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Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics

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KEEPING FEMINISM IN ITS PLACE: SEX SEGREGATION AND THE DOMESTICATION OF FEMALE ACADEMICS

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I. INTRO

I noticed seven years ago the sex-segregated coat racks at my son's elementary school, little shelves carefully labeled "Mrs. Fairchild's Boys" and "Mrs. Fairchild's Girls."¹ This year, my daughter started kindergarten in the same building, and was greeted by the same, although slightly more frayed, labels, still conveying the clear message that it was somehow inappropriate for boys' coats to intermingle with girls' coats—or perhaps for the boys and girls themselves to mix during their arrivals and departures.

That's when I noticed the sex-segregated coat racks at the law school. At the law school, the closets are metaphorical. But they are no less real.

My central thesis is that segregation of men and women and denigration of feminist scholarship intertwine to disadvantage women in legal academia in complex and subtle ways. These patterns of sex segregation on the experiential level and disparagement on the theoretical level contribute to the domestication of women at work.

The domestication of women in the legal academy has several dimensions. One aspect of it is occupational segregation by sex. Individual works have looked at some of the pieces of sex segregation in law schools: differential patterns of hiring, tenuring and promotion of female and male law professors, sex segregation by subject matter taught,

* Professor of Law, University of Missouri-Kansas City. This work benefited from discussions with and reviews from Susan B. Apel, Theresa Beiner, June Carbone, Richard Delgado, Barbara Glesner-Fines, Sylvia Lazos, Sam Marcossan, Dan Subotnik, and Rob Verchick, and contributions from the women law professors' listserv, Antigone. Christina Beck, Larry MacLachlan and Jenifer Svancara provided exceptional research assistance.

¹ Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 451 (1999):

My son is a fourth grader at an elementary school in Kansas. At his school, the coat racks—these are little shelves about a foot deep for coats and backpacks—for some first and third grade classes are alphabetical—one closet is A-L and the other is M-Z. But the coat racks for the kindergarten, second, fourth, and fifth graders are sex-segregated. One closet is labeled "Mrs. Fairchild's Boys" and the other is "Mrs. Fairchild's Girls." These are just shelves—it is not as though people would fit inside these cupboards. I've always wondered just what the teachers are worried about the coats doing in there.

and the different experiences of male and female law students.² No one has painted the big picture. Cumulatively, what messages are sent, what cultural role expectations transmitted by sex segregation in the legal academy? To mix metaphors, it is like the story of the three blind people who are describing pieces of the elephant³ – but this particular elephant is the one in the living room that most people are politely ignoring.

A second aspect of domestication is the habituation of women to domestic roles within the walls of academia. In part this is related to the way some, perhaps many, female law professors are occupying traditional housewife roles at work. For their part, many male law professors are re-enacting at work the role of breadwinner. My focus in first exploring this phenomenon will be primarily on the ways women in academia are disadvantaged by sex segregated responsibilities, but as I have cautioned in previous writings, we must continually be attentive to the ways men are disadvantaged as well.⁴ Theorists have written about the conflicts women experience between their occupational roles and family responsibilities, which are often structured to be exclusive.⁵ I suggest that part of the institutional tension for women is not just a matter of being forced to make choices between jobs and families. It is a matter of women importing patterns of domestic behavior and being subtly coerced into domestic roles *at work*.⁶ Women in law schools are absorbing familial roles and performing domestic labor in the academy. In short, female law professors are performing more of the occupational equivalent of the “housework” and the “childcare” than their male counterparts.⁷

Domestication has another etymological meaning and that is taming.⁸ This is somewhat different from the subtle, almost invisible cultural pressures to assume scripted

² See *infra* notes 9-14, 15-21, and 23-28. This analysis omits an intersecting dimension of segregation that is vitally important—the experiences of white women as insiders in a majority culture and women of color as the ultimate outsiders. For thoughtful treatments of this issue, see SHEILA T. GREGORY, *BLACK WOMEN IN THE ACADEMY: THE SECRETS TO SUCCESS AND ACHIEVEMENTS* (1995); *Black Women Law Professors: Building a Community at the Intersection of Race and Gender: A Symposium*, 6 *BERKELEY WOMEN’S L.J.* 1 (1990-91); Cheryl I. Harris, *Law Professors of Color and the Academy: Of Poets and Kings*, 68 *CHI.-KENT. L. REV.* 331 (1992); Pamela J. Smith, *The Tyrannies of Silence of the Untenured Professors of Color*, 33 *U.C. DAVIS L. REV.* 1105 (2000).

³ Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 *J. LEGAL EDUC.* 311, 327 (1994).

⁴ See NANCY LEVIT, *THE GENDER LINE: MEN, WOMEN AND THE LAW* (1998); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 *UCLA L. REV.* 1037 (1996). Racial segregation in academia is beyond the scope of this article, but has received careful attention in other works. See, e.g., Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 *OHIO ST. L.J.* 733 (1998); Sharon E. Rush, *Beyond Admissions: Racial Equality in Law Schools*, 48 *FLA. L. REV.* 373 (1996); Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 *WM. & MARY J. WOMEN & L.* 53 (1999).

⁵ See, e.g., Marion Crain & Ken Matheny, “*Labor’s Divided Ranks*”: *Privilege and the United Front Ideology*, 84 *CORNELL L. REV.* 1542, 1587 (1999).

⁶ Ruthann Robson explains that “[d]omestication occurs when the views of the dominant culture are so internalized that they seem like common sense.” RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* 18 (1992).

⁷ I do not intend this pejoratively toward law students, but instead descriptively of the occupational conditions of female professors.

⁸ *OXFORD ENGLISH DICTIONARY* 593 (1971)(“living under the care of man, in or near his habitations; tame, not wild”).

roles. This aspect of the 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.” As this article develops, this theoretical attack is founded on tenuous epistemological grounds; it functions rhetorically as ad hominem argument, and politically to discourage dialogue.

I want to emphasize up front several caveats. First, the domestication thesis is a working hypothesis, which I have been able to corroborate, but only partially, through the accumulation of some empirical and some anecdotal data. Thus, this article is in part a call for research and the compilation of information about scholarship, service and teaching responsibilities, as well as outside consulting tasks. Second, tremendous variability exists among institutional cultures at law schools across the country, so the distribution of work and valuation of individual worth at different law schools may vary significantly. Thus, sex segregation at the task level or discouragement of feminist scholarship may not be occurring at institutions that have a laissez faire attitude toward scholarship or where feminists are part of the power structure or where collegiality is highly valued. But available evidence indicates that at some, perhaps many, law schools, these currents—occupational sex segregation and role differentiation, habitual expectations about women’s tasks, and, at the extreme, taming of more radical feminist views—combine to domesticate women law professors.

II. THE CREATION OF DOMESTIC ROLES : SEX SEGREGATION IN LEGAL ACADEMIA

A. Occupational Segregation

The statistics reflect very explicit patterns of occupational channeling. While women have made significant strides in entering the legal profession—in 1999 approximately 49% of first year law students and 27% of all lawyers are female⁹—the most striking pattern is that law schools are creating pink collar ghettos. In legal academia, women are congregated in lower-ranking, lower-paying, lower-prestige positions.

A study just this year by Richard Neumann of Hofstra University shows that in the fall of 1998, “70% of legal writing teachers were women,” an equivalent percentage of assistant deans were women,¹⁰ while women held only 10% of law school deanships,

⁹ U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S. (118th ed. 1998); Kim Nilsen, *Women Outnumber Men at Law Schools*, TRIANGLE BUS. J., May 19, 2000, at 6.

¹⁰ “Like elementary school teaching, the job has *become* gender-stereotyped as female, and the stability of the statistics suggest that it will remain that way indefinitely.” Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. ____ (forthcoming 2001).

and constituted just 26% of combined tenured and tenure track faculty,¹¹ but only 16% of tenured faculty members.¹² “The female percentages of lecturers and instructors are so steadily high that those jobs, like assistant deanships, have become stereotyped as female.”¹³

Even when men and women with comparable credentials and prior work experience are given tenure track appointments, “men are being disproportionately hired as associate professors and women as assistant professors,” and “women are gaining tenure at lower rates than men.”¹⁴ Women are “disproportionately concentrated in lower-ranked schools.”¹⁵ Perhaps most discouraging is not just the sheer percentages, or even the stability of those percentages over time, but the mechanisms that keep the statistics unchanged, and the lived experiences of the people who are the statistics.

B. Student Experiences

In 1994, law professor Lani Guinier and colleagues documented statistically significant grade disparities between male and female law students at the University of Pennsylvania. One startling finding was that “[d]espite identical entry level credentials . . . [b]y the end of their first year in law school, men are three times more likely than women to be in the top 10% of their law school class.”¹⁶ The disparity did not end after the first year. “In terms of rank and GPA, first- and second-year men are 1.6 times more likely to be in the top fiftieth percentile of the class than are women. Third-year men are 1.5 times more likely to be in the top fiftieth percentile.”¹⁷ The study also found that

¹¹ *Id.* at 12-13. “The 1999-2000 increase to 11% represents a gain of only one deanship.” *Id.* at 13. *See also* Marina Angel, *The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure*, 50 J. LEGAL EDUC. 1, 10 (2000) (“In 1998 the number of women deans rose to twenty.”).

¹² Susan B. Apel, *Gender and Invisible Work: Musings of a Woman Law Professor*, 31 U.S.F. L. REV. 993, 993 (1997). Other sources report comparable percentages: Paula Gaber, *Just Trying to Be Human in This Place: The Legal Education of Twenty Women*, 10 YALE J.L. & FEMINISM 165, 243, 244 (1998) (“while women comprise only eight percent of law school deans, they represent sixty-nine percent of assistant deans. Only seventeen percent of professors are women, yet fifty-two percent of assistant professors and sixty-seven percent of non-tenured lecturer/instructors are women.”); Deborah Rhode, *Whistling Vivaldi*, 23 N.Y.U. REV. L. & SOC. CHANGE 217, 218 (1997) (citing A.B.A. COMMISSION ON WOMEN IN THE PROFESSION, *WOMEN IN THE LAW: A LOOK AT THE NUMBERS* 39-40 (1995) (“Women account for about 30 percent of full-time faculty, but less than 20 percent of tenured positions and less than 10 percent of law school deans.”)).

¹³ Neumann, *supra* note 10, at 16.

¹⁴ *Id.* at 16. *See also* Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 259 (1997) (“law schools have tolerated a pattern in which men begin teaching at significantly higher ranks than do women with comparable credentials and work experience.”).

¹⁵ Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333, 334 (1996), citing Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299 (1992).

¹⁶ Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 3 (1994).

¹⁷ *Id.* at 24.

women were underrepresented in many of the most prestigious law school honors and activities.¹⁸

Once the silence was broken, a cascade of reports, some anecdotal, some statistical, attested that women law students' experiences differ fundamentally from those of men. Female law students perceive a gendered structure of classroom dialogue, where male students are called upon more frequently, voluntarily speak more often, and receive greater encouragement; male law students may feel compelled to shoulder the burden of classroom participation, but little scholarship addresses the gendered experiences of male law students from a sympathetic vantage point.¹⁹ Other studies based on national data confirm performance differentials in grades and awards,²⁰ although the results from individual schools are mixed, with some evaluations finding no significant performance disparities—these findings, though, are primarily from non-elite law schools.²¹ It may be that the gender climate is changing at the turn of the new millenium, although perhaps more slowly at elite schools.

Students of color and gay, lesbian, bisexual and transgendered law students may experience demeaning behavior, insensitivity, and systematic exclusion according to

¹⁸ *Id.* at 27 (“the Order of the Coif, the graduation awards given by the faculty, the Law Review membership and board, and the moot court competitions and board.”).

¹⁹ William F. Kullman, *Feminist Methodologies in the Law School Classroom: Listening for a Change*, 4 TEMP. POL. & CIV. RTS. L. REV. 117, 131 (1994). *See also, e.g.*, Taunya L. Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 138-39, 141 (1988); Cheryl M. Herden, *Women in Legal Education: A Feminist Analysis of Law School*, 44 J. LEGAL EDUC. 13 (1994); Suzanne Homer & Lois Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1, 4 (1989-90); Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1, 14 (1998); Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1238-40 & n.164 (1988); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988).

²⁰ *See* AMERICAN BAR ASSOCIATION, ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION (1996). A study by the Law School Admissions Council found statistically significant first year grade point disparities between women and men, although these differences were smaller than those found by Lani Guinier and her colleagues. LINDA F. WIGHTMAN, LSAC RESEARCH REPORT SERIES: WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF WOMEN AND MEN 11-12 (1996)(noting that “[r]esults such as these contribute to the general conclusion that women are performing competitively in law school and that differential academic performance is not an issue. Using a criterion of practical significance, these results by themselves might suggest no need for further study or concern. However, some useful information about the relative performance of women and men is masked by simple summary statistics For example, the data in Table 2 illustrate that while 53.9 percent of men earned first-year grades at or above the mean at their law school, . . . only 50.6 percent of women earned comparable standing.”); Allison L. Bowers, *Women at the University of Texas School of Law: A Call for Action*, 9 TEX. J. WOMEN & L. 117, 135 (2000)(reporting that on average men received significantly higher GPAs than women). *See also* Jean C. Love, *Twenty Questions on the Status of Women Students in Your Law School*, 11 WIS. WOMENS L.J. 405 (1997).

²¹ *See* ABA COMMISSION ON WOMEN IN THE PROFESSION, DON'T JUST HEAR IT THROUGH THE GRAPEVINE: STUDYING GENDER QUESTIONS AT YOUR LAW SCHOOL 28-34 (1998); Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 UCLA WOMEN'S L.J. 81, 81 (1996); Marsha Garrison et al., *Succeeding in Law School: A Comparison of Women's Experience at Brooklyn Law School and the University of Pennsylvania*, 3 MICH. J. GENDER & L. 515, 521 (1996).

multiple facets of their identities.²² Part of all law students' educational experience is noticing the absence of tenured female faculty,²³ and observing sex segregation by subject matter.

C. Segregation in the Curriculum

Law schools do not merely reflect social reality; they construct it.²⁴ One way that gender differences are produced in law schools is by the structure of the curriculum. Segregation by sex persists in substantive course teaching assignments. Female law professors are much more likely than male law professors to teach substantive courses addressing familial issues, as well as skills courses that demand intensive labor and student nurturing.²⁵ During the 1999-2000 school year, 58% of the professors who taught family law were female.²⁶ Conversely, in 1999-2000, 76% of the law professors teaching corporate law, 78% of the law professors teaching commercial law, and 87% of law professors teaching corporate finance were male.²⁷ One study showed that even after controlling for credentials and expertise, women are not hired to teach prestige courses, such as constitutional law.²⁸

Very few men teach courses on gender and law. The *AALS Directory of Law Teachers 1999-2000* lists 234 women and 18 men who presently teach or have taught Women and Law classes.²⁹ Only six of the men are presently teaching such a course. Thus only 3% of the approximately 180 law schools nationwide have a male currently

²² See, e.g., Devon Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1282 n.58 (2000); Okianer Christian Dark, *Just My 'Magination*, 10 HARV. BLACKLETTER J. 21 (1993); Scott N. Ihrig, *Sexual Orientation in Law School: Experiences of Gay, Lesbian, and Bisexual Law Students*, 14 LAW & INEQ. 555 (1996); L. Amede Obiora, *Neither Here Nor There: Of the Female in American Legal Education*, 1996 LAW & SOC. INQUIRY 355.

²³ Bowers, *supra* note 20, at 120.

²⁴ Christine Haight Farley, *supra* note 15, at 348.

²⁵ See Merritt & Reskin, *supra* note 14, at 205-06, 267 (“men were significantly more likely than women with equivalent backgrounds to teach constitutional law, a high-status course preferred by many new professors. Women, on the other hand, were significantly more likely than men with identical credentials to teach both skills courses and trusts and estates—lower status offerings that provide fewer opportunities for career advancement.” “Men and women teach on the same law faculties today, but they are often hired to teach different courses”). See also Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 782 n.109 (2000).

²⁶ ASSOCIATION OF AMERICAN LAW SCHOOLS, *AALS DIRECTORY OF LAW TEACHERS 1999-2000* 1155-59 (1999). During this school year, 365 law professors taught family law, 213 (58%) females and 152 (42%) males. Those percentages represent the people teaching family law in 1999-2000. The total number of professors who listed themselves as ever having taught family law was 575. Of those, 47% (271) were male and 53% (304) were female.

²⁷ *Id.* at 1108-1114 (listing 366 males (76%) and 116 females (24%) who teach corporations, *id.* at 1067-1073 (listing 326 males (78%) and 81 females (22%) who teach commercial law), *id.* at 1106-1108 (listing 149 males (87%) and 22 females (13%) who teach corporate finance). Total number of teachers both past and present is 684.

²⁸ Deborah Jones Merritt, *Who Teaches Constitutional Law?*, 11 CONST. COMMENT. 145, 157 (1994) (“Being female cut the odds that a recently hired professor would teach constitutional law in half—even after controlling for credentials and work experience. No other personal characteristic—including race, age, or the sex-race interaction—significantly affected the likelihood of teaching constitutional law.”).

²⁹ Association of American Law Schools, *supra* note 26, at 1278-80.

teaching a class or seminar on gender. Relatively few men publish in the feminist theory area—it may be a risky career move—and those who do so may be viewed as infiltrators.³⁰ Nobody wants to crash into the pink ghetto.

This assessment may be too bleak, since many individual professors of both sexes undoubtedly incorporate gender issues in a wide range of courses. Basic texts in the criminal area, for example, show increasing sensitivity and attention to the treatment of rape as both law and lived experience.³¹ But the law school curriculum continues to be sex segregated in other ways. Contracts casebooks often omit the terrain of intimate agreements; torts texts rarely include feminist critiques of the “no duty to act” rule.³² Query the number of courses in which issues are examined regularly through the lens of gender.³³

Law schools are rife with patterns of sex separatism. One irony is that segregation by sex is occurring in an institution supposedly committed and attentive to equality. Occupational segregation by sex, by positions within the law school, by substantive course assignments, and by responsibilities, has economic and political consequences. It is separate—and not at all equal. The more insidious consequence is the continued construction of women as less valuable workers, less interesting, prestigious or important players.

III. THE CREATION OF DOMESTICS AND THE DOMESTICATION OF PROVOCATIVE BEHAVIOR

A deeper, more invisible pattern is occurring in the work of law schools across the country. Women law professors are becoming domesticated—and I mean that in several senses. First, female law professors are performing a disproportionate share of domestic chores within the law school relative to their numbers on faculties. Second, some feminists who espouse more radical or provocative theories suffer a different kind of domestication: a taming of the individuals through promotion and tenure processes and castigations in print of their more radical theorizing. Third, a number of traditional

³⁰ See, e.g., Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995)(detailing the ways society punishes men who act atypically for their sex); Stephen Heath, *Male Feminism*, in MEN IN FEMINISM 1 (Alice Jardine & Paul Smith eds., 1987) (“Men’s relation to feminism is an impossible one. This is not said sadly nor angrily . . . but politically.”). See also *infra* text at note 68.

³¹ Compare SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 371-405 (4th ed. 1983) with SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 315-84 (6th ed. 1995)(including a “perspectives” section in introducing the materials on rape and an article on female fear as one of the social costs of rape).

³² See, e.g., Leslie Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 33-36 (1988); Anita Bernstein, *A Feminist Revisit to the First Year Curriculum*, 46 J. LEGAL EDUC. 217, 219 (1996); Lucinda M. Finley, *A Break in the Silence: Including Women’s Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989); Marjorie M. Shultz, *The Gendered Curriculum: Of Contracts and Careers*, 77 IOWA L. REV. 55, 61-63 (1991); Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 124-50 (2000).

³³ See, e.g., Bernstein, *supra* note 32.

theorists have accused some feminists and other critical scholars of attacking reason because they urge acceptance of atypical points of view. These separate threads—concerning the roles of female academics, the career jeopardy for particularly radical feminists, and the assault on feminist theory as work lacking in reason—unite to keep feminism in its place.

A. The Gendered Division of Labor – The Politics of Housework

Much of what women academics do is “‘invisible work,’ . . . attending to the minutia that builds and maintains an academic community.”³⁴ These tasks range from student advising, attending student and community functions, and planning law school programs, to hosting or participating in colloquium series, reviewing manuscripts for colleagues, and serving on law school, university and public service committees. Some of these tasks may be slightly more than the academic equivalent of making coffee, but in some cases, not much more.

The phenomenon is often heard in the whisper stream,³⁵ but is not well documented at all. Mention in print of the excessive service responsibilities women shoulder is often relegated to footnotes or single lines in works on other issues.³⁶ It is as if the topic is unseemly to raise or that open discussion of it might feed perceptions of feminists as complainers.

It is difficult to calculate hours spent on service work and to develop empirical methods to test the idea that women in academia are performing domestic roles. And certainly one of the best ways to persuade people that a phenomenon exists is to establish its quantitative significance. What I offer in the following passages are just rudimentary pieces of evidence about the differential responsibilities of men and women at law schools. Some of the evidence is anecdotal, some involves calculations based on

³⁴ Apel, *supra* note 12, at 994.

³⁵ See ANDREW VACHSS, *DEAD AND GONE* 68 (2000).

³⁶ See 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, 834 (1988) (“Because there are so few women, they seem to be placed, as tokens, on every visible law school, university, and external committee.”); Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 TEMP. L. REV. 117, 177 (1997) (“Because there are fewer women on law faculties, they may be asked to undertake more committee work or more nurturing tasks like mentoring students, since men and women students may view women faculty as more accessible.”); Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 716 n.100 (1992) (“Most women and scholars of color take on a disproportionate burden of committee work and student counseling.”). This is not a problem unique to women, but one that also affects minority race law professors. Leonard M. Baynes, *Who Is Black Enough for You? An Analysis of Northwestern University Law School's Struggle Over Minority Faculty Hiring*, 2 MICH. J. RACE & L. 205, 225 (1997) (“Faculty of color often have ‘unofficial’ additional burdens placed on them, such as mentoring students of color and junior faculty of color, serving as the representative voice of people of color on various faculty committees, and interacting with the larger community of color.”); Richard Delgado & Derrick Bell, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 355, 363 (1989) (“Although about half of all minority professors reported that assignment to too many committees was not a problem, 40% described their committee assignments as excessive--more than they want, and more than those of the average professor.”).

experiences at individual schools. It is my hope this initial assemblage of information will spark more methodologically comprehensive efforts to collect data. More precise computation regarding the service activities of male and female law professors awaits an extensive nationwide survey.³⁷

Consider the evidence. A number of women faculty across the country were kind enough to take the time to respond to a query I posted on Antigone, the women law professors' listserv, regarding whether professors had observed differences in assignment or performance of committee or other service responsibilities by gender, and if so, whether legitimate reasons existed for any observed differences.³⁸

At this point, the conversations just report observations, but the similarities of those experiences echo. The women who responded were unanimous in their perceptions that women at their respective schools do more of the "housework" chores (serving on committees, advising students, supporting student organizations) than their male counterparts. Many also noticed marginalization of gender issues. A professor at a West Coast law school observed that "women's issues—feminism, family law, etc.—have an outsider air that makes them seem less important, less central to the institution."

The gender discrepancy is readily apparent in small section teaching assignments, particularly if those sections have research and writing components. A professor at a public law school in the Midwest calculated the gender composition of professors in the school's small section program in the past four years: "80% of the current female faculty have taught in the small section program and about 25% of the male faculty have done so. There are several senior male colleagues who are quite committed to this program and they continue to teach small sections and do them well. So the result does not really look like a female ghetto—but the percentages are telling."

The roles fulfilled by law professors are accompanied by behavioral expectations on the part of students. "Frequently students treat Legal Research and Writing instructors like their mothers. They come to expect herculean efforts, take them for granted, treat them with little respect, and save their best behavior for their real professors (like they behave when the father comes home)."³⁹

Law professors at individual schools are beginning to append numbers to some of these anecdotal observations. In a recent article, Vermont law professor Susan B. Apel reported a calculation she conducted regarding attendance at law school events:

I picked six events at random: an event outside of the law school to which invitations had been extended to a limited number of faculty, a committee meeting, a presentation to the faculty by an outside speaker, a presentation to the entire law school community by an outside speaker, a going away

³⁷ See, e.g., Delgado & Bell, *supra* note 36, at 355-56.

³⁸ To preserve the confidentiality of our conversations on Antigone, I have obtained specific permission to recount the stories (without names or identifying information) in this section.

³⁹ Farley, *supra* note 15, at 356.

party for a colleague, and a law school faculty dinner. I counted heads. All had more women faculty in attendance. Given however, that the current faculty is 69.6 percent male and 30.4 percent female, the relative numbers were even more telling.⁴⁰

I crunched some numbers regarding committee assignments by gender at my law school over a five year period (1996-2001). During that time, 30 percent of our tenure track faculty was female.⁴¹ For most committees, over the five year period, the percentage of women members approximated (although slightly exceeded) the percentage of women on the faculty. For example, the Policy and Planning Committee averaged 36 percent female; the Student Affairs/Readmissions Committee averaged 34 percent female; the Buildings and Grounds Committee averaged 32 percent female; the Communications and Information Technology Committee averaged 34 percent female; the Curriculum Committee averaged 43 percent female.

Several possibly gendered patterns did emerge. Over the five year period, female membership on the Appointments Committee averaged 27 percent, slightly less than the percentage of women on the faculty and less still than the average female membership on the other committees. Female membership on the Admissions Committee averaged 50 percent, a significantly larger percentage than that of women on the faculty. Two ad hoc committees concerning faculty hiring were convened during that five year window: one was a Visitor's Committee (for the four years between 1996-2000), which averaged 14 percent female membership; the other was a Chair Search Committee (for the two years 1996-1998), which averaged 25 percent female membership.

One other item I observed regarding committee membership during a different five year window, 1990-1995, the years during which our law school had an Ad Hoc Academic Support Committee (whose charge it was to develop programs to assist students who wanted extra study help): the membership of that committee averaged 65 percent female over the five years, approximately twice the percentage of women on the faculty during those years. It would be intriguing fodder for a much larger study whether these patterns of female faculty performing more committee work than male faculty in areas related to admissions and student support and less "power" (in, say, governance or hiring areas) committee work hold true nationwide. But even numeric calculations of committee membership may fail to consider different levels of committee participation: who organizes committee meetings, arranges for speakers, plans lunches, or drafts committee memoranda. "Gendered expectations may extend beyond smile work, of course, to include serving as secretary for committees or performing wifely duties such as making coffee or cleaning up after meetings."⁴²

These numbers appeared at a law school that I truly believe is attentive to gender issues—one that has a committee appointment process that not only asks individuals on

⁴⁰ Apel, *supra* note 12, at 997-98.

⁴¹ In 2000, 25%; in 1999, 32%; in 1998, 31%; in 1997, 33%; in 1996, 29%.

⁴² Marcia L. Bellas, *Emotional Labor in Academia: The Case of Professors*, 561 ANNALS AM. ACAD. POL. & SOC. SCI. 96, 107 n.4 (1999).

which committees they would like to serve, but also has its elected Policy and Planning Committee review a proposed committee assignments list for gender (and other) imbalances.

It may be that part of the committee service imbalance results from self-selection: women may express distinct preferences for student-related service work. It may also be that well-intentioned deans are trying to have women or minorities as a visible presence on each committee, thus overloading the individuals with committee work. In response to the Antigone survey I conducted, one woman who is now a law school dean, responded with a story about committee assignments during her early years of teaching. As one of two women on the tenure track, she was called into the dean's office as he was compiling committee assignments, and told, "You have to be on the Appointments Committee, because [the only other woman] doesn't want to be." This is the point at which segregation and minority status intertwine: when women are underrepresented on the tenure track faculty, the law school's interest in obtaining female representation on committees, significantly overworks the tenure track women.⁴³

Recent research at the undergraduate level reveals that female faculty members spend a disproportionate amount of their time, relative to male faculty members, on teaching and service.⁴⁴ Statistics collected by the U.S. Department of Education show that "female faculty, across all types of institutions, devoted a greater percentage of their time to institutional service activities than did male faculty."⁴⁵ Marcia L. Bellas, a professor of sociology at the University of Cincinnati, observes that "[t]eaching and service are most closely aligned with social prescriptions of appropriate feminine activities, and, on average, women spend more time in these activities than men."⁴⁶ These activities, she notes, entail "substantial amounts of emotional labor—labor that is

⁴³ Critical race theorists have written in other contexts about one of the problems with being a token: tokens tend to get exploited. See generally Roy L. Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. REV. 419 (1986); Richard Delgado, *Affirmative Action As A Majoritarian Device: Or, Do You Really Want To Be A Role Model?*, 89 MICH. L. REV. 1222 (1991); Linda S. Greene, *Tokens, Role Models, and Pedagogical Politics: Lamentations of an African-American Female Law Professor*, 6 BERKELEY WOMEN'S L.J. 81 (1990-91); Rennard Strickland, *Scholarship in the Academic Circus or the Balancing Act at the Minority Side Show*, 20 U.S.F. L. REV. 491 (1986).

⁴⁴ Marcia L. Bellas & Robert K. Toutkoushian, *Faculty Time Allocations and Research Productivity: Gender, Race and Family Effects*, 22 REV. HIGHER EDUC. 367, 376 (1999) ("Controlling for other factors, we found that women spent significantly more time in teaching than men and less time in research, but women did not differ from men in the percentage of time devoted to service activities. Note, however, that assistant professors spend more time in service activities than other faculty. Because women (and faculty of color) are disproportionately represented among assistant professors, controlling for rank may underestimate the effect of being a woman and of being a person of color in time spent in service."); Shelly M. Park, *Research, Teaching and Service: Why Shouldn't Women's Work Count?*, 67 J. HIGHER EDUC. 46, 52 (observing at the undergraduate level that "[t]eaching duties have fallen and continue to fall disproportionately to women. . . . In 1988 faculty women were spending, on average, 61 percent of their time teaching, whereas faculty men spent only 54 percent of their time teaching. In 1989-90, 43 percent of all male faculty, but only 35 percent of female faculty, taught eight or fewer hours per week.").

⁴⁵ Park, *supra* note 44, at 53 (citing U.S. DEPARTMENT OF EDUCATION, PROFILES OF FACULTY IN HIGHER EDUCATION INSTITUTIONS, 1988 153 (1991)).

⁴⁶ Bellas, *supra* note 42, at 97.

generally not viewed as involving valuable skills and is consequently poorly rewarded.”⁴⁷ Earlier research confirms that women faculty are more receptive to student interaction and spend more time each week advising students.⁴⁸ In the aggregate, men spend more time in research and administrative activities, pursuits that reap financial and promotional rewards.⁴⁹

Even in their research, some female faculty may be less productive than male peers because of the intense scrutiny of their scholarship. Researchers in disciplines other than law have observed that “women may take more care in the research process because their work is scrutinized more closely than men’s. As a result, women may spend more time in each research product relative to men. Women may also feel less confident in their research abilities than men, a factor that would also contribute to a more meticulous research style.”⁵⁰

As part of the attempt to calculate the service responsibilities of faculty by gender, I constructed a list of all of the student organizations, competitions, and professional societies and the journals at UMKC Law School. In the 2000-2001 period, of the organizations, competitions and journals that had a tenure track faculty advisor, 45% are advised by male law professors, while 55% are advised by female law professors. Thus, on a tenure track faculty that is 29% female, more than half of the student organization and journal advising is done by women. Of course, this type of calculation must come with a caveat: it does not even begin to encompass the number of hours invested in the individual activities, and it may well be that a more refined evaluation of the number of hours invested by gender would alter the picture.

Some of the evidence about service responsibilities performed by women can only be discovered by reading between the lines. For instance, in one survey regarding research and teaching accomplishments that was sent to over 800 law professors nationwide, the author noted, only as an aside about the demographics of the respondents, that “[w]omen were significantly more likely to respond than men.”⁵¹ It would be an interesting piece of evidence about gender and service responsibilities whether women or men are generally more likely to respond to surveys or edit drafts of articles or in other ways collegially promote the scholarship of others.

One difficulty with this apportionment of work is its lack of visibility. As Susan B. Apel explains, this use of women faculty is “completely ordinary, so normalized as to be unremarkable, and hence, invisible in the academic community.”⁵² The reward structure in academia subtly reinforces this domestication. Service activities such as these

⁴⁷ *Id.* “Both teaching and mothering entail social expectations of nurturance, altruism, and self-abnegation.” *Id.* at 98.

⁴⁸ *See, e.g., ANNE STATHAM, ET AL., GENDER AND UNIVERSITY TEACHING: A NEGOTIATED DIFFERENCE* (1991).

⁴⁹ Bellas & Toutkoushian, *supra* note 44, at 379 (citations omitted).

⁵⁰ *Id.*

⁵¹ *See* Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 *CHI.-KENT L. REV.* 765, 773 (1998).

⁵² *Id.* at 995.

do not fit neatly as resume fodder. They are time consuming and they detract from other work. Certainly, these inequalities in service expectations and responsibilities are not unrelated to some of the difficulties some women have had with producing scholarship.⁵³

Women—even bright, educated women lawyers and law professors—have been culturally trained to fill traditional domestic roles.⁵⁴ It is no wonder that they re-enact those patterns at work. In some ways, sex roles may be less negotiable in the work world.⁵⁵ This is not a male conspiracy of domination. It is a quiet replication of patterns that play out at home.

To the extent that bias enters the faculty appointment process or the assignment of committee responsibilities, much of the discrimination is unconscious.⁵⁶ Numerous studies have come to light recently in the social sciences demonstrating the mechanisms by which the unconscious devaluing of women and segregation of the sexes occurs. For instance, one study looked at hiring practices in psychology departments:

[F]ictitious summaries of resumes of Ph.D.'s in Psychology were circulated to heads of Psychology departments who were asked at what rank the professors should be hired. Some of the resumes had women's names and others had men's. The resumes of the men were ranked at the associate professor level whereas the same resumes with women's names on them were ranked at the assistant professor level.⁵⁷

Multiple regression analyses of law school hiring by law professor Deborah Jones Merritt and sociologist Barbara Reskin attests that the same patterns occur in the initial law school appointments and course assignments.⁵⁸

A companion problem is what happens to male law professors if female law professors are absorbing more of the nurturing, relational tasks. Do most male law professors even keep boxes of kleenex in their offices for students to cry into? No Puffs, no glory? Seriously though, are male law professors deprived of nurturing relationships with students? Do they take more of the committee assignments that require out of town travel, drive faculty candidates to and from the airport more often than their female counterparts, or do more public speaking that promotes the law school? Male law

⁵³ See Carl Tobias, *Engendering Law Faculties*, 44 U. MIAMI L. REV. 1143, 1149 (1990).

⁵⁴ See Levit, *THE GENDER LINE*, *supra* note 4, at 33-44, 49-63; ROBIN WEST, *CARING FOR JUSTICE* 82 (1997); Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525, 530 (1999).

⁵⁵ H.E. Baber, *Tomboys, Femmes, and Prisoner's Dilemmas*, 9 J. CONTEMP. LEGAL ISSUES 37, 62 (1998).

⁵⁶ See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987); Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999).

⁵⁷ Ann C. McGinley, *Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL'Y 415, 435 (2000)(citing studies).

⁵⁸ See *id.*, citing Merritt & Reskin, *supra* note 13.

professors are probably not immune from patterns cultivated in other spheres of their lives either. In teaching more prestige courses, such as constitutional law, do male law professors shoulder larger class sizes?⁵⁹ While the literature regarding the gender implications of the responsibilities of female law professors is scant, the literature regarding the gender roles of male law professors is virtually nonexistent. We will have to leave to future explorations whether male law professors assume more of the academic equivalents of mowing the yard or taking out the trash.

Another possibility about the gendered division of work in legal academia is that male law professors are engaged in more breadwinning tasks not only inside the law school but also outside. “Many law professors devote much time to consulting, giving bar review lectures, conducting professional seminars, and performing arbitrations; a few have what in effect are full legal practices.”⁶⁰ If observations and anecdotal information are accurate, male law professors spend significantly more time consulting for pay than do female law professors. George Shepherd, a law professor at Emory University, notes, “The more famous and successful you are as a professor, the more you get asked to do outside consulting. Because male professors tend to be more famous and successful (for various reasons, perhaps including sexist differences in support from their law schools), they get to do more outside consulting.”⁶¹ Consulting can certainly enhance teaching and scholarship and offer academics exposure to real world, cutting edge problems, but it can also drain faculty time.⁶²

Research suggests that despite women’s entrance into the workforce, cultural expectations that men will engage in breadwinning have changed very little.⁶³ (Obtaining representative documentation regarding consulting activities is difficult. I requested from my own university’s vice provost for academic personnel just the number

⁵⁹ In an empirical assessment of whether research and teaching responsibilities complement or compete with each other, Professor Deborah Jones Merrit noted that “professors who taught constitutional law may have taught more credit hours than did their colleagues” and “[p]rofessors who graduated from more selective colleges, served as editors of main law reviews, or obtained their tenure-track appointment through the AALS hiring process taught significantly more credit hours than did their colleagues,” but the analysis did not speak to whether male or female law professors, on the whole, taught more credit hours. Merrit, *supra* note 51, at 805. See also *infra* text at note 28.

⁶⁰ George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2137 (1998). See also Monroe Freedman, *Crusading for Legal Ethics*, LEGAL TIMES, July 10, 1995, at 25 (“some law professors double and triple their academic salaries by consulting and testifying about ethics.”); Manuel R. Ramos, *Legal Law School Malpractice: Confessions of a Lawyer’s Lawyer and Law Professor*, 57 OHIO ST. L.J. 863, 915 (1996) (“Some law professors, such as Geoffrey Hazard, formerly at Yale, and now at the University of Pennsylvania, in addition to a six-figure law professor salary, makes \$375,000 a year by consulting and serving as an expert witness in hundreds of legal malpractice cases.”).

⁶¹ E-mail correspondence, October 23, 2000. See Shepherd & Shepherd, *supra* note 60. See also Millicent Poole, Laurel Bornholt & Fiona Summers, *An International Study of the Gendered Nature of Academic Work: Some Cross-Cultural Explorations*, 34 HIGHER EDUC. 373, 389 (1997) (noting that in several other countries, particularly Australia and Israel, male academics responding to a survey perceived greater needs, economic, personal and reputational, than female academics to engage in paid consulting work).

⁶² Rebecca S. Eisenberg, *The Scholar as Advocate*, 43 J. LEGAL EDUC. 391 (1993).

⁶³ Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221, 1256 (2000); Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 118 (1998).

of law faculty submitting the required consultation reports and the gender of those submitting. Only seven (four men and three women) on a faculty of 24 had filed the required reports.) This is an issue that is incendiary to broach, but one which deserves inquiry. We need to assemble data regarding whether breadwinning and caregiving roles are apportioned by gender within law schools.

We may be able to agree, irrespective of political persuasions, that caring and nurturing are good qualities. What seems to be happening is that the qualities are being introduced into the law school along with the attendant expectation that women will perform the tasks associated with them. What is truly interesting is that we are only at the consciousness raising stage with this—only in the 1990s did women law professors begin to raise the issue of these patterns. Of course, much more empirical testing is needed; it is often the accumulation of hard numbers that are needed to prompt changes. But the preliminary evidence indicates that it has become expected that both male and female law professors will function in domestic ways within law schools.

B. Treatment of Radical Feminist Theorists

For I am he am born to tame you Kate
And bring you from a wild Kate to a Kate
Conformable as other household Kates.⁶⁴

The domestication of female professors is accomplished in more forthright ways as well. Some women who engage in radical or provocative theorizing suffer negative employment consequences.⁶⁵ A number of these celebrated tenure and promotion battles may have been in part sex discrimination and in part efforts to tame radical feminists.⁶⁶

⁶⁴ WILLIAM SHAKESPEARE, *THE TAMING OF THE SHREW*, act 2, sc. 1, lines 278-80 (1592). See also Jeanne L. Schroeder, *The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory*, 5 *YALE J.L. & FEMINISM* 123 (1992).

⁶⁵ See JAMES BOYLE, *CRITICAL LEGAL STUDIES* xi (1992) (“Recent years have seen well-publicized denials of tenure to academics who espoused feminist and CLS ideas, together with an apparent relaxation of scholarly standards for anyone who wishes to suggest that critical legal scholars are nihilists, fascists, Marxists or (more mysteriously) all three.”); Richard Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 *U. PENN. L. REV.* 537 (1989) (reporting that “some schools are denying tenure to women at disproportionate rates.”).

⁶⁶ See, e.g., Diane Curtis, *Faculty Tenure Vote*, *S.F. CHRON.*, Nov. 3, 1988, at A4 (describing the case of Marjorie Shultz, a professor at Boalt Law School who was denied tenure in 1982 and again in 1985, and finally granted tenure after 13 years of teaching in 1988; Shultz indicated she believed her “interest in some of the less traditionally male areas of law played some part in past refusals by the predominantly white male faculty to grant her tenure.”); Margo Harakas, *Radical Differences*, *SUN-SENTINEL* (FT. LAUDERDALE FLA.), Apr. 15, 2000, at 1D (describing the procedural treatment of radical feminist theologian Mary Daly, a tenured professor, when Boston College terminated her for refusing to admit men to her feminist ethics class); *Harvard Settling Suit Alleging Bias*, *N.Y. TIMES*, Sept. 22, 1993, at B11 (Harvard agreed to settle Prof. Clare Dalton’s sex discrimination suit by contributing \$260,000 to enable Dalton to establish a Domestic Violence Institute); Lawrence Ingrassia, *Harvard Denies Tenure to Professor Involved in Bitter Legal-Studies Rift*, *WALL ST. J.*, Mar. 11, 1988 (reporting that despite favorable recommendations from 15 outside scholarship reviewers, Harvard Law School “denied tenure to a liberal woman assistant professor, [Clare Dalton,] whose appointment was opposed by faculty conservatives.”); Debra C. Moss, *Would This*

These cases are not just anachronisms that occurred during the late 1980s; they are ongoing cases from the late 1990s alleging pay and treatment disparities, intolerance, and hostility toward women generally and feminist scholars specifically.⁶⁷ They serve as warnings to other feminists not to engage in provocative work. Statistics confirm that women and minorities are denied tenure at much higher rates than white males: “in 1993 the tenure rate for white men in tenure-track positions was 78 percent, compared with 61 percent for white women and 62 percent for all minority categories.”⁶⁸

While the use of legal process may help in extreme and clear-cut cases,⁶⁹ the difficulties of documentation, proof hurdles in employment discrimination laws, deference given by courts to academic decisions, subjectivity of standards of merit, and subconscious nature of bias have “made the academic world virtually impregnable to legal attack for gender, ethnic, or racial discrimination.”⁷⁰

Happen to a Man?, 74 A.B.A.J. 50, 53 (1988)(describing the University of Pennsylvania Law School’s denial of tenure to Drucilla Cornell); Sharon Rush, *Understanding Diversity*, 42 U. FLA. L. REV. 1, 14-16 (1990) (discussing tenure battles of Professors Drucilla Cornell, Clare Dalton, and Lucinda Finley); *Sex Discrimination Fight*, SAN DIEGO UNION TRIBUNE, Aug. 27, 1989, at A7 (grievance panel concluded that Boalt Hall had discrimination against law professor Eleanor Swift in denying her tenure while six male colleagues were granted tenure).

⁶⁷ See, e.g., Roya Aziz, *UC-Davis English Prof Receives \$600,000 in Settlement*, 2000 WL 28353956 (Oct. 11, 2000) (reporting that Margit Stange, a professor who taught interdisciplinary feminist approaches to literature, settled her sex discrimination lawsuit for \$600,000 when she was denied tenure by the Chancellor and Vice Provost despite committee and departmental support); Laura Gatland, *How One Law School Is Addressing Gender Issues*, 7 PERSPECTIVES 10 (Spring 1998)(discussing Northwestern University School of Law’s 1996 denial of tenure to Prof. Jane Larson, a well-regarded feminist legal theorist, despite the law school dean’s recommendation of tenure); Courtney Leatherman, *\$12.7-Million Judgment in Tenure Case Leaves Many Academic Experts Stunned*, CHRON. HIGHER EDUC., Feb. 5, 1999, at A14 (noting that Leslie Craine, an assistant professor of chemistry, was awarded \$12.7 million in a sex discrimination and sexual harassment suit over being denied tenure); Kit Lively, *Brigham Young Denies Tenure to Scholar for Contradicting Mormon Views*, CHRON. HIGHER EDUC., June 21, 1996, at A15 (finding that BYU relied on assistant professor of English Gail T. Houston’s feminist views rather than her academic record to deny her tenure); *M.I.T. Finally Admits Discrimination Against Female Professors*, N.Y. TIMES, Mar. 23, 1999, at 78 (reporting that M.I.T. admits patterns of demoralizing of female professors, although states that none of the discrimination was conscious or deliberate); Robin Wilson, *The Faculty*, CHRON. HIGHER EDUC., June 6, 1997, at A10 (reporting on Harvard’s denial of tenure to Prof. Bonnie Honig, a feminist political scientist, after she earned the endorsement of her department and a higher-level panel judging her candidacy, and Yale University’s inexplicable denial of tenure to Prof. Diane Kunz, a well-qualified candidate, after her department voted to grant her tenure); Robin Wilson, *Five Women To Leave Fla. State Law Faculty*, CHRON. HIGHER EDUC., June 4, 1999, at A16 (describing the May 1999 resignation en masse of five female law professors—more than half of the women on the faculty—from Florida State University College of Law, four of whom allege that “a group of elitist male professors has belittled women’s scholarship and views.”). See also *Ottaviani v. State Univ. of New York at New Paltz*, 679 F. Supp. 288, 316 (S.D.N.Y. 1988) (“The Dean is widely thought to see the present Women’s Studies Program as lacking in academic credibility – perhaps because of its commitment to a feminist perspective as a fundamental component of education reform.”).

⁶⁸ Debbie Goldberg, *Who Makes the Cut?*, WASH. POST., July 27, 1997, at R4.

⁶⁹ See Barbara Feder & John Hubner, *Bias Against Female Professors Called ‘Universal Problem,’* TORONTO STAR, Mar. 13, 2000, at LI04.

⁷⁰ See Martha S. West, *Gender Bias in Academic Robes: The Law’s Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67 (1994).

Even if the negative consequences are not often visited on experimentalism or radical positions, the fear of those consequences is chilling. Writing in the feminist theory area may be risky business, because of tenure battles over “scholars . . . whose writing did not fit comfortably within established patterns.”⁷¹ Mary Coombs interviewed two dozen outsider scholars from a variety of institutions. The interviewees discussed the ways they were discouraged from producing feminist and critical race scholarship. Some were explicitly advised not to write “nontraditional” pieces, others had seen colleagues “apparently harmed professionally because their scholarship was feminist.”⁷² These are ways of regulating and taming women who do not conform, even if, viewed most benignly, they result from a failure to credit feminist theorizing as worthwhile legal scholarship.⁷³

C. Discouragement and Unexplored Traditionalism: The Reception of Feminist Legal Theory

Almost a decade ago, Richard Delgado examined the treatment of the writings of radical feminist scholars. He described practices such as ignoring the contributions of feminist scholars “extending far beyond failure to give recognition when it is due,” mentioning their works only in passing (grudgingly, dismissively, or “perfunctorily”) or at the end of long string cite, or not directly confronting the deeper critiques of feminist issues.⁷⁴ “[M]ainstream figures who control the terms of discourse,” Delgado concluded, “marginalize outsider writing as long as possible.”⁷⁵

Another current, apart from its outsider status, has also influenced the reception of feminist theory. In popular culture, negative images have long been associated with the term “feminist”: “Feminists are portrayed as bra-burners, man-haters, sexists, and castrators.”⁷⁶ At times, intellectual currents become rhetorical packages that move into social or cultural understanding. With feminism, the reverse seems to be happening. In part, reception of feminist theory in the legal academy seems to be influenced by contemporary pop culture spin on the term.⁷⁷

In the popular media, feminism these days seems to be a concept that is more successfully defined by the exaggeration and caricatures constructed by the political right than by the ideas developed about it by the political left. Rush Limbaugh’s one word definition of feminism—“feminazi”—and Pat Robertson’s explanation in a Christian

⁷¹ See Aviam Soifer, *MuSings*, 37 J. LEGAL EDUC. 20, 24 (1987).

⁷² Coombs, *supra* note 36, at 690, 716 n.32 (“One source vividly recalled the Clare Dalton tenure battle during the time she was working toward an LL.M. at Harvard and read that as a warning.”).

⁷³ See, e.g., Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN L. REV. 807 (1993).

⁷⁴ Richard Delgado, *The Imperial Scholar Revisited: How To Marginalize Outsider Writings, Ten Years Later*, 140 U. PA. L. REV. 1349, 1356, 1363 (1992).

⁷⁵ *Id.* at 1350.

⁷⁶ Bender, *supra* note 32, at 3.

⁷⁷ See generally RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE (2000).

Coalition fundraising letter that feminism is a “socialist, anti-family political movement that encourages women to leave their husbands, kill their children, practice witchcraft, destroy capitalism, and become lesbians” define the popular understanding of the term.⁷⁸

So perhaps it should come as no surprise that feminist *legal* theory is still tarnished with some of the worst stereotypes attributed to feminism generally.⁷⁹ It is interesting that the rhetorical techniques of hyperbolic language and ad hominem arguments used to damn feminists in the 1970s are being resurrected at the turn of a new millenium. Kenneth Lasson claims that radical feminists’ “words are often virtually incomprehensible, their writings filled with shrill jargon and polysyllabic gibberish—their voices as outraged as their messages outrageous.”⁸⁰ Richard Posner is perhaps less biting, but equally dismissive of some radical feminists who, in his words, simply “have plenty of goofy ideas and irresponsible dicta.”⁸¹

Mark Hager writes in accusatory tones. “Gender feminists,” a term he borrows from Christina Hoff Sommers, want to “burn[] out” patriarchy, “root and branch” and their “militancy can pose a grave threat to liberal values.”⁸² Individual “gender feminists” are “suspicious and hostile,” their projects “simplistic,” their goals lead to “despotism.”⁸³ Cultural feminists, he claims, are engaged in a “war on ‘male’ culture.”⁸⁴ Even pessimistic liberal feminists engage in “second-class treatment of white men.”⁸⁵ Hager’s article comes with a disclaimer that it “is a political argument,” which, he contends, should excuse him from the constraints against hyperbole and the requirements of substantiation and fairness:

This essay is neither an article in the usual law review sense, nor is it a book review. It is a political argument. As an argument, it does

⁷⁸ Howard Fineman, *Some Hard Right Turns for the GOP*, NEWSWEEK, June 20, 1994, at 38.

⁷⁹ See Marina Angel, *Women in Legal Education: What It’s Like to Be a Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799, 830-36 (1988)(describing denigration of scholarship regarding women’s issues).

⁸⁰ Kenneth Lasson, *Feminism Awry: Excesses in the Pursuit of Rights and Trifles*, 42 J. LEGAL EDUC. 3-4 (1992)(describing radical feminism as “petty mewlings of pouty prima donnas who are intellectually dishonest to boot.”). See also Arthur Austin, *Evaluating Storytelling as a Type of Nontraditional Scholarship*, 74 NEB. L. REV. 479, 480-88 (1995); Arthur Austin, *The Top Ten Politically Correct Law Review Articles*, 27 FLA. ST. U.L. REV. 233 (1999); Arthur Austin, *The Top Ten Politically Correct Law Reviews*, 1994 UTAH L. REV. 1319; Kenneth Lasson, *Political Correctness Askew*, 63 TENN. L. REV. 689 (1996).

⁸¹ Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40.

⁸² Mark Hager, *Sex in the Original Position: A Restatement of Liberal Feminism*, 14 WIS. WOMEN’S L.J. 181, 186, 183 (1999). I’m not sure what to make of the title, *Sex in the Original Position*, particularly given the author’s apology to John Rawls in the first footnote and the complete absence of analysis in the remainder of the article regarding Rawlsian actors in a state of nature—on the one hand it simply equates feminism with fucking (and in unimaginative missionary style too!); on the other hand, I would hate to fall prey to one of the worst caricatures of feminism: the lack of a sense of humor.

⁸³ *Id.* at 207, 210. See also *id.* at 183(“[W]hen they insist on denying sex differences, feminists may reach intrusively for control of bodies and emotions. This assaults autonomous personhood and flouts liberalism. They may also manipulate minds and rights, again flouting liberalism.”).

⁸⁴ *Id.* at 185.

⁸⁵ *Id.* at 239.

not cite every assertion, as do some law review articles. Its assertions of fact are generally supported by science and social science literature, though by no means are they undisputed. Other assertions are recognizable as matters of interpretation and viewpoint. Equally important, the argument here does not purport to present or analyze on its own terms the books I utilize. Except as it comports with my own purposes, I do not try to summarize the structures, arguments or techniques of these books, nor do I try to address all or even most aspects of them. I do not comment on their scholarly or literary merits, and I do not take pains to be fair to those works as such. I use the books as vehicles for presenting and developing an argument with the schools of feminist thought I construe them to represent.⁸⁶

The “feminazi” reactions are perhaps less troubling, though, than the attempts to delegitimize entire fields of inquiry. Feminists and other critical scholars are accused of attacking truth and reason and the rule of law, are branded “the radicals,” and are dismissed for advancing an “atypical” point of view.⁸⁷ Accusing an entire movement of opposition to reason “conjures up a vision of crazy ideologues.”⁸⁸

When traditional theorists claim the high ground of reason, they are denouncing feminists and critical theorists as “unreasonable.” This calls for careful examination of what they mean by reason. Traditionalists use a consensus definition of reason. Their argument is that if legal theory acknowledges “atypical” experiences, it allows unrepresentative individuals to dictate rules for a group and that this risks the death of common sense. Of course, common sense is all too often neither common—to everyone—nor sensible. In other words, the consensus theory of reason has its flaws. Notice first the structural circularity on which it is built. Traditionalists are making a choice: “they are selecting the ‘typical’ experience as the [only] valid one. This is a decidedly circular form of reasoning; the mere typicality of experience is proof of its own validity.”⁸⁹

Notice also that this measure of merit is itself a perspectival one, approving of beliefs and experiences, as long as they are the typical ones, which “confound[s] common or widely shared with objective or true.”⁹⁰ I would urge instead a definition of reason that relies on criteria of rationality— principles of scientific method and logic that consider: the explanatory and exploratory power of a theory, its external validity and depth (reliance on cumulative, comprehensive and converging evidence from a variety of disciplines), and its treatment of

⁸⁶ *Id.* at 187.

⁸⁷ See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 3, 5 (1997); Richard A. Epstein, *Legal Education and the Politics of Exclusion*, 45 *STAN. L. REV.* 1607, 1617-18 (1993).

⁸⁸ Daria Roithmayr, *Guerillas in Our Midst: The Assault on Radicals in American Law*, 96 *MICH. L. REV.* 1658, 1658 (1998).

⁸⁹ Nancy Levit, *Critical of Race Theory: Race, Reason, Merit, and Civility*, 87 *GEO. L.J.* 795, 801 (1999).

⁹⁰ *Id.*

evidence and data in ways consistent with accepted methods of scientific inquiry.⁹¹

Considered according to these criteria:

the traditionalist rejection of ‘different voices’ violates the way evidence is treated in science, history, sociology, and comparative psychology. What is ‘atypical’ in science is generally not rejected, but is accounted for by inquiry. The history of scientific reason is not one of excluding facts that do not conform to the theory. Traditionalists make the claim that rationality is universal, but ignore the great weight of psychological, anthropological, and sociological evidence that people perceive situations and reason differently about them, depending on various facets of identity. Much of the work of feminists, critical race theorists, and gay and lesbian legal theorists discusses problems of negotiating among groups that see things differently.⁹²

What happens when rhetorical and analytical techniques such as these are used?⁹³ Dissent can be suppressed in many ways. Some of those methods of suppression are linguistic devices: make ad hominem arguments about authors, dismiss the arguments they make by branding those arguments as extremist, and refuse to engage competing political visions on an empirical level.⁹⁴ The denigration of feminist scholarship and dismissal of some feminists from the dialogic process through the use of ridicule and high level name-calling contributes to a culture that tolerates academic trash talk in lieu of reason and analysis. The identification of traditional ways of thinking with reason and rationality and scholarship of critique with un-reason and contamination is a sweeping

⁹¹ See Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 *FORDHAM L. REV.* 263 (1989).

⁹² Levit, *supra* note 89, at 801-02.

⁹³ The increasing lack of civility in academic discourse is not targeted toward feminist theory alone. Critical race theory is a popular target, *see id.*, as are innovations in critical cognitive theory. *See, e.g.*, David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 *COLUM. L. REV.* 1908, 1946 (1999) (describing Pierre Schlag’s work as “a paranoid construction”).

⁹⁴ When feminists make the case that the role of biology has been overemphasized and the cultural shaping of gender traits underrecognized, *see* DEBORAH RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 82 (1989); Herma Hill Kay, *Perspectives on Sociobiology, Feminism, and the Law*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 74, 75 (Deborah L. Rhode ed., 1990); Levit, *THE GENDER LINE*, *supra* note 3, at 2-3, 16-36, 63, they are accused of “biodenial.” *See* Hager, *supra* note 82, at 241 n.13 (citing approvingly DAPHNE PATAI & NORETTA KOERTGE, *PROFESSING FEMINISM: CAUTIONARY TALES FROM THE STRANGE WORLD OF WOMEN’S STUDIES* 136-57 (1994)). Truisms about hormonal impulses and maternal instinct are repeated as fact, often with absolutely no citation to authority. *See, e.g., id.* at 189 (“Scientific findings consistently point to average disparities in sexual emotion, aggression patterns, and nurturing behavior.”)(no citation to any authority), 190 (“However, it remains that the science of sex disparities may explain why maternal child rearing remains predominant. Hormonally-shaped emotions may make women better at and more pleased by the intimate tenderness of child rearing.”(again, no support). What goes unexplored are deeper theoretical and empirical arguments about the cultural construction of gender, such as explanations why behavioral differences between the sexes, in performance on standardized tests, rates of juvenile delinquency or running time, are diminishing.

castigation of feminism and critical theory as animalistic, without capacity, without worth.

IV. BRIDGING THEORY AND PRAXIS

Sex segregation and diminishment of feminism and feminists are occurring, and, I suggest, these phenomena are in part intertwined. This section explores some of the possible causes and cures.

A. Making Different Choices and Exploding the Myth of Choice

One myth that faculties (employers in other settings) may use to justify readily apparent sex segregation is the idea that women make individual choices, some of which lead to their own marginalization. Joan Williams explains how assumptions about appropriate gender behavior pervade our daily lives. She has written that a cult of domesticity still predominates in this country, organizing market work and family work, apportioning breadwinning roles to men and caregiving roles to women.⁹⁵ Domesticity creates a picture of an ideal worker, and it also organizes women's political and emotional lives.⁹⁶ It assumes that women do the familial caretaking and nurturing work and that behaviorally "women are selfless and nurturing, and instinctively commit their efforts to the well-being of others."⁹⁷ This is an ideology, a package of cultural expectations. So it is entirely unsurprising that women absorb parts of an ideology that oppresses them or that these patterns replicate in the legal academy.

In some circumstances, it may be true that female academics sacrifice themselves "for the sake of the children" and fail to challenge their, deans, colleagues or the culture of their workplace. They may fear that any upheaval or refusal to do academic chores will simply cause the students to suffer or be deprived of an activity or outlet.⁹⁸

In the academic context, it may be hypothesized that perhaps women are just more interested than men in family law issues,⁹⁹ in heavy one-on-one student contact, in

⁹⁵ Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1559 (1991); Williams, *supra* note 63.

⁹⁶ Williams, *supra* note 63, at 89 (describing one characteristic of domesticity as a "system of providing for caregiving by marginalizing the caregivers, thereby cutting them off from most of the social roles that offer responsibility and authority").

⁹⁷ Kathryn Abrams, *Destabilizing Domesticity*, 32 CONN. L. REV. 281, 282 (1999).

⁹⁸ I am indebted to Susan B. Apel for this point.

⁹⁹ Merritt & Reskin, *supra* note 14, at 272 ("Legal employers may believe that women and minorities are particularly suited for domestic relations work and subtly encourage them to specialize in that field. Indeed, female lawyers sometimes complain about overt pressure to develop a domestic relations practice. . . . The significant overrepresentation of women and minorities hired to teach family law probably does not derive entirely from those candidates' experiences or preferences, but those factors may partially explain the sex and race effects we identified.") But Merritt and Reskin suggest that prior choice of practice experience does not account for the high percentage of females teaching family law: *Id.* at n.222 ("If work experiences accounted for the variation in teaching family law, then experience working for a legal aid office (entailing a high proportion of family law issues) should have shown a positive relationship with teaching family law. Instead, that coefficient failed to reach significance in our equations. Similarly, if legal aid experience were

energetic, nurturing of students and colleagues, and in junior league boosterism of community programs and activities.

This “choice” argument has been used successfully in employment discrimination cases such as *EEOC v. Sears, Roebuck & Co.*¹⁰⁰ by employers who frame statistical disparities in employment patterns—such as women’s underrepresentation in higher paying commission sales jobs—as the consequence of women’s preferences for lower paying, lower stress non-commission jobs.¹⁰¹ This assumption of culturally or biologically embedded preferences has meant an institutional reluctance on the part of courts to evaluate the ways in which employer practices shape women’s choices.¹⁰² A 1999 study published by the American Enterprise Institute purports to show that women earn between 95 and 98 cents to the male dollar and that the vast amount of wage disparities are due to women’s career choices and voluntary assumption of family responsibilities.¹⁰³

But the rampant sex segregation and gender imbalance in service work in the legal academy cannot all be reduced to this simplistic explanation. Feminist legal theorists have offered powerful critiques of this idea of choice. Women don’t naturally gravitate to “the softer side of Sears,” nor do they willingly choose the marginalization of jobs that pay less. The rhetoric of choice is used to deny institutional and structural inequalities.¹⁰⁴ Free choice language masks the reality that choices occur within constraints.¹⁰⁵ Those constraints include a lack of institutional options, an absence of other alternatives (if someone does not do the student advising, it will not get done), the inability to refuse certain kinds of work because of subordinate status, and socialization toward certain behaviors and roles. It may well be that female academics have been socialized so that they will more readily remember (and feel responsible for organizing) events like Secretary’s Day, but this linkage of “choice” and socialization omits completely institutional responsibility.

strongly associated with teaching family law, then women of color (with their disproportionate background in this area) should have been more likely than white women to teach the course.”)

¹⁰⁰ 628 F. Supp. 1264 (N.D. Ill. 1986), *aff’d*, 839 F.2d 302 (7th Cir. 1988).

¹⁰¹ See, e.g., Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1840 (1990) (“Courts who interpret sex segregation as women’s own choice thus negate the very choice they purport to defend.”); 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 (1992).

¹⁰² Kathryn Abrams, *Cross-Dressing in the Master’s Clothes*, 109 YALE L.J. 745, 756 (2000). See also Schultz, *supra* note 101, at 1811.

¹⁰³ WOMEN’S FIGURES: AN ILLUSTRATED GUIDE TO THE ECONOMIC PROGRESS OF WOMEN IN AMERICA (Diana Furchtgott-Roth & Christine Stolba, eds. 1999).

¹⁰⁴ Penelope Eileen Bryan, *Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1273 n.523 (1999). See also Rhode, *supra* note 94, at 165-67; Robin West, *Colloquy: Submission, Choice and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986); Williams, *supra* note 95.

¹⁰⁵ See Paul Gerwitz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 742 (1986) (“choice[s] must be made from a finite ‘opportunity set.’”).

Rather than assuming that female academics make simple, reflexive or natural choices to do more of the student work, committee work, or teaching in particular areas, we in the legal academy (not just the feminist community) need to develop a much more nuanced understanding of choice, including socially coerced choices, strategic choices, choices under pressure, choices by people in subordinate positions, and choices within a limited range of options.¹⁰⁶ This will open the possibility of reconstructing the institutional environment within which those choices are made.¹⁰⁷

In looking for the ways that choices are constrained by workplace cultures, institutional structures, and unconscious biases,¹⁰⁸ we need to move toward analysis of the important responsibilities of academic communities. Student mentoring, for example, is undervalued institutionally and its functions historically assigned to women. It is a topic, as Patrick Schiltz writes, that is the “almost completely ignored by the academy.”¹⁰⁹ Indeed, some administrators have resisted formalized mentoring programs for fear they will drain faculty time away from scholarship and teaching.¹¹⁰ If student advising is pedagogically important, perhaps incoming law students should be assigned a faculty mentor.¹¹¹ A program of assigned mentors recognizes the value of nurturing students, formalizes it, and removes gender as a consideration. While informal mentoring may be more successful than a program of assigned mentoring, because students and their assigned mentors may share no interests and faculty will unequally invest themselves in mentoring activities, if law schools institutionalize the expectation of mentoring and reward the practice, that would provoke real change.¹¹²

B. Silence, Institutional Evaluation, and Inquiry

Part of the reason the phenomenon of domestication is unexplored is that silence is one of its very attributes. Complaining smacks of the worst stereotypes of feminists—as “bitchy, demanding, aggressive, confrontational, and uncooperative, as well as overly

¹⁰⁶ See, e.g., Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 939 (1987) (observing that “socially constructed notions of gender . . . currently skew the choices of women and men”); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 826 (1989) (“women’s ‘choices’ must be seen as elements of an integrated system of power relations that systematically disadvantages women”).

¹⁰⁷ Kathryn Abrams, *Ideology and Woman’s Choices*, 24 GA. L. REV. 761, 776 (1990).

¹⁰⁸ Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1215.

¹⁰⁹ Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 772 (1998).

¹¹⁰ See Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105, 1134.

¹¹¹ See, e.g., Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Law Students*, 7 UCLA WOMEN’S L.J. 81, 82-83 (1996) (evaluating the idea of institutionalized mentoring and tutoring programs).

¹¹² Paula Gaber, “*Just Trying To Be Human in This Place*”: *The Legal Education of Twenty Women*, 10 YALE J. L. & FEMINISM 165, 257 (1998). Jennifer Gerarda Brown suggests “making out-of-class contact with students a factor in annual faculty evaluations. . . . Granted, many coed law schools do this now, but deans are free to give very little weight to this information.” Jennifer Gerarda Brown, “*To Give Them Countenance*”: *The Case for a Women’s Law School*, 22 HARV. WOMEN’S L.J. 1, 10 n.40 (1999). See also Heather A. Carlson, *Faculty Mentoring as a Way To End the Alienation of Women in Legal Academia*, 18 B.C. THIRD WORLD L.J. 317 (1998).

sensitive and humorless.”¹¹³ Women are taught not to complain: being quietly of use is good; whining is bad.¹¹⁴

We need to develop the empirical base to test the hypothesis of sex segregation in the teaching of courses such as family law, children and the law, and elder law, and corporations and business associations by, respectively, women and men, and the exclusive appropriation of feminist legal theory courses by women. A statistical evaluation of gender and work patterns is needed: who is doing the power committee work on various faculties and who is doing the “housework” (taking minutes of meetings, planning social events, judging moot court oral arguments, supervising student writing projects, and so on). Perhaps it is the “usual suspects”—folks who always volunteer, people of both sexes—or perhaps the anecdotal and developing empirical evidence will confirm the domestication hypothesis.

If women have individual complaints of “too much committee work,” they are whining. If the issues are revisited as matters of collective and structural inequities, and developed with an empirical base, they will be given more credence. As law professors, we shun the “billable hour” computations required in our former lives as lawyers. But keeping track of student contact and advising hours may be a way of assessing responsibility for and giving importance to the care and nurturance of students. Examination of the gender composition of committees or faculty advisement positions for student organizations should reveal whether those burdens fall more heavily on one sex. Open inquiry into faculty outside consulting might be a way to curb some of the breadwinning activities and redirect faculty energies toward the law school to ensure compliance with AALS directives.¹¹⁵ What these suggestions share is the encouragement toward inquiry and open discussion about the ways unconscious gender biases shape participation.

We also can no longer overlook the ways feminists and provocative theorizing are silenced. We need to investigate the epistemological premises of the critiques of more

¹¹³ Bender, *supra* note 32, at 3.

¹¹⁴ See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 330 (1995)(referring to the works of Camille Paglia, Katie Roiphe, and Naomi Wolf who claim that “feminism has ‘betrayed’ women by presenting them as wholly victimized and by encouraging a whiny introspection.”). Girls are taught from an early age to be helpful. See, e.g., The Girl Scout Law: “I will do my best to be honest and fair, friendly and helpful, considerate and caring, courageous and strong, and responsible for what I say and do, and to respect myself and others, respect authority, use resources wisely, make the world a better place, and be a sister to every Girl Scout.” (visited Nov. 6, 2000) <<http://www.girlscouts.org/about/promiselaw.html>>.

¹¹⁵

A full-time faculty member is one who during the academic year devotes substantially all working time to teaching and legal scholarship, participates in law school governance and service, has no outside office or business activities, and whose outside professional activities, if any, are limited to those that relate to major academic interests or enrich the faculty member’s capacity as scholar and teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one’s responsibility as a faculty member.

American Bar Association, *Standards for Approval of Law Schools*, Standard 402(c) (1996), (visited Nov. 9, 2000) <<http://www.abanet.org/legaled/standards/chapter4.html>>.

radical forms of feminist theory: Do single truths (or ways of looking at things) exist? What do principles of logic and scientific method suggest should be done with “atypical” evidence or perspectives?¹¹⁶ We should also encourage civility in academic discourse—an avoidance of caricature, ad hominem terms and emotive labels; an obligation of good faith engagement with opposition scholarship; and, perhaps most of all, a movement toward empirical inquiry to test controversial propositions.¹¹⁷

C. Patience, Persistence and Integration

Second generation discrimination issues are more subtle and complex than issues of equal pay or voting rights. Some of them are also uncomfortable topics, like the politics of housework in legal academia. But politically and socially, we must speak forthrightly about insidious inequalities, and understand them academically. The history of the women’s movement offers some rich lessons about what to do in the face of deep structural inequalities.

Perhaps particularly in legal academia, we assume that rights cure inequities. Women have rights, the argument goes, and if individual instances of injustice occur, appropriate legal processes can solve them. (Of course, talking about equality is a great way to avoid talking about inequality.¹¹⁸) But the discrimination model falls flat. The mechanics of lawsuits over small, but persistent patterns of inequality in academia are not promising; individual lawsuits afford little cure for systemic patterns of subtle discrimination, and they may not even be appropriate for acculturated patterns of behavior.¹¹⁹ The tendency is to fall into complacency when the issue is raised that female faculty members have “rights,” as if the problems are solved because they do. This difficulty may be unique to the law school audience, who tend to think in the language of rights. As Professor Stephanie Wildman has carefully described, many of the acts of subordination that occur in legal academia are a function of systems of privilege, unconscious biases, and traditional ways of doing things that make the disadvantaging processes invisible and elusive.¹²⁰ Gaining understanding of the ways unconscious biases and gendered patterns of behavior operate offers the best prospect for changing them.¹²¹ On both the theoretical and empirical levels, much more work needs to be done to evaluate the ways occupational sex segregation reinforces positions of power, the ways identification of certain positions with women encourages the channeling of women into those occupations, and the expectations attached to positions that make it hard to revalue them.

One large scale trend in the labor market has been toward somewhat less occupational segregation by sex—although occupational integration may not mean at the

¹¹⁶ See *supra* discussion in text at notes 87-92.

¹¹⁷ See *id.*

¹¹⁸ See generally RICHARD DELGADO, *WHEN EQUALITY ENDS: STORIES OF RACE AND RESISTANCE* (1999).

¹¹⁹ See *supra* text at notes 69-70.

¹²⁰ See STEPHANIE M. WILDMAN et al., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 7-24 (1996).

¹²¹ See *supra* text at notes 56-57.

micro-level women and men holding the same jobs within firms.¹²² Women became integrated successfully in professional occupations by performing the same tasks as men.¹²³ And increased integration in professional occupations is tied to cultural changes toward more egalitarian apportionment of pay and responsibilities.¹²⁴ One lesson of integration research in the social sciences is that attention must be given not just to the surface level of integrating within industries or occupations, but the more specific firm, department, job or task level. Applying this knowledge in the law school setting requires task-specific evaluation. Preliminary evidence suggests that those aspects of law school life that resemble home are performed by female law professors, that law schools fail to define some of the work that principally women in the legal academy are doing as useful, productive contributory work, and that, in short, law professors are, in subtle ways, replicating homemaker and breadwinner roles at work.

We know what strategies have been successful in the sweep of the women's movement. That history is one of a slow, persistent, and reasoned fight for opportunities. But those fights always began with inquiry, which was often read as women making trouble. The victory of women's suffrage took 72 years, in "an effort that included '56 referenda to male voters, 480 efforts to get state legislatures to submit suffrage amendments, 277 campaigns to get state party conventions to include woman suffrage planks, 47 campaigns to get state constitutional conventions to add woman suffrage, 30 campaigns to get presidential party conventions to adopt woman suffrage planks and 19 successive campaigns with 19 successive Congresses.'"¹²⁵ We have been working toward equality in law schools for decades, but as the wealth of recent feminist scholarship indicates,¹²⁶ we remain energized. We *know* that we are on the right side of history, and we *know* that justice—even in one of the world's greatest democracies—takes time.

¹²² Amy S. Wharton, *Feminism at Work*, 571 ANNALS AM. ACAD. POL. & SOC. SCI. 167, 172 (2000). See also Selmi, *supra* note 25, at 737 ("Focusing on occupations, however, likely understates the prevailing level of segregation because there is strong evidence that segregation is even more extreme at the job, rather than occupation, level, and it is still relatively rare for men and women to work in gender-integrated jobs.").

¹²³ See, e.g., Paula England, *The Pay Gap Between Male and Female Jobs*, 25 LAW & SOC. INQUIRY 913, 920 (2000); Wharton, *supra* note 122, at 176.

¹²⁴ Gregory B. Lewis, *Gender Integration of Occupations in the Federal Civil Service: Extent and Effects on Male-Female Earnings*, 49 INDUS. & LAB. REL. REV. 472, 472 (1996).

¹²⁵ Elisabeth Griffith, *The Long Hard Fight*, WASH. POST, Aug. 25, 1995, at A23 (quoting suffragist Carrie Chapman Catt).

¹²⁶ Individual books and articles are too numerous to mention. Recent symposia include: *Feminism and Legal Theory Workshop*, Cornell University Law School (April 1999); *Feminist Views of the Social Sciences*, 571 ANNALS AM. ACAD. POL. & SOC. SCI. 8 (2000); *Journal of Gender, Race & Justice's Symposium on Critical Race Feminism: Preparing Legal Thought for the 21st Century*, University of Iowa College of Law, November 6-7, 1998; *Symposium: Gender, Agency, Violence, and the Law*, 25 LAW & SOC. INQUIRY 295 (2000); *Symposium: Gender, Work & Family Project Inaugural Feminist Legal Theory Lecture*, 8 AM. U.J. GENDER SOC. POL'Y & L. 1 (1999); *Symposium on Unfinished Feminist Business*, 75 CHI.-KENT L. REV. 641 (2000).