked on as having greater value. Moreover, law faculties should decide to spread this work among the faculty. All faculty should engage in this inside work, not only those who are perceived to be good at committee work. Most importantly, service on time-consuming committees, especially chairing a committee, should earn the faculty member additional research assignments, sabbaticals or course relief. This policy would create an incentive for faculty to serve; it would compensate those who lose time on faculty

250. Aimee LaPointe Terosky et al., *Shattering Plexiglas: Continuing Challenges for Women Professors in Research Universities*, in UNFINISHED AGENDAS, *supra* note 14, at 52, 61; see also Sherry Towers, *A Case Study of Gender Bias at the Postdoctoral Level in Physics, and Its Resulting Impact on the Academic Career Advancement of Females* (Apr. 19, 2008) <http://arxiv.org/abs/0804.2026v1>, at 4, 13 (noting that in an eight year statistical study of men and women postdoctoral researchers in particle physics, women were allotted forty percent more of the service work than their male colleagues, an allocation that was negatively correlated with their probability of obtaining a faculty position).

251. Monroe et al., *supra* note 247, at 220.

252. This is true beyond law schools. See *id.* at 229–30 (describing a campus program that asked women and persons of color to act as “School Equity Advisors,” which meant that they had responsibility to approve all external hiring searches to ensure adequate numbers of women and minorities, but at the same time the women who served also had less time for their research, negatively affecting chances for promotions or raises, and often served as lightning rods for frustration based on the belief that women were getting special treatment).

253. See *id.* at 220.

committee work with valued time away from teaching and committee service that is necessary for successful scholarly output.

IV. CONCLUSION: DEGENDERING LAW SCHOOL FACULTIES

This Article has attempted to demonstrate that there is a gender divide in many important aspects of law school faculties. Women continue to work in predominately sex-segregated jobs as faculty or to teach female-identified courses or both; men continue to predominate in schools as deans and to hold important powerful positions in the law school. Women continue to suffer from differential expectations from colleagues and students and often bear the brunt of bullying behaviors at work.

Masculinities theory and the research on gender and organizations inform us that structures and behaviors that appear to be gender-neutral are actually gendered, often making success in the position of law professor more difficult for women. This Article uses social science theory to explain the differential treatment of men and women on law faculties and to demonstrate that gender is involved in decision making and in behaviors that affect the law school and its faculty members. The gendered nature of these behaviors is often invisible to the beholder and unconscious to the actors involved.

Without more empirical or qualitative data concerning the behaviors discussed, I hesitate to write a prescription to resolve the problems, but I do offer suggestions below that will allow law faculties to eliminate many of the gendered structures and practices. The first step is to recognize that gender plays an important and hidden role in the careers of women and men in the legal academy and to recognize which practices, structures, and behaviors are gendered and may cause harm to women's careers and the careers of men who do not meet the stereotypical masculine norms. With suitable introspection and dialogue resulting from the visibility of the gendered nature of law faculty positions, law schools should actively promote policies and behaviors that move toward more egalitarian workplaces and sites of learning.

A few suggestions: law schools should be conscious of their hiring patterns, considering whether they hire a disproportionate percentage of women in the lower status, lower paid positions and whether men dominate in the higher status, higher paid positions. If so, they should attempt to hire more men at the bottom and more women at the top. Law schools doing tenure track hiring should

establish gender-neutral standards for determining into which rank a person will be hired. Perhaps even more important, they should increase the status and pay of the positions of academic support, clinical and legal writing faculty, and adopt tenure track or clinical tenure track standards that are appropriate for the positions. These standards, in my view, should include scholarship and visibility in their fields as a requirement. If they do, law schools should make summer research grants available to the faculty holding these positions. They should also grant these faculty members the opportunity to teach non-writing courses and non-clinical courses.

Law schools should consider establishing flex-time toward the tenure track that would permit a parent (father or mother) to stop the clock for a few years while he or she is caring for a child. They should establish a faculty oversight committee to consider the masculine practices at the law school that may create a hostile environment for white women, some white men, and faculty of color. The oversight committee should assure that bullying practices cease, especially those that pertain to appointments, tenure, and promotion. Law faculties should also examine who does the bulk of the committee and service work in the law school. If this work is borne disproportionately by women faculty, the school should set up systems to avoid this problem. First, a faculty task force should consider what tasks are necessarily performed by faculty. All those that are not necessarily faculty tasks should be assigned to administrators. Once the necessary faculty tasks are defined, the committees performing those tasks should have increased support so that faculty members perform only those tasks necessary for a faculty member to perform. Schools should establish rewards for faculty service on committees, especially for those serving as chairs. The rewards need to compensate for the lost time not spent on scholarship and to encourage those who do not ordinarily do service. Faculty members who are active on committees and serve as chairs should receive liberal release time and lower course assignments to allow them to do their scholarly work.

Establishing procedures to promote more egalitarian workplaces for faculty members will benefit women and many men faculty as well as our students. Without this introspection and the new policies and procedures, we allow gender dynamics to reproduce not only on the faculties of law schools but also in law firms and legal offices

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Reproducing Gender on Law School Faculties

across the country because we have failed to model egalitarian workplace behavior for our students.

