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Melissa Hart

University of Colorado Law School

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THE MORE THINGS CHANGE . . . : EXPLORING SOLUTIONS TO PERSISTING DISCRIMINATION IN LEGAL ACADEMIA

MELISSA HART*

In May 2014, a conversation about gender discrimination among law school faculties exploded on the email listserv for the American Association of Law Schools (“AALS”) Section of Women in Legal Education. This conversation drew in dozens of participants from schools all over the United States and included teachers who were just starting out and those nearing retirement, drawing in clinical faculty, legal writing faculty, library faculty, and podium faculty. The topics that were raised ranged from the discriminatory actions of colleagues and students, to the marginalization of particular subject areas in the curriculum, to structural hierarchies in the profession, to the role of class in exacerbating other inequalities. The conversation went on for several weeks, and many of the participants urged that we needed to harness the feelings of anger and frustration expressed by so many and work together to channel that energy into productive change.

As one step, a group of faculty members from all over the country, inspired by a suggestion from Professor Meera Deo of Thomas Jefferson School of Law, banded together to propose a “crosscutting program” at the 2015 meeting of the AALS that would draw from empirical data, legal research, litigation strategy, and personal experience to both further conversations about the persistence of discrimination in the legal academy and activate strategies for addressing continuing problems. The program had a unique structure to permit the inclusion of as many voices as possible in the conversation. The program began with a three-person panel similar to more traditional AALS presentations. The second part of the program was made up of three-minute statements by speakers who were selected in response to a “call for remarks” circulated by the program organizers. The Articles in this symposium issue represent some of the ideas that emerged from this crosscutting program. The Articles are presented here in the order that the speakers offered their remarks at the AALS program.

Several themes run through the Articles included in this Symposium. First, long-standing, but not inherently necessary, law school structures and systems perpetuate race

* Professor of Law and Director of the Byron R. White Center for the Study of American Constitutional Law, University of Colorado Law School.

and gender discrimination. Several of the contributions discuss the ways that the skills-doctrine distinction on law school faculty magnifies inequality. Others consider how the tenure standards applied at most schools reinforce the effects of implicit and explicit bias. A second current running through many of the Articles here is the intersectional nature of discrimination. Whether it is because of race, class, or sexual orientation, the discrimination that women in the academy face is often exacerbated by other forms of bias. A third theme that many of the authors touch on is that legal academia is at a pivotal moment to address some of the structures that continue to perpetuate discrimination. Changes in the legal market and in legal education are pushing law schools to reexamine many of their calcified assumptions. We should seize this opportunity to challenge our institutions to make real change that will root out persistent discrimination.

I. The Discriminatory Consequences of the Skills-Doctrine Divide

Several Articles in this issue consider a topic that has increasingly become the subject of heated debate in the legal academy: the status divide between doctrinal, tenure-track professors and legal writing, clinical, and library faculty members. In *Podia and Pens*, Kristen Tiscione and Amy Vorenberg highlight the inequities created by the two-track system that exists in law schools, whereby those who teach lawyering skills occupy a second-class status compared with podium teachers.¹ Skills teachers tend to be paid less, have less job security, and have lower status within their institutions. Given that women are over-represented in skills teaching positions and under-represented among tenured and tenure-track faculty, this two-track system significantly exacerbates gender inequality in law schools. Tiscione and Vorenberg describe the rationale for the two-track system that is the most common structure in American law schools, and then explain the harms caused by this prevailing structure and the benefits that would flow from a single-track system offering skills teachers the same compensation and status structure available to podium teachers. Unfortunately, as Tiscione and Vorenberg note, there are significant obstacles to any shift to a single-track system. Many of these obstacles are best understood as social and cultural inertia, perhaps exacerbated by the economic anxieties facing law schools and law professors in today's shifting market. The authors suggest some first steps in overcoming those obstacles. And they conclude that, going forward, "the burden is on both podia and pens to bridge this gap."²

1 Kristen K. Tiscione & Amy Vorenberg, *Podia and Pens: Dismantling the Two-Track System for Legal Research and Writing Faculty*, *infra* pp. 47–64.

2 Tiscione & Vorenberg, *infra* at 64.

Lucille Jewel's piece, *Oil and Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies*, examines the ways in which the skills-doctrine divide not only reinforce class and gender hierarchies in law schools, but also shortchange law students by denying them a holistic legal education in which the ability to apply theory to real problems is understood as requiring both skills and doctrinal expertise.³ Jewel suggests that the current uncertainties in legal education offer us all an opportunity to rethink the doctrine-skills divide and that we should take hold of that opportunity. Finally, in *Putting Legal Writing on the Tenure Track: One School's Experience*, Catherine Christopher describes how Texas Tech University School of Law transitioned to tenure-track status for legal writing professors.⁴ Drawing from that experience, she offers some suggestions for faculty at other schools who hope to eliminate the two-track system that leaves many women in the legal academy at such a disadvantage.

II. Intersectionality

As several authors in this issue recognize, discrimination is often a result of a complicated mix of implicit and explicit biases, based not on gender alone, but sometimes on the intersection of gender with class, race, sexual orientation, or age. In *Who's Afraid of White Class Migrants?*, Lisa Pruitt explores how the legal academy has failed to acknowledge, in scholarship and in its own ranks of both teachers and students, the experiences of the white poor and working class.⁵ She examines the tendency to conflate socio-economic status and race and describes the blank reaction that she has confronted when she tells her own story of "class migration"—coming into academia from a working-class background. She urges that the legal academy must acknowledge the unique experiences of working-class whites as part of a robust commitment to diversity. Michael Green, too, considers the impact of socio-economic status on his path to the legal academy.⁶ In *Just Another Little Black Boy from the South Side of Chicago*, he discusses growing up as a poor black boy in a crime-ridden neighborhood and the essential role that his mother played in keeping him on a path out of that neighborhood and ultimately into academia. Despite his own

3 Lucille A. Jewel, *Oil and Water: How Legal Education's Doctrine and Skills Divide Reproduces Toxic Hierarchies*, *infra* pp. 111–34.

4 Catherine Martin Christopher, *Putting Legal Writing on the Tenure Track: One School's Experience*, *infra* pp. 65–81.

5 Lisa R. Pruitt, *Who's Afraid of White Class Migrants?: On Disdain, Denial, and Discrediting (and Toward a Richer Conception of Diversity)*, *infra* pp. 196–254.

6 Michael Z. Green, "Just Another Little Black Boy from the South Side of Chicago": *Overcoming Obstacles and Breaking Down Barriers to Improve Diversity in the Law Professoriate*, *infra* pp. 135–53.

success, Green ponders the dearth of black men in legal academia and particularly in fields like employment discrimination. He urges us to focus our attention on “pipeline programs to increase the critical mass of black males provided the opportunity” to pursue legal academic careers.⁷

Continuing the theme of intersectional discrimination, Faith Jackson and Edieth Wu’s contribution explores the dynamics faced by black women in the legal academy generally, and particularly at Historically Black Colleges and Universities (“HBCUs”).⁸ They examine the ways in which discrimination against black female faculty at HBCUs remains unchecked and urge more direct confrontation of the continued inequities.

Meanwhile, Ann Tweedy describes the ways in which law school hiring committees have discriminated on the basis of sexual orientation when the orientation at issue is bisexuality.⁹ Her piece echoes a theme that emerges in several of these Articles: law school faculty members who may be relatively attuned to the need to avoid certain “traditional” kinds of discrimination still struggle to recognize other classifications as warranting protection or acknowledgement.

III. Tenure Wars

Finally, several of the Articles included here focus on the standards currently used to evaluate faculty candidates for tenure and promotion, and on the way the tenure process plays out when bias—implicit or explicit—infests that process. Susan Rozelle’s piece critiques the entire existing structure of the legal academic work world as inherently discriminatory. Rozelle focuses on the ways in which “law schools’ institutional culture presumes the Ideal Worker: white, male, middle-class, middle-aged, and married to a woman who manages his home and his family life for him.”¹⁰ She observes that many of the structural systems in place in law schools are not necessary and make success much more challenging for those who do not fit this “Ideal Worker” profile. Rozelle suggests a number of steps institutions might take—shifting away from a face-time mindset, paying attention to scheduling and its impact on non-work obligations, rethinking tenure standards, offering better

7 Green, *infra* at 151.

8 Faith Joseph Jackson & Edieth Y. Wu, *Must We Deploy Drones in the 21st Century to Target Under the Radar Discrimination Against Minority Women at Law Schools at Historically Black Colleges and Universities?*, *infra* pp. 164–95.

9 Ann E. Tweedy, *A Bisexual Perspective on Law School Hiring*, *infra* pp. 82–86.

10 Susan Rozelle, *How to Eat the Elephant in the Legal Academy*, *infra* pp. 44–46.

family-leave policies—to redesign “a workplace structure that is more compatible with other obligations.”¹¹

Meera Deo’s contribution, *A Better Tenure Battle*, examines how law schools evaluate teaching as part of tenure and promotion.¹² Deo presents evidence from interviews she conducted during 2013 to show that women of color in particular face much higher levels of student confrontation in the classroom as well as bias in teaching evaluations. She ultimately offers three structural solutions to address these problems: eliminate student teaching evaluations, modify them in ways that would make it easier to evaluate whether racial or gender bias is affecting an evaluation, or replace or supplement student evaluations with regular peer evaluations.

Maurice Dyson’s contribution focuses on some of the problematic tools the legal academy uses to measure quality not only in teaching, but also in scholarly evaluation. In particular, he considers the role of rumor and pressure to conform.¹³ He observes that a significant part of an academic’s reputation comes from unsubstantiated or hard-to-substantiate rumors that circulate within and among schools. These rumors can significantly impact decisions around tenure and evaluation, and yet they are very susceptible to both implicit and explicit bias. To combat this problem, Dyson argues for a commitment to transparency, to direct confrontation of rumor, and to developing more effective tools for measuring quality.

Shifting from barriers to success to the consequences a broken procedure can have even for candidates who are successful, Angela Mae Kupenda and Tamara Lawson’s Article exposes the reality experienced by many women and men of color as they suffer through the tenure process—what the authors describe as “tenure wars.”¹⁴ Kupenda and Lawson raise the important question of what a scholar and her institution need to do after a successful tenure battle to heal the wounds that people of color and white women suffer disproportionately as a result of implicit and explicit bias. They explore this process through an analogy with “truth and reconciliation” processes that many nations have used

11 Rozelle, *infra* at 46.

12 Meera E. Deo, *A Better Tenure Battle: Fighting Bias in Teaching Evaluations*, *infra* pp. 7–43.

13 Maurcie R. Dyson, *Still Using the Wrong Yardstick: Measuring Quality by the Proxies of Bias, Conformity, and Rumor*, *infra* pp 154–63.

14 Angela Mae Kupenda & Tamara F. Lawson, ‘Truth and Reconciliation’: A Critical Step Toward Eliminating Race and Gender Violations in Tenure Wars, *infra* pp. 87–110.

as a mechanism for social healing after war, and query how that type of process might be used in law schools following painful tenure processes.

CONCLUSION

The Articles here raise a broad range of issues, both in terms of the types of discrimination they describe, and in terms of the structures and systems they critique. Whether it is the law school hiring process, the tenure and promotion process, the hierarchical structure of the law school faculty, or all of it together, the Articles expose the persistent discrimination that continues to infect the legal academy. Importantly, however, these Articles do not simply critique existing structures. They offer ideas for reform. This important point—that our goal should be not simply to bemoan the problems we still face but to take action for change—was the resounding conclusion of the AALS meeting as well. At the end of the presentations, the hundred or more people in the room exchanged emails and phone numbers and continued to talk about where and how to use the ideas shared on the Women in Legal Education listserv and in this conversation to press for meaningful change. These conversations are a good start for a reimagined legal academy, in which the more things change, the more they truly change.