GENDER AND THE CRISIS IN LEGAL EDUCATION: REMAKING THE ACADEMY IN OUR IMAGE

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You never want a serious crisis to go to waste. And what I mean by that is an opportunity to do things you think you could not do before.

- Rahm Emanuel[1]

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1. *Rahm Emanuel on the Opportunities of Crisis*, WALL ST. J. (Nov. 19, 2008), http://live.wsj.com/video/rahm-emanuel-on-the-opportunities-of-crisis/3F6B9880-D1FD-492B-9A3D-70DBE8EB9E97.html#!3F6B9880-D1FD-492B-9A3D-70DBE8EB9E97.

INTRODUCTION

American legal education is in the grip of what some have called an "existential crisis."[2] The *New York Times* proclaims the death of the current system of legal education as a result of a severe shortage of full-time jobs for law school graduates[3] combined with spiraling debt loads to finance increasing tuition.[4] The trend toward emphasizing theory at the expense of more practical professional skills has also been identified as a major component of the crisis.[5] This is attributed, in part, to the incentivizing of faculty to produce increasingly abstract scholarship and the costs this imposes on pedagogy and the mentoring of students.[6] A number of critics, inside and outside of legal academia, assert that students graduate from law school ill-equipped to actually practice law.[7]

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2. Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES (July 14, 2012), http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html?_r=2&ref=todayspaper; *see also* BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012); Paul F. Campos, *Campos: The Law Student Debt Crisis*, TAXPROF BLOG (May 16, 2012), http://taxprof.typepad.com/taxprof_blog/2012/05/campos-the.html; Bill Henderson, *Unsustainable Law Student Debt*, LEGAL WHITEBOARD (Mar. 25, 2012), http://lawprofessors.typepad.com/legalwhiteboard/2012/03/unsustainable-law-student-debt.html.

3. *See* Joe Palazzolo, *Law Grads Face Brutal Job Market*, WALL ST. J., June 25, 2012, at A1, *available at* http://online.wsj.com/article/SB10001424052702304458604577486623469958142.html.

4. *See, e.g.*, David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=1&pagewanted=all; Caplan, *supra* note 2; *see also* Brian Z. Tamanaha, *How to Make Law School Affordable*, N.Y. TIMES, June 1, 2012, at A27, *available at* http://www.nytimes.com/2012/06/01/opinion/how-to-make-law-school-affordable.html?ref=opinion ("T[he] economics of legal education are broken."); Editorial, *Legal Education Reform*, N.Y. TIMES, Nov. 26, 2011, at A18, *available at* http://www.nytimes.com/2011/11/26/opinion/legal-education-reform.html ("American legal education is in crisis. The economic downturn has left many recent law graduates saddled with crushing student loans and bleak job prospects. . . . [The case method approach] was dated by the 1920s. It was a relic by the 1960s. . . . In reforming themselves, law schools have the chance to help reinvigorate the legal profession."); TAMANAHA, *supra* note 2; Henderson, *supra* note 2; Campos, *supra* note 2.

5. Segal, *supra* note 4.

6. *See* 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, 707-08 (1998) ("[L]aw schools have the capacity to replace many of the traditional functions of professional mentoring . . . . However, . . . the academy is unlikely to assume those responsibilities because of an increasing materialism of its own—a materialism measured mainly in academic prestige rather than personal income.").

7. Many firms are adding business training because students are not receiving it in law school. *See, e.g.*, Palazzolo, *supra* note 3; Segal, *supra* note 4; *see also* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (highlighting the subordinate place of practical legal skills).

At the same time, despite women graduating from law schools in significant numbers since the 1980s,[8] they continue to lag behind in the most prestigious positions in academia—tenured, full professorships:

> Statistics collected by the Association of American Law Schools (AALS) . . . demonstrate that while women have made continuous progress on law school faculties, they still occupy a disproportionate percentage of the lower-paying, lower-status jobs. From academic year 1998–99 to academic year 2007–08, the percentage of women law school deans rose from 10.4% to 19.8%. Their proportion of full professors grew from 20% to 29.3% of the population. Unfortunately, however, women represent 61.3% of lecturers and 65.4% of instructors. In contrast, men represent the vast majority of high-paying and high-prestige positions, 80.2% of deans, 70.7% of full professors, but a minority of low-paying and low-prestige positions, 38.7% of lecturers and 34.6% of instructors.[9]

I argue that these two phenomena—the incentivizing of scholarship at the expense of pedagogy and the slow progress of women to tenured, full professorships—are linked. The former has imposed significant costs on legal education as a whole.[10] It has distorted the allocation of institutional resources at American law schools and has skewed scarce resources, including faculty time, law student tuition, and private donor contributions. In addition to these general costs, the trend also imposes a disproportionate cost on women faculty who carry a much greater share of the caregiving and household responsibilities in their families.[11] These women are also bur-

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

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

10. Segal, *supra* note 4.

11. *See, e.g.*, Danielle Kurtzleben, *Vive La Difference? Gender Divides Remain in Housework, Child Care*, U.S. NEWS & WORLD REP. (June 22, 2012), http://www.usnews.com/news/articles/2012/06/22/vive-la-difference-gender-divides-remain-in-housework-child-care ("Last year, women did far more housework and child-rearing than their male counterparts, while men stayed at the office longer than women, according to the Labor Department's 2011 American Time Use Survey."); Joan C. Williams & Donna L. Norton, *Building Academic Excellence Through Gender Equity*, 4 AM. ACAD. 185, 200 (2008) ("Despite the gains of the women's movement, the fact of the matter is that women still shoulder the lion's share of caregiving responsibilities."); Robert Drago, Research Dir., Inst. for Women's Policy Research, Bias Against Caregiving and Faculty Advancement, Presentation at the ACE/Alfred P. Sloan Invitational Conference for Medical School Deans (Sept. 23, 2010), *available at* http://www.acenet.edu/leadership/programs/Documents/3-Drago.pdf (highlighting "leaks in the academic pipeline for women").

dened by a disproportionate share of the student caregiving and institutional "housework" on committees inside law schools.[12]

In this paper, I argue that the external pressure on law schools created by the crisis actually presents an opportunity for women faculty. Part I describes the origins of the modern university and the unified model of teaching and scholarship. Part II evaluates the costs of this model to legal education as highlighted by the critics in the current crisis. Part III explores the heightened cost to women law faculty of this model adopted from the broader university. And Part IV offers suggestions for fundamentally restructuring the legal academy to provide a level playing field for women faculty and facilitate their movement in equal numbers into tenured, full professorships.

I. THE ORIGINS OF THE MODERN UNIVERSITY AND THE UNIFIED MODEL OF TEACHING AND SCHOLARSHIP

Law schools are parts of a larger academic whole—the university. The university is a place where teachers and students gather to create, share, and transmit knowledge. Universities were constructed around gendered norms where men taught other men, few of whom were primary caregivers for others. Not surprisingly, the slow progress of women in legal academia mirrors that of women in American universities generally. The American Association of University Women (AAUW) has concluded that "women have made remarkable strides in academia" in the last twenty years, but that "[d]espite these gains, women remain underrepresented at the highest echelons of higher education. . . . On average, compared to men, women earn less, hold lower-ranking positions, and are less likely to have tenure."[13]

Both American universities and American law schools embrace a unified model of teaching and research (hereinafter the "unified model"), where faculty perform the dual functions of teacher and scholar concurrently during a career, in addition to engaging in faculty governance.[14] The unified model valorizes the integration of teaching and research functions on the part of the professoriate. While this unified model has benefits, it im-

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12. Nancy Levit, *Keeping Feminism in Its Place: Sex Segregation and the Domestication of Female Academics*, 49 U. KAN. L. REV. 775, 786-87 (2001); *see also* McGinley, *supra* note 9, at 150-52 (citing studies that demonstrate this disparity in academia more generally).

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

14. "Faculty governance entitles faculty members to significant or even decisive input in virtually every decision made at the law school" or "letting the inmates run the asylum." Susan J. Becker, *Thanks, But I'm Just Looking: Or, Why I Don't Want to Be a Dean*, 49 J. LEGAL EDUC. 595, 598 (1999).

poses costs as well.[15] It also imposes particularly disparate costs on women. So too does the tenure system, which facially measures teaching, scholarship, and service but de facto really only values scholarship unless the candidate's teaching is "'so bad as to provoke student rioting.'"[16]

This embrace of the unified model mirrors other parts of the university. Note, however, that law schools are significantly different from many other schools within the university in that law professors are generally paid much higher annual salaries than their counterparts in political science, sociology, public health, and other departments.[17] Law schools are more similar to medical schools in terms of faculty salaries. But unlike medical school faculty, law professors do not generate millions of dollars in research grants from government or the private sector. This situation has drawn the attention of a number of legal scholars and public commentators in the wake of the job crisis of the past four years and the spiraling debt loads of American law students. Scholars have observed that student tuition dollars cross-subsidize faculty scholarship. And one scholar quantified the cost of some law review articles at nearly $100,000.[18] This observation triggered a flurry of responses, both pro and con legal scholarship and pro-doctrinal scholarship versus non-doctrinal, interdisciplinary scholarship.[19] Thus, the recent crisis in legal education has seen the advent of a number of critics who have pointed out the significant costs of law schools adopting university norms while other scholars have mounted a vigorous defense of the status quo.[20]

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15. *See generally* Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367 (1990).

16. Paula A. Monopoli, *Teaching Lawyers to Be More than Zealous Advocates*, 2001 WIS. L. REV. 1159, 1168 (reviewing DEBORAH RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000)) (quoting Schiltz, *supra* note 6, at 750).

17. *See, e.g.*, *Average Faculty Salaries by Field and Rank at 4-Year Colleges and Universities, 2011–12*, CHRON. HIGHER EDUC., http://chronicle.com/article/Sortable-Table-Average/131081 (last visited Feb. 20, 2013) (noting that "[p]rofessors in law [averaging the highest salary at $135,187], engineering, and business earned the most, while instructors of English, history, and ethnic and gender studies made the least").

18. *See, e.g.*, *Would You Pay $100,000 for a Law Review Article?*, INSIDE L. SCH. SCAM (Aug. 12, 2011), http://insidethelawschoolscam.blogspot.com/2011/08/would-you-pay-100000-for-law-review.html (citing estimate by Richard Neumann of the Hofstra University School of Law).

19. *See, e.g.*, Walter Olson, *Cost of a Law Review Article: $100,000; Student Debt to Pay for It: Priceless*, OVERLAWYERED (May 8, 2011), http://overlawyered.com/2011/05/cost-of-a-law-review-article-100000-student-debt-to-pay-for-it-priceless; Karen Sloan, *Legal Scholarship Carries a High Price Tag*, NAT'L L.J. (Apr. 20, 2011), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202490888822&slreturn=1.

20. *See, e.g.*, Erwin Chemerinsky, *You Get What You Pay for in Legal Education*, NAT'L L.J. (July 23, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202564055135&You_get_what_you_pay_for_in_legal_education&slreturn=20120623185606; Karen Sloan, *Book Gives Law Schools Failing Grade*, NAT'L L.J. (June 18, 2012), http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202559659082&slreturn=20120626190945 (quoting John O'Brien, Dean of the New England School of Law and

In order to understand the resistance to women ascending to positions of authority in modern academia, one must look briefly to the origins of the modern university and the embrace of the German model of the university associated with Wilhelm von Humboldt. One must also look to how modern American law schools came to have a home within universities and how they came to adopt the same tenure criteria as other departments, including the hard sciences and the social sciences.[21] As noted above, the criteria for tenure at most American universities and law schools include a tri-partite model of teaching, scholarship, and service. Despite the rhetoric that each is equally important, most institutions rely almost exclusively on a tenure candidate's scholarship. The following Section traces the origins of the unified model in the context of the evolution of the modern university. It also reviews the history of how American law schools became part of the modern university. Situating the current status quo in this historical context is helpful since, often, "certain contemporary conditions can be more easily understood in the light of the intellectual history of earlier times."[22]

A. The Origins of the Modern University

> Universities first arose in Europe during the later Middle Ages (c. 1150–1500). The *universitas* was a corporation or guild of masters (professors) and scholars (students). Western civilization was developing rapidly at the time. The birth of this new and uniquely Western institution resulted from a combination of powerful societal trends. Briefly, these trends were the revival of mercantilism, growth of cities and the urban middle class, and bureaucratization, along with the 12th-century intellectual renaissance. As European society became more complex, the universal Roman church, secular governments, and municipalities required educated priests, administrators, lawyers, physicians, and clerks for business. Fulfilling this social demand were the universities, which were clearly oriented toward teaching and the learned professions.[23]

The golden age of learning in philosophy, rhetoric, and law developed by the Greeks and the Romans was followed by the Dark Ages in which "[t]he barbarian invasions destroyed the schools of the Roman Empire[,] . . . the darkest [period] in the intellectual history of Europe."[24] The resulting intellectual drought "gave rise to the monastic and Cathedral schools which

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Chairman of the ABA's Council of the Section of Legal Education and Admissions to the Bar, that "'the claim that a law degree is a bad investment doesn't hold water'").

21. *See* William D. Henderson, Commentary, *The Inferiority Complex of Law Schools*, NAT'L JURIST, Mar. 2012, at 4, 4-5.

22. Charles Homer Haskins, *The Spread of Ideas in the Middle Ages*, 1 SPECULUM 19, 30 (1926).

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

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

served the needs of the church."[25] During the Dark Ages, "'Benedictine monasticism created almost the only homes of learning and education, and constituted by far the most powerful civilizing agency in Europe until it was superceded as an educational instrument by the growth of the universities.'"[26] Thus, the original image of a "scholar" was derived from a singularly male figure keeping knowledge alive as a scribe in an isolated monastery during the Dark Ages.

During this period, monasteries had limited communication with town centers, and the Catholic Church facilitated much of that communication.[27] Thus, this communication had very little effect on the broader society.[28] This began to change as a result of the rise of the cathedral schools, which were created by the church to educate the clergy.[29] Monasticsm and the cathedral schools preceded the evolution of the university as an institution.[30] This evolution began in earnest in the twelfth century with a great influx of knowledge from the Arab and Byzantine worlds (including much of the ancient Greek philosophy as we know it).[31] The first medieval universities were founded in the wake of this influx of heretofore unknown knowledge.[32]

One of the most prominent medieval universities was the University of Paris.[33] An institution that had begun as a cathedral school became a university that served as a model for other universities.[34] The University of Paris evolved from an institution managed by individual professors to one managed by a "small oligarchy of officials."[35] In addition to this institutional shift, universities began to grant licenses (with approval from the state or church) to their graduates to credential them to teach elsewhere.[36] As a result, these early universities trained the professoriate that went on to staff other educational institutions across Europe.[37]

Oxford was one of the other major medieval universities.[38] Unlike the University of Paris, Oxford's early existence was more closely connected to political concerns than to religious ones.[39] Thus, unlike other universities

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25. *Id.*
26. *Id.* (quoting 1 HASTINGS RASHDALL, THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES 27 (1895)).
27. *See* Haskins, *supra* note 22, at 20-23.
28. *See id.*
29. *See id.*
30. *See* van Scoyoc, *supra* note 24, at 323.
31. *Id.* at 324.
32. *See id.* at 324-25.
33. *See id.* at 325-26, 328.
34. *Id.* at 326, 328.
35. *Id.* at 326.
36. *See id.* at 327-28.
37. *See id.*
38. *See id.* at 328-31.
39. *See id.* at 331.

that evolved from the cathedral schools, university officials at Oxford were linked more directly to the school itself, and it operated in a manner more akin to that of a modern-day school administration.[40]

During the Renaissance, a number of societal changes triggered a significant increase in the number of educated people. These changes included, among other things, the advent of the printing press, which facilitated the distribution of books.[41] The Renaissance also saw the rise of Humanism, which focused less on the Bible as had the curriculum of the medieval period and more on philosophy, poetry, and history among other subjects.[42]

As time went on, the mission of the university evolved:

> First to develop was the European medieval university, characterized by its *teaching* mission and Scholasticism; the later Middle Ages society evolved rapidly, and higher education was required for administration in the church, secular states, and municipalities, as well as for the traditional "professions." Thereafter, the early modern university of Europe and Latin America accepted *nationalization* (service to the government of the nation-state) and humanism; the early modern period saw the rise of independent nation-states. Next, the formative U.S. college of the 19th century advanced the *democratization* (service to the individual of the nation-state) of higher learning; America is the world's first democratic nation-state and it extends Jeffersonian and Jacksonian liberalism to education. Simultaneously, the 19th-century German (Humboldtian) university promoted the *research* mission and academic freedom; the state of Prussia consolidated its intellectual power by founding the University of Berlin in 1809–1810, following the Enlightenment and total defeat by Napoleon.[43]

The model upon which many countries, including the United States, eventually based their universities was the German (Humboldtian) university.[44] Wilhelm von Humboldt was the Prussian education minister in the early nineteenth century.[45] His innovations in the university model at the University of Berlin during his brief period as minister have come to dominate our thinking about what a modern university should be:

> While setting up the new university, Humboldt established one basic doctrine: "to appoint the best intellects available, and to give them the freedom to carry on their research wherever it leads." Three principles that flowed out of Humboldt's doctrine became paramount at Berlin and later at most of the German-speaking universities. Ultimately, these principles also became famous around the globe. First, the principle of the unity of the research and teaching missions confirmed the importance of original scholarship. Second, the principle of academic freedom developed. Consisting of *Lernfreiheit* (the concept of "freedom to learn"), which allowed students to pursue any course of study, and *Lehrfreiheit* (the concept of

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40. *See id.* at 328.
41. *See* Paul F. Grendler, *Schooling in Western Europe*, 43 RENAISSANCE Q. 775, 780 (1990).
42. *See id.* at 781.
43. Scott, *supra* note 23, at 5-6.
44. *See id.* at 22-23.
45. *Id.* at 20.

> "freedom to teach"), which allowed professors free inquiry regarding their lines of research and teaching, this principle was protected by the state. Third, the principle of the centrality of the arts and sciences, comprising "astronomy, biology, botany, chemistry, classics, geology, history, mathematics, philology, philosophy, physics, and political science," raised the academic status of the traditional (humanistic) liberal arts faculty to the same level as the theology, law, and medicine faculties—thereby elevating pure research.[46]

In the United States, the Humboldtian model came to have some uniquely American features: "Throughout the 20th century, the modern American university elevated the mission of *public service* (service to the public of the nation-state); during 'America's century,' the U.S. was the world's leading democratic, economic, and military power."[47]

A number of scholars have noted that a primary legacy of the Humboldtian model is this idea of the unity of teaching and research so that the university professor engages in both concurrently.[48] "In summary, the German university left many substantial legacies [including] regular integration of the teaching and research missions . . . ."[49] And, while they note the benefits of the unified model, many scholars have also noted the ongoing tension between the two activities:

> The current "knowledge society" presents complex research mission issues. Perennial problems are balancing the overall teaching and research missions, as well as basic versus applied research, which is linked to the public service mission. . . . Ultimately, research is a proven, dynamic mate to the teaching mission of the university, simultaneously meshing with the nationalization or public service missions. The research mission is valuable for the improvement of societies around the globe—creating a skilled workforce, enabling economic growth, improving health care, and encouraging knowledge production.[50]

So how did training in the law, which has been viewed historically as a trade and now as more of a profession, come to be associated with the American university as an institutional matter?

B. How American Law Schools Came to Be Housed in the University

One of the most interesting scholars of the modern American law school is Bill Henderson, a professor of law at Indiana University Bloomington. In a recent article, Henderson notes that in the eighteenth and nineteenth centuries, law was viewed as a trade in which one apprenticed with a practicing lawyer as the preferred method of training.[51] It was not until the

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46. *Id.* (citations omitted).
47. *Id.* at 6.
48. *See id.* at 23.
49. *Id.*
50. *Id.*
51. Henderson, *supra* note 21, at 4.

late nineteenth and early twentieth centuries that law schools began to appear as units of larger universities.[52] This trend was met with great skepticism by scholars of the time.[53] Henderson notes that in 1918, economist Thorstein Veblen commented on this alarming development by noting that "'the law school belongs in the modern university no more than a school of fencing or dancing.'"[54] Indeed, he and other academics:

> [B]elieved that universities should be citadels for science-based learning and the production of knowledge. Law, in contrast, was a trade. Indeed, in the early 1900s, a substantial portion of the practicing bar had obtained their skill and knowledge through office apprenticeships. When law schools did begin to appear, they were just as likely to be proprietary law schools operating out of a local YMCA than to be part of an established university.[55]

Why, then did universities embrace law schools and absorb them as sub-units? Henderson offers three practical reasons: (1) law was the primary occupation of many elected officials who saw this embrace as a way to elevate their own status and credentials; (2) a small number of law schools at elite universities like Harvard had adopted the "case method," developed by Christopher Columbus Langdell, which appeared similar to a scientific method of inquiry, with "objective legal rules" that could be parsed from judicial cases to form a body of knowledge that could be divined; and (3) law schools, with large lectures and without expensive laboratories, were profit centers for universities.[56]

As an increasing number of American law schools became units of larger universities, the faculties of those law schools began to compare themselves to their colleagues in other departments. Thus, Henderson asserts they developed an "inferiority complex" in that their work was less scholarly than that of their counterparts.[57] In order to assure themselves and the rest of the university that they were true scholars, they increasingly adopted the university's unified model of teaching and scholarship built upon the Humboldtian approach. In addition, they adopted a tenure system.[58] That tri-partite tenure system in the larger university, while facially requiring excellence in teaching, scholarship, and faculty governance or service, actually focused dominantly on scholarship.[59] And law schools followed this tenure model in all respects in large part to justify their position

52. *See id.*
53. *See id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *See id.* at 4-5.
58. *See id.* at 4.
59. *See id.*

as a legitimate member of the academic community in which they found themselves.[60]

The current trend in law faculty hiring reifies this movement. Most young law faculty now have fewer than one year of actual practice experience. They come from a handful of elite law schools where theory is emphasized over practice.[61] But their credential is a J.D., not a Ph.D. The J.D. is not a research degree. There is no requirement that they study statistical methods of empirical inquiry. Nor do they have to conduct research and document that original research in a culminating thesis tested by oral examinations. The J.D. is a professional degree that emphasizes doctrinal knowledge, problem solving, and advocacy methods.

As students, many of today's law faculty could have obtained a Ph.D. rather than a J.D., given their stellar undergraduate credentials. However, in the last forty years many of these talented students were warned by their mentors that there were few jobs in academia for Ph.D. recipients. They would have to be geographically very flexible and willing to accept low pay. These students opted to pursue a J.D. instead and then an academic career in law which required far fewer years of study and more lucrative salaries—in many cases doubling the starting salary of a Ph.D. in political science, sociology, or economics. They were rational actors who were maximizing their own welfare. One could hardly blame them, but they came to law school faculties ill-equipped to do rigorous empirical social science research of any quality.

So some would argue that law schools have been captured in a sense by a generation of faculty who did not have the discipline to obtain a true research degree but who would like the status of those of their undergraduate colleagues who did. And this inferiority complex that continues to plague the legal academy has significant costs to students and women faculty alike.

This Article is not an attempt to evaluate the validity of this movement in law schools. It suffices to say that the "parallels between science and law inevitably breakdown"[62] when subject to close scrutiny, and indeed, the emperor appears to have no clothes. However, this is the status quo, so the next section evaluates the cost of the unified model and the tenure system's disproportionate weighting of scholarship to both students and women faculty.

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60. *See id.*

61. William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?*, A.B.A. J., July 2012, at 36, 38.

62. Henderson, *supra* note 21, at 4.

II. THE COST TO LEGAL EDUCATION OF ADOPTING UNIVERSITY NORMS

Even prior to the current crisis, a number of scholars have engaged in a critique of the unified model, as it has been adopted by the modern American law school.[63] The current crisis has brought such critiques again to the fore. The fundamental premise is that the current model shortchanges pedagogy and mentoring of students in favor of the pursuit of increasingly abstract scholarship.[64]

The model encourages fewer and fewer years of practice for beginning law professors.[65] It disadvantages women, given the de facto criteria of requiring an article or two be published before hiring plus a federal court clerkship.[66] Scholars like former law professor and now federal judge, Patrick Schiltz, have characterized the increasing volume of scholarship required by law professors as academic "greed"—asserting it is the equivalent of the avarice represented by the increase in billable hours in law firms.[67]

The commentary on the current crisis in legal education has linked the cost of legal scholarship and the enormous student debt incurred with few job prospects. It has challenged the notion that law faculty in a professional school (unlike a graduate school model) should be spending any time writing things other than treatises or doctrinal work. Articles which are essentially political science, economics, and philosophy might arguably be produced much less expensively in those departments of the university where

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63. *See, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) ("I fear that our law schools and law firms are moving in opposite directions. The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use. . . . But many law schools . . . have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy."); Scordato, *supra* note 15.

64. Edwards, *supra* note 63.

65. Yale Law School will be offering a Ph.D. in Law as of Fall 2013. Sam Favate, *Yale Law School to Offer Ph.D. in Law*, WALL ST. J. L. BLOG (July 11, 2012, 11:23 AM), http://blogs.wsj.com/law/2012/07/11/yale-law-school-to-offer-ph-d-in-law. For critiques from law professors who graduated from Yale Law School, see David Lat, *Calling Dr. Law: Yale Will Offer a Ph.D. in Law for Would-Be Legal Academics*, ABOVE L. (July 12, 2012, 4:22 PM), http://abovethelaw.com/2012/07/calling-dr-law-yale-will-offer-a-ph-d-in-law-for-would-be-legal-academics/2. *See also* Brian Leiter, *The Worst Idea in the History of Legal Education: A "PhD in Law"?*, BRIAN LEITER'S L. SCH. REP. (July 11, 2012, 2:57 PM), http://leiterlawschool.typepad.com/leiter/2012/07/the-worst-idea-in-the-history-of-legal-education-a-phd-in-law.html.

66. *See* Segal, *supra* note 4 (describing how publication of "esoteric" scholarship by aspiring law professor hires is "defended by law school professors as a way to attract the best and brightest to teaching"); *see also* Paula A. Monopoli, *In a Different Voice: Lessons from* Ledbetter, 34 J.C. & U.L. 555, 578 n.144 (2008) (citing a study that notes a 50% drop in women Supreme Court clerks in 2006).

67. Schiltz, *supra* note 6, at 706 ("For lawyers, it is greed for money; for law professors, it is greed for academic prestige.").

the faculty are paid far less. Some undergraduate schools either have separate legal studies departments, e.g., Amherst College, or offer degrees in legal studies within political science departments, e.g., the University of Massachusetts.[68] In these departments, there are faculty members who have J.D.'s, Ph.D.'s, or both whose scholarship is interdisciplinary.[69] However, most of these faculty members do not command an assumed market rate of salary as if they could go to the best law firms in the country and become highly paid associates or partners.

The current crisis has put stress on the unified model of legal teaching and scholarship which presumes that it is more beneficial than costly for faculty to perform the two functions, in addition to faculty governance, as part of their job description.[70] But some scholars have engaged in persuasive critiques of this model over the past two decades.[71] When situated in the crisis in legal education that has recently come to pass, these scholars appear prescient. And some historians have noted the increasing tension between the two functions in the university as a whole and the distortions it creates in the teaching function:

> By 1900, the German university model and research mission had influenced, to varying degrees, higher education throughout the world. . . . In America, the emerging world power, institutions such as Johns Hopkins adopted both the research ideal and graduate education . . . . The research mission dominated U.S. universities by 1910. With the triumph of the research ideal in America there began a decline of the teaching mission during the 20th century (much publicized in recent decades).[72]

III. THE DISPROPORTIONATE COST TO WOMEN FACULTY OF THE UNIFIED MODEL

A. The Marginal Role of Women as Scholars in the University

The university as an institution has consistently excluded women as students and professors. In the evolution of the medieval to the modern university, women always had a marginal role. This was in part a result of the different curriculum that girls were allowed in primary education, a curricu-

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68. *See Law, Jurisprudence, and Social Thought*, AMHERST C., https://www.amherst.edu/academiclife/departments/ljst (last visited Feb. 20, 2013); *Undergrad-Legal Studies*, UMASSAMHERST, http://polsci.umass.edu/legal (last visited Feb. 20, 2013).

69. *See Law, Jurisprudence, and Social Thought Faculty*, AMHERST C., https://www.amherst.edu/academiclife/departments/ljst/faculty (last visited Feb. 20, 2013); *Undergrad-Legal Studies*, *supra* note 68.

70. *See generally* Scordato, *supra* note 15.

71. *See id.*

72. Scott, *supra* note 23, at 22-23 (citation omitted).

lum that did not prepare them to attend university.[73] It was also a result of views on the proper sphere for women—the private rather than the public sphere.[74] That view was significant in terms of encouraging the sex segregation of caregiving, and that segregation in turn creates a practical barrier to women's full participation in the university even today.

During the Renaissance, female education was limited in two significant ways: (1) it focused exclusively on the study of grammar, neglecting any formal reasoning; and (2) women were taught in local languages, denying them the ability to learn Latin—the formal language of most universities.[75] As a result, even if their families had allowed it, they were not prepared to attend universities.

For example, education was based around the teaching of the Trivium (language based subjects) and Quadrivium (number based subjects).[76] The traditional Trivium was composed of grammar, logic, and rhetoric.[77] Male students were exposed to all three of these areas with a particular focus on logic.[78] For the most part, female students were taught only grammar.[79] Rhetoric and logic were seen as unnecessary to a woman's primary duty of educating children, and might have a negative effect on the traditionally female virtues of chastity, silence, and obedience.[80] As a result, women were not prepared to discuss the source material used in universities, e.g., Aristotle or Cicero.[81]

Not only was female education limited to grammar study, women were rarely allowed to study Latin since it was used in the public sphere, and the proper sphere for women was in the private sphere as caregivers.[82] Thus, it was deemed unnecessary to teach women Latin. Since university classes were taught entirely in Latin, women were not prepared to attend.[83]

Thus, the different primary curriculum for girls and boys had a deleterious effect on the number of women who would be able to enroll in universities and this, in turn, translated into a dearth of women as university professors.[84]

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73. *See* Joan Gibson, *Educating for Silence: Renaissance Women and the Language Arts*, HYPATIA, Spring 1989, at 9, 10.
74. *See id.* at 12.
75. *See id.* at 10-12.
76. *Id.* at 10.
77. *Id.*
78. *Id.* at 11.
79. *See id.*
80. *See id.* at 12.
81. *See id.* at 10-12.
82. *See id.* at 12.
83. *See id.* at 10-12.
84. *See id.*

> Renaissance pedagogical theorists believed that a woman should acquire learning appropriate to her expected adult role. This usually meant two things: first, most educated girls came from the middle and upper classes. Second, a girl normally acquired vernacular reading and writing skills sufficient for her expected role as virtuous and practical wife and mother, but no more. Since she could not attend university or have a public role, she did not receive Latin schooling. . . .
>
> But there were exceptions. A few girls, often with strong paternal support, received Latin humanistic educations. Such girls did not have an easy time of it, because they had acquired skills inappropriate to their sex. A male with Latin humanistic schooling could go on to the university and enjoy a public career where he could use his learning. A woman with a Latin education could only hope to be recognized through a literary exchange with male humanists.[85]

The private sphere of caretaking in the home was still the proper place for women, not the public space of the university. So, as we can see, the role of "scholar" is itself highly gendered and in the context of the ancient origins of the workplace we inhabit—the university—it is associated with the masculine.

B. Women and Caregiving in the Modern University

Even when women began to become members of the university as students and faculty in the late nineteenth and twentieth centuries, the teaching and service functions were viewed as more appropriate to women since they connoted caregiving—the activity that women were involved in the private sphere. Women were not associated with the masculine image of scholar, passed down from the original monastic figures who preceded the modern university. To this day, in American universities teaching and service is often associated with the feminine and research with the masculine.[86] As noted above, in the university norms adopted by law schools, research is clearly the most salient factor in tenure, promotion, and pay decisions.[87]

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85. Grendler, *supra* note 41, at 784-85 (citations omitted).

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

87. *See id.* at 50 ("Why should research be the primary criterion for tenure and promotion? One line of argument, which focuses on research as an indicator of faculty merit, goes something like this: 'Research separates the men from the boys (or the women from the girls). Teaching and service won't serve this function because everyone teaches and does committee work.' A variation on this theme argues that '[t]eaching and service won't serve this function because there is no satisfactory way of evaluating teaching and service.' According to the first line of reasoning, research performance is the only factor that *differentiates* faculty presumed to be equal in other respects. According to the second line of reason-

Academic merit has been based on norms that are historically male, with publishing having the dominant role in pay and promotions. There is substantial research demonstrating that women publish less than men for a number of reasons, including more time with students, family obligations, and other external limits on their time.[88]

Why do women struggle so hard with the unified model of teaching and research and the norms surrounding the emphasis on scholarship as the dominant consideration in tenure decisions? Because they work a second shift. They work at home as well as the workplace. In addition, they are expected to do the caregiving at work as well—putting them in a teaching and governance capacity exacerbates these demands. Women who teach are expected to caregive for students far more than their male counterparts. And women who engage in committee service are burdened with greater expectations and fewer rewards.[89]

1. *Caregiving at Home*

In her groundbreaking book, *The Second Shift*, Berkeley sociologist Arlie Hochschild offers a detailed study of the cost of the second shift—the disproportionate child and home care working women still do—on women, men and families.[90] She recollects her mother putting Arlie and her brother into the family station wagon, with a picnic supper, and driving into Washington D.C. to pick up her father at his government office on Friday afternoons.[91] She notes that he would come out of the office at 5 p.m. with his briefcase and join the family in the car, happy to see them.[92] Hochschild says, "When I see similar scenes, something inside rips in half. For I am neither and both the brisk stepping carrier of a briefcase and the mother with

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ing, research performance is the only factor by which faculty members can be *objectively* evaluated, even if they are unequal in other respects." (footnote omitted)).

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

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

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

89. *See* Park, *supra* note 86, at 53-54.

90. ARLIE RUSSELL HOCHSCHILD WITH ANNE MACHUNG, THE SECOND SHIFT xii (2d ed. 2003).

91. *Id.*

92. *Id.*

the packed picnic supper. The university is still designed for such men and their homes for such women."[93]

Hochschild offers empirical support for her assertion that working women still perform the most significant proportion of the child care and household chores. She notes, "In a 1978 national survey, Joan Huber and Glenna Spitze found that 78 percent of husbands think that if husband and wife both work full time, they should share housework equally. . . . In fact, the husbands of working wives at most average a third of the work at home."[94] The results of that study continue to be replicated up to the present day.[95]

Women also do the disproportionate share of the caregiving of elderly relatives. A recent AARP survey demonstrated that women are more likely than men to provide care and more likely to provide the most burdensome kinds of care.[96]

All of this uncompensated carework provides an important subsidy to the American economy. Women pick up the disproportionate cost of such uncompensated carework. In her book, *The Price of Motherhood*, Ann Crittenden cites economist Shirley Burggraf who has

> calculated that a husband and wife who earn a combined income of $81,500 per year and who are equally capable will lose $1.35 million if they have a child. Most of that lost income is the wages forgone by the primary parent. . . . [T]his seems an

93. *Id.*

94. *Id.* at 294 n.1 (citing JOAN HUBER & GLENNA SPITZE, SEX STRATIFICATION: CHILDREN, HOUSEWORK AND JOBS (1983)).

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

96. NAT'L ALLIANCE FOR CAREGIVING & AARP, CAREGIVING IN THE U.S.: EXECUTIVE SUMMARY 2 (2005), *available at* http://assets.aarp.org/rgcenter/il/us_caregiving_1.pdf ("Female caregivers are more likely to provide care at the highest Level of Burden (71% at Level 5 and 58% at Level 1). Male caregivers are more likely to provide care at the lowest Level of Burden (42% at Level 1 and 29% at Level 5).").

> unreasonable penalty on the decision to raise a child, a decision that contributes to the general good by adding another productive person to the nation.[97]

Burggraf "uses the term 'feminine economy' to describe all the work of caring for dependents, from infants to the sick and elderly."[98]

2. *Caregiving at Work*

Not only do women provide the bulk of caregiving to children and elderly, they do the disproportionate share of the "housework" in the workplace itself, including within the faculty governance structure of the university. As noted above, as the university evolved, the idea that faculties should self-govern became the norm. However valid that idea may be in terms of preserving academic freedom, it has costs for women who attempt full participation in the professorial ranks:

> [W]omen in the academy play domestic, supportive roles. Even when hired into positions that are equal in name and title to men, women law faculty perform the "housework" of the law school. This work includes service on hard-working, low-status committees in the law schools.
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> . . . Internal work seems to be less important to the prestige of the school and, concomitantly, to the career of the faculty member. Many men seem to focus more on their scholarship and reap the benefits of doing so. Law faculties tend to emulate the family's gender divide. That is, women tend to do the housework—the committee work and other internal work at the law school—men tend to do the outside work—more scholarship, more travel, more self-promotion, more blog entries and other "scholarly" career work.
>
> This problem is not merely a phenomenon of law schools. A recent study at the University of California, Irvine found that women do much more of the service work at the university and that service work is generally of lower status than research and teaching and is not rewarded by the system. This problem was especially acute for women who were post-tenure because they were no longer shielded from service work.[99]

Some scholars have argued that the slow progress of women to tenured, full faculty positions is the result of a choice by women, and individu-

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97. ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 89 (2001).

98. *Id.* at 275 n.6.

99. McGinley, *supra* note 9, at 150-51 (footnotes omitted) (citing, among other sources, Levit, *supra* note 12, at 777, 786-87 and Kristen Monroe et al., *Gender Equality in Academia: Bad News from the Trenches, and Some Possible Solutions*, 6 PERSP. POL. 215, 220, 229-30 (2008)).

> Another study of forty professors (twenty men and twenty women) at four major research universities found that sixteen of the twenty women (eighty percent of the female subjects), as opposed to five of nineteen men (twenty-six percent of the males), noted that they had experienced significant increases in institutional service responsibilities that detracted from their "scholarly learning."

Id. at 151-52.

al choice is not something that the university as an institution should have to respond to.[100] But as we can see from societal structures themselves, women who have full time jobs at home and who provide more carework in the workplace—when their lives are viewed as a whole—are not really responding to autonomous choice as much as being squeezed onto a path that is the result of this imbalance. While the job description of a professor seems gender neutral on its face, when looked at through the narrow lens of the workplace it can be seen that it is not neutral in the context of the complete picture of women's work.

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

> Some might argue that these stark statistical differences [in the disparity between the number of women graduating from American law schools over the past twenty-five years and the number of women in tenured, full professorships and deanships] result from choice or a lack of interest on the part of women lawyers to serve as law professors, but in a comprehensive study of women in male-dominated jobs, law professor Vicki Schultz demonstrated that women's "choice" is often shaped by the work environment and employment policies. Moreover, Schultz's empirical and qualitative research indicates that women react to opportunities and conditions at work in determining the types of work they desire. . . . Unfortunately, Schultz's study demonstrated that workplaces often create barriers to women's entry and success. As Schultz noted, there are "powerful disincentives for women to move into and to remain in nontraditional occupations."[101]

McGinley also notes that while "[e]mpirical studies by Merritt, Reskin, and Kornhauser, and the statistics collected by the AALS identify important inequalities that women professors face as employees in law school settings,"[102] these studies do not identify the structures and norms that create such inequalities. For example, these include structures that result in women spending more time with students and students reacting poorly to women faculty who do not respond to this expectation.[103] McGinley does an excellent job identifying the structures and norms that create and perpetuate these

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100. *See* Laura T. Kessler, *Paid Family Leave in American Law Schools: Findings and Open Questions*, 38 ARIZ. ST. L.J. 661 (2006) (entertaining the possibility that the "opt-out" theory might account for some of the discrepancy in advancement of female law professors); *see also* Stephen J. Ceci & Wendy M. Williams, *Understanding Current Causes of Women's Underrepresentation in Science*, 108 PROC. NAT'L ACAD. SCI. 3157 (2011) (concluding that "differential gendered outcomes in the real world result from differences in resources attributable to choices, whether free or constrained . . . .");.

101. *Id.* at 103-04 (footnotes omitted) (quoting Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1816 (1990)).

102. *Id.* at 104.

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

inequalities. In the next section, I build on that work and propose some significant structural change that I think may be possible at this moment in history, given the current crisis in legal education.

IV. MOVING AWAY FROM THE UNIFIED MODEL AND CHANGING GENDERED STRUCTURES

The cost to women of the unified model of teaching and scholarship is clear. Women continue to lag behind in assuming the most powerful positions in legal academia—tenured full professorships.[104] The cost has become even more significant with the ratcheting up of the volume of scholarship expected of young faculty. To those who say the current structures and ways of evaluating faculty for tenure are sacrosanct, I say clearly the university as an institution has evolved—as have its forms, structures, and mission—over hundreds of years.

Given the cost of legal education, the nature of the law school as a professional and not a graduate school, and the disproportionate cost to women, law schools should continue to evolve; law school tenure, which is under pressure as a result of the current crisis in legal education, should change as well.[105] I would argue that innovations introduced by the Hum-

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104. A number of reports use the increase in the number of female deans of law schools as a metric in measuring women's progress in legal education. I would argue this statistic is of limited value since the dean of the law school is actually not as powerful a position in academia as the tenured, full-time professor. For this idea and for the idea of the devaluing of position that occurs when women begin to occupy a previously male position in significant numbers, see *id.* at 101 n.1.

> The study also found that when a woman held a service or administrative position, the position itself would be devalued. The researchers conducting the study "heard this comment so frequently across all disciplines that [they] coined the term '*gender devaluation*' to refer to the subtle process by which administrative positions lose their aura of status, power, and authority when held by women. These positions often become treated as service or support roles until they are reoccupied by men. So, for example, being a department chair could be viewed as a position of power or one of service. When a man is department chair, the position confers status, respect, and power. When a woman becomes department chair, the power and status seem diminished, and the service dimension becomes stressed."

Id. at 151 (alteration in original) (quoting Monroe et al., *supra* note 99, at 219-20).

105. *See ABA Committee Considers Dropping Tenure-Policy Requirement*, THOMSON REUTERS NEWS & INSIGHT (Nov. 16, 2011), http://newsandinsight.thomsonreuters.com/Legal/News/2011/11_-_November/ABA_committee_considers_dropping_tenure-policy_requirement. For the actual standards, see AM. BAR ASS'N, 2007–2008 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 30-35 (2008), *available at* http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/20072008StandardsWebContent/Chapter_4.authcheckdam.pdf. For commentary, see Paul L. Caron, *ABA Minority Proposal Softens Removal of Tenure as Accreditation Standard*, TAXPROF BLOG (Mar. 22, 2011), http://taxprof.typepad.com/taxprof_blog/2011/03/aba-softens-.html; Paul L. Caron, *ABA Continues to Consider Removal of Tenure as Accreditation Standard*, TAXPROF

boldtian model of the modern university, to the degree that they emphasized the integration of teaching and original research, have had an adverse impact on women faculty. A corollary development, the de facto emphasis on scholarship to the exclusion of teaching and service in the tenure process, has also been a structural barrier for women in the university. To the degree that American law schools adopted these models when they became parts of the larger university, these models had a depressing effect on the progress of women into tenured, full professorships.

There is no question that the Humboldtian legacy of the unified model has benefits and that there are synergies created when faculty engage in teaching and scholarship at the same time. However, there are also costs both to legal education generally and to women faculty in particular that must be balanced against the fact that there are significant benefits to the model as well. This cost-benefit analysis may also play out differently in the context of the American law school that grants the J.D., a professional degree, as opposed to other departments of the university, where the degree granted is the Ph.D., a terminal research degree. Unlike their colleagues in Political Science, Economics, or Philosophy who are explicitly training future scholars who will receive a Ph.D., law faculty are preparing practitioners who will receive a J.D. New information in a law professor's field may arguably be gained more appropriately by reading broadly rather than by engaging in time-consuming original research and scholarship.[106] The argument for this position is outlined below.

The idea that students with debt-financed tuition dollars are cross-subsidizing legal scholarship by faculty has been a central part of the recent debate on the crisis in American legal education. A Ph.D. candidate in an American graduate school not only typically has her tuition waived, she is paid by the university through teaching fellowships and stipends. Ph.D. candidates work for the university as graduate assistants teaching small sections of lectures. This is very different from the financing model for legal

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BLOG (July 12, 2011), http://taxprof.typepad.com/taxprof_blog/2011/07/aba-committee-.html; Dan Filler, *AALS Issues Strong Response to Proposed ABA Accreditation Standards*, BRIAN LEITER'S L. SCH. REP. (Mar. 31, 2011, 3:11 AM), http://leiterlawschool.typepad.com/leiter/2011/03/aals-issues-strong-response-to-proposed-aba-accreditation-standards.html; Christine Hurt, *Masters Forum (Legal Education): Should the ABA Mandate Tenure?*, CONGLOMERATE (Mar. 22, 2011), http://www.theconglomerate.org/2011/03/masters-forum-legal-education-should-the-aba-mandate-tenure.html; and Karen Sloan, *Law Faculty Upset over ABA's Proposed Tenure Shift*, NAT'L L.J. (July 27, 2010), http://www.law.com/jsp/article.jsp?id=1202483570773.

106. *See* Scordato, *supra* note 15, at 369 ("The majority of empirical studies . . . have found no significant relationship between teaching effectiveness and research productivity . . . ." (citing RICHARD I. MILLER, EVALUATING FACULTY FOR PROMOTION AND TENURE 49-50 (1987); Virginia W. Voeks, *Publications and Teaching Effectiveness*, 33 J. HIGHER EDUC. 212, 218 (1962))).

scholarship where the cross-subsidy arises from tuition dollars paid by law students and financed by debt.

In addition, law students must attend one of only two hundred ABA approved law schools in order to be eligible to sit for the bar exam in the vast majority of states.[107] Graduate students in Philosophy, Political Science, or Economics, on the other hand, may choose among the graduate school that offers them the most prestige and/or competitive financial deal without regard to the oligopolistic practices of American law schools that hold the franchise—ABA accreditation—that diminishes competition. One can be a political scientist, a philosopher, or an economist without additional credentialing. One cannot practice law without a license, and one may not get a license without taking a state bar exam. And one can only take a state bar exam if one has graduated from an ABA accredited school. Thus, scholarship and research among faculty in American universities is not paid for by graduate students—the universities pay them. This is the polar opposite of American law schools where law students pay debt-funded tuition that in turn cross-subsidizes legal scholarship by law faculty.

So there are myriad reasons to reconsider the model of American legal education and, in particular, the unified model of teaching and scholarship adopted from university norms. Wholesale change could take two paths: we could abandon the unified model and offer a dedicated teaching or a dedicated scholarship track; or we could adopt a model of research institute that would provide an "incubator" for women scholars who are primary caregivers. In either case, women would be provided the time and space to become scholars in their own right.

A. The Dedicated Track Model

Some scholars have suggested that law schools move to a dedicated track model.[108] Law faculty would be free to choose either an exclusively teaching track or an exclusively scholarship track.

1. *Benefits of a Dedicated Track Model*

The benefits of a dedicated track model include allowing professors to focus their energy on improved and innovative pedagogy if they choose the teaching track or to focus on excellence in scholarship if they choose the research track.[109] This clearly offers benefits for legal education as a whole since it improves the experience of the students, and it isolates legal schol-

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107. *See ABA-Approved Law Schools*, A.B.A., http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html (last visited Feb. 20, 2013).

108. *See* Scordato, *supra* note 15, at 410-14.

109. *Id.* at 410-11.

arship which may be better subsidized by privately donated dollars and state or federal research grants rather than student tuition dollars.

It also offers significant benefits for women faculty who are primary caregivers of children and elderly relatives. By creating an exclusively scholarship track, women could opt onto that track until tenure. They would have the time to focus on scholarship, which is the dominant factor in tenure and promotion decisions, in a way that their second shift both at home and at work does not currently allow.

By opting for a dedicated scholarship track, women would be able to avoid the disproportionate burden that attaches to the teaching function for women in terms of student expectations. These expectations include how available women faculty should be for advice, writing clerkship recommendation letters, and other byproducts of teaching a large first-year or upper division required course.

When they have secured tenure, women could choose to be on a teaching track for the post-tenure period. At this point, they would have established themselves as scholars and could more easily accommodate the increased burdens of teaching that attach to their gender. For example, even when teaching is given some weight in assessing compensation, the use of student evaluations has serious flaws, as noted in a wide body of literature on gender bias in student evaluations.[110] Utilizing such evaluations can have negative effects on compensation in direct and indirect ways, including time taken from scholarship by the need for women to work harder than men to receive comparable student evaluations.[111] And men often receive the institutional teaching awards.[112]

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110. *See generally* Joey Sprague & Kelley Massoni, *Student Evaluations and Gendered Expectations: What We Can't Count Can Hurt Us*, 53 SEX ROLES 779 (2005).

111. *Id.* at 791. The authors write:

> These findings are substantiated by the observations of other feminist researchers who have reported incidents of student hostility toward women instructors who are perceived as not properly enacting their gender role or who present material that challenges gender inequality.
>
> . . . That is, women teachers may be called on to do more of what sociologists call emotional labor, labor that is frequently invisible and uncounted.
>
> Thus, if teachers are being held accountable to, and are attempting to meet, gendered standards, then women and men may be putting out very different levels of effort to achieve comparable results. If it takes more for a woman to get a 5 and she nearly kills herself to do it, that difference in effort will not be measurable on student rating scales.

Id. (citations omitted).

112. This is often a product of gender schemas about women faculty. But it is also a product of how such awards are structured. For example, one student reported to me that the Student Bar Association at our home institution, which runs the Professor, Adjunct Professor, and Staff Member of the Year awards, only listed three white, male faculty members and no female candidates for the full-time professor award and the only choices for the adjunct category were three men, including one faculty member of color and one faculty member

For the dedicated model to be successful, law schools might have to offer incentives for faculty to opt into the teaching track. These could include higher pay or chaired professorships. This would help offset the perceived cost in terms of prestige that many faculty would see in opting for a dedicated teaching track.

Law schools could also give a preference to faculty members who are the primary caretaker for children or elderly relatives in their families when selecting those faculty members who could opt for the dedicated scholarship track. Higher education institutions currently have criteria to determine who is a primary caretaker in terms of parental leave.[113] Similar criteria could be used to select faculty who are allowed to opt for the dedicated scholarship track. While this would likely result in more women being allowed onto that track, the criteria would be facially gender neutral.

There is substantial evidence that women do a disproportionate share of the institutional housework in academia generally.[114] They "caregive" and tend to students more than their male colleagues.[115] There is also a clearly gendered pattern of course assignments in law schools with women being assigned to less prestigious areas of the curriculum.[116] Young professors tend to write in the areas they have been assigned to teach, if simply to be efficient in the learning of their subjects. If women are not channeled into less prestigious areas of the curriculum because they are not teaching early in their careers, they may write in areas that are more likely to be published in highly ranked law reviews. There is a nexus between the rank of the journals in which a faculty member publishes and the perception of her "market value." There is clear evidence that women are published less frequently in

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with a disability. The only women nominated by the SBA were in the category of Staff Member of the Year, which included two female staff members and a male staff member.

113. *See, e.g.*, *Childbirth Leave and Work Reduction Policy*, BOSTON UNIVERSITY (2011), http://www.bu.edu/handbook/leaves-absences/maternity-leave/ ("An individual is a primary care giver when he or she is either responsible for more than 50% of the care of the child, or is the sole caretaker of the child for more than twenty hours per week, Monday through Friday, between the hours of 9:00 a.m. and 5:00 p.m."); DUKE UNIVERSITY, FACULTY HANDBOOK: PROFESSIONAL AFFAIRS OF THE FACULTY 4:11 (2013), *available at* http://www.provost.duke.edu/pdfs/fhb/FHB_Chap_4.pdf (defining primary caregiver "as the individual who has primary responsibility for the care of the child immediately following the birth or the coming of the child into the custody, care and control of the parent for the first time"); *Faculty Serious Illness, Major Disability, and Parental Leave Policy*, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL (revised Aug. 19, 2004), http://academicpersonnel.unc.edu/faculty-policies-procedures/leave/CCM1_017244 (defining primary caregiver as "the individual who has primary child-rearing responsibility for his or her child").

114. *See* Sprague & Massoni, *supra* note 110, at 791.

115. *See supra* Section III.B.

116. *See* McGinley, *supra* note 9, at 102-03.

American law reviews than men.[117] These are all examples of norms that are skewed against women in terms of how their institutions value them. A dedicated track model may help alleviate many of the costs imposed on women faculty by such skewed norms.

Most American law schools do not have a mandatory paid maternity leave policy. This puts young, untenured women at a significant disadvantage in the race to tenure. There is anecdotal evidence that men use paternity leave to write while women use maternity leave to caregive, which raises policy concerns. Ad hoc leave policies which require negotiation by untenured faculty are disadvantageous to women who are clearly less likely to "ask" and negotiate for themselves in terms of pay and benefits, according to a number of studies.[118] A dedicated track would also allow women to write and to become mothers in their prime childbearing years. Thus, a dedicated track model would structurally resolve many of the issues currently addressed in the context of discussions about whether and how to offer paid maternity leave.

2. *Costs of a Dedicated Track Model*

Some might argue that abandoning the unified model of teaching and scholarship imposes costs on law students in terms of faculty who are less up to date in their fields. They might argue that women faculty received positive reinforcement from students and would lose that support if they opt for a scholarship track. In addition, the financial cost of a dedicated track is significant. Tuition dollars subsidize research and writing. To disaggregate teaching and scholarship would arguably require new ways of financing legal scholarship which, in turn, may answer some of the criticism currently being leveled at legal education.

There is also a cost to the institution in terms of not being able to evaluate teaching effectiveness pre-tenure. However, in reality tenure committees give little weight to teaching and service and the quality and quantity of a tenure candidate's scholarship is the dominant factor in tenure decisions at American law schools. Candidates are rarely denied tenure because they are not competent in the classroom and are much more likely to be denied tenure if they fail to produce sufficient scholarship.

I would argue that each of these costs identified above is offset by the value of creating a level playing field for women scholars to get a foothold

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117. *See, e.g.*, Minna J. Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the "Top Ten" Law Reviews*, 31 WOMEN'S RTS. L. REP. 385, 386 (2010) (concluding that there is "significant gender disparity in publication [in the fifteen 'top ten' law reviews] with some variation as to degree").

118. *See generally* LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (2003).

in their field and develop an expertise. The uphill battle for women to be perceived as scholars, given the roots of the university itself, is significant.

Women provide a disproportionate service to society in terms of caregiving. Both women who have children and women who do not have children provide care to children and elderly relatives in higher numbers than men who are similarly situated.[119] Such caregiving must be valued by every institution in civil society. To do so in American law schools would teach students that caregiving is an important social value. And men who could demonstrate primary caregiving of children or elderly relatives might be incentivized to do so in order to be eligible for a dedicated scholarship track. If affirmative action is justified in hiring as a method of remedying past discrimination, then it should be justified in creating a separate track for primary caregivers, who will admittedly be predominantly women. Such a track provides them the time to develop as scholars which is essential in solving the seniority gap since scholarship is the primary criteria for moving up the ranks to tenured, full professor positions.

Finally, a dedicated model would not automatically relieve a faculty member of the service required by norms of faculty governance. Women pick up a disproportionate share of the "housework" portion of such governance work, as demonstrated above. But presumably a dean could allow faculty on a dedicated scholarship track to opt out of committee work as a means of reducing the disproportionate burden.

B. The Research Institute Model

In the early years of the Humboldtian model, individual faculty had their own research institutes.[120] These institutes were later abandoned due to institutional constraints, politics, and the need for large university wide subsidies, but they did exist at the beginning of the Humboldtian movement: "Each full professor at the University of Berlin directed an 'institute' or 'seminar' (curricular specialization) built around himself and including a pyramid of junior professors, lecturers, and students. Full professors also negotiated directly with the appropriate government ministries, not the university, for the funding of their institutes."[121]

The separate research institute may be an alternative to the dedicated track model that provides women time and space to become experienced scholars within the American university. The creation of legal research institutes within universities, where women scholars could opt to work on research questions and publish as a career track, would provide a place for women to be free of the increased burdens women face as a result of faculty

119. *See supra* Section III.B.
120. *See supra* text accompanying notes 44-56.
121. Scott, *supra* note 23, at 20-21.

governance and teaching work. These institutes could be supported by private donor dollars or by state support in public universities. Or one could argue that if the research is valuable, the free market will support it. These solutions would answer the criticism of the current model where student tuition dollars financed by debt provide non-transparent cross-subsidies of faculty scholarship.

These research institutes would provide "incubators" where women could establish themselves as scholars without the disparate impact that the teaching and governance imposes on women. Women could establish themselves as scholars during their prime childbearing years. The latter is an important social function that should be accommodated by the university. Given the valorization of pure research over teaching for purposes of tenure, chairs, leaves, etc., and prestige as measured by the law school rankings in *U.S. News and World Report*, such a model would allow women to opt to be pure researchers and avoid the disparate cost of teaching and governance imposed on women faculty. Unlike the dedicated track model, the research institute model would have the benefit of minimizing the burdens of both functions on women faculty.

As noted above, one might also argue that interdisciplinary legal research that tends to be more theoretical should be housed in the political science, philosophy, or economics departments of the universities that house law schools. Faculty in these departments tend to earn significantly less than law professors. If law students would like a career in legal scholarship, they would have to opt for obtaining both a J.D. and a Ph.D.—the research degree—and would join the faculties in these other departments. This model of producing legal scholarship is arguably less expensive when viewed from a meta-university level perspective since the faculty salaries are significantly lower. If one were to establish legal research institutes, faculty from both the law school and these other departments would have a space to collaborate. The research would also not be subsidized by debt-funded law student tuition dollars; rather, graduate students in those departments would be paid by the university while obtaining their Ph.D. The subsidy could come from research grants from governmental institutions like the National Science Foundation or the National Institutes of Health. Resituating interdisciplinary legal scholarship in such legal research institutes that draw on other departments of the university would allow such "law and" scholarship to flourish. It provides a place for scholarly production, with insights from both law and the other disciplines, while moving the funding mechanism for such scholarship away from debt-financed law student tuition dollars, a criticism of the status quo, which has been a significant part of the discourse about the current crisis in legal education. For example, some would argue that economists are not equipped by themselves to produce accurate law and economics scholarship because they are not schooled in the legal system. By resituating this kind of hybrid scholarship in legal research institutes that

include legal scholars and scholars from other departments, the quality of such research could be improved. Faculty who opted to work within such institutes could acquire both a J.D. and a Ph.D. They would thus be equipped with an actual research degree, be well-versed in statistical methods and be better able to do sound empirical research. This move would acknowledge the reality that the J.D. is a professional degree that is not meant to train students to be scholars but rather to be practicing lawyers and judges.[122]

This decoupling of abstract research from law teaching would arguably put the "professional" back in professional school and would alleviate some of the distortions that have been the subject of much external media scrutiny of legal education in the current crisis. This, in turn, would benefit students who have to go into significant debt to obtain a professional—not a graduate—degree so they can actually practice law.

C. The Argument for Moving Away from the Status Quo to Either Model

I would argue that moving away from the unified model of teaching and research in the American law school to either a dedicated track model or a separate research institute model would facilitate the development of a generation of women scholars. It would eliminate the unequal burden on time and energy that women experience by the reproducing of gender that McGinley identifies in her work.[123] It would minimize the costs to students of the unified model that the current crisis in legal education has emphasized, including the lack of time or incentives for innovative pedagogy.[124]

As Hochschild notes:

> The career woman pays a cost by entering a clockwork of careers that permits little time or emotional energy to raise a family. Her career permits so little of these because it was originally designed to suit a traditional man whose wife raised his children. In this arrangement between career and family, the family was the welfare agency for the university and women were its social workers. Now women are working in such institutions without benefit of the social worker.[125]

Some might decry the result of such structural change that would result in men doing more of the teaching and governance in American law

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122. Yale Law School will be offering a Ph.D. in Law as of Fall 2013. *See Yale Law School Introduces Innovative New Program—Ph.D. in Law*, YALE L. SCH. (July 11, 2012), http://www.law.yale.edu/news/15782.htm. This announcement has been much derided in the legal academy. *See, e.g.*, Leiter, *supra* note 65.

123. *See generally* McGinley, *supra* note 9.

124. Some would argue it is not engaging in both teaching and scholarship at the same time that is problematic in the current crisis. It is the nature of the scholarship that is rewarded—abstract theoretical or interdisciplinary over doctrinal scholarship in the form of treatises or case notes that might be more helpful to practitioners.

125. HOCHSCHILD & MACHUNG, *supra* note 90, at xii.

schools. I would argue that this potential cost to men is worthwhile in terms of social investment in the scholarship of women. Under either a dedicated track or research institute model that gave a preference to primary caregivers, the university would absorb the cost of caregiving rather than allocating the cost to the individual. In a public law school, in particular, this would signal to law students that the state values caregiving. If men become primary caregivers of children or elderly relatives, then they too could be given preference for the dedicated scholarship track. Currently, women who are primary caregivers are challenged by a lack of time to produce the same quantity and quality of scholarship that their male counterparts produce. Women raise new citizens as well as perform paid work. Either of these new models would acknowledge that carework and compensate primary caregivers for it with time.

There are federal government programs, like the National Science Foundation's ADVANCE program,[126] that fund research to support women scholars in the STEM fields. This program could be adapted to fund an experiment in the disaggregation of the unified model at a small group of American law schools. ADVANCE has highly developed metrics to measure whether efforts funded by the NSF grants are effective.[127] These metrics could be adapted to legal academia as a way to measure the effectiveness of such new models. They could be used to evaluate whether such models facilitate faster progress for women into tenured, full professorships.

American law schools could also explore part-time tenured positions. However, this approach would not resolve the disproportionate costs imposed on women by the teaching and governance functions, although it does have the benefit of being more politically likely to come to fruition. While we must pursue individual remedies, we also have to be bold in pursuing more collective, structural remedies as well. Universities and the law schools within them, especially public ones, must acknowledge that women as a group are far more likely to be primary caregivers. They must redefine the job description of tenure-track and tenured law professor to reflect that reality. The institution rather than the individual should bear a larger share of the cost of the benefit that women's caregiving provides to society as a whole.

The playing field for women scholars is not level, and while the job description that attaches to tenure track positions at American law schools appears neutral on its face, it in fact has a disproportionate impact on women. Facially neutral university norms about the unified model of teaching

126. *ADVANCE: Increasing the Participation and Advancement of Women in Academic Science and Engineering Careers (ADVANCE)*, NAT'L SCI. FOUND., http://www.nsf.gov/funding/pgm_summ.jsp?pims_id=5383 (last visited Feb. 20, 2013).

127. *Advance at a Glance*, NAT'L SCI. FOUND., http://www.nsf.gov/crssprgm/advance/index.jsp (last visited Feb. 20, 2013).

and scholarship have a disparate impact. We have used affirmative action in the past in hiring to remedy this imbalance and that has not proven sufficient to yield equal numbers of men and women in tenured full professorships. My proposals go beyond hiring and provide an institutional subsidy in recognition of the time women currently spend in caregiving at home and for students and the law school itself. These proposals may be in tension with principles of neutrality and fairness of opportunity rather than outcomes, but the neutrality principle in this regard is flawed when it comes to the structure of law schools and universities. This is particularly true when the production of scholarship has become the only important criteria for tenured positions. I have seen more than one situation where a male and a female candidate come up for tenure and the woman has far fewer articles than the male candidate. And the only reason for the disparity is that the female candidate has the primary responsibility at home for children while the male candidate has a spouse at home who does the primary caregiving of his children. However, the disparity is often construed as the female candidate being less qualified or less committed to the scholarly enterprise.

The structures of the American university itself are gendered at their very core. And, while they appear neutral, they have a disparate impact on women. Thus, the fundamental structures must be altered long enough to develop critical mass of female scholars. Such changes might be analogized to the legislative quotas imposed by a number of other countries in order to achieve gender parity. Indeed, some countries like Denmark decided that they could repeal such measures when the numbers of men and women in elective office became more balanced.[128] Similarly, the structural changes I propose may only be necessary until society as a whole reallocates both private and institutional caregiving and housekeeping more fairly.

CONCLUSION

Universities reproduce cultural norms in societies and women are marginalized in these institutions as much as they are in other institutions of civil society. Individual solutions like paid maternity leave, and more attention to who does the institutional housework are not going to be sufficient to

128. *See* POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRES, EUROPEAN PARLIAMENT, ELECTORAL GENDER QUOTA SYSTEMS AND THEIR IMPLEMENTATION IN EUROPE 20 n.10 (2011), *available at* http://www.europarl.europa.eu/committees/fr/ studiesdownload.html?languageDocument=EN&file=60648 (noting that Denmark abolished its party quotas "because they were no longer considered necessary . . . [h]owever, in the last ten years the previous steady increase in women's representation in Denmark has stagnated at the national, regional and local levels"); *see also* ROHINI PANDE & DEANNA FORD, WORLD DEVELOPMENT REPORT 2012: GENDER QUOTAS AND FEMALE LEADERSHIP (2012), *available at* http://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1322671773271/Pande-Gender-Quotas-April-2011.pdf.

disrupt the reproduction of gender in universities and their law schools. As long as scholarship is the coin of the realm and women work two full-time jobs at home and at work, they will continue to earn less both in terms of monetary compensation and respect as scholars, "'even when they hold the same rank as men.'"[129]

Ann McGinley and others have correctly identified the norms that caused the power imbalance in American legal education, including implicit bias, lack of institutional help with work/family conflicts, and masculine norms that cause the reproduction of gender.[130] It will take vision and courage for American law schools to restructure in fundamental ways that acknowledge that imbalance and that offer institutional support for women who are primary caretakers of children or elderly relatives.[131]

Our chances of achieving such change have never been better. With the advent of the employment crisis and the external drumbeat of the national media, we have momentum, and the spotlight has been directed on our corner of the academic world. This widespread, national criticism about the structure of law schools should help us increase the pace of change. Long-held beliefs about how law schools should be structured are coming under increasing pressure. We should use the crisis as a springboard for fundamental change that promises full equality for future generations of women in academia. As Bill Henderson has said, "For over a century, law schools have suffered from an inferiority complex. We have masked it well, but its consequences are finally coming home to roost. Like most psychological conditions, our lives will be much better and healthier when we deal with its root cause."[132] The same could be said for dealing with the root causes of the slow progress in women faculty ascending to tenured, full professorships in the legal academy.

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129. Monopoli, *supra* note 66, at 555 (quoting MARTHA S. WEST & JOHN W. CURTIS, AM. ASS'N OF UNIV. PROFESSORS, AAUP FACULTY GENDER EQUITY INDICATORS 2006, at 12 (2006), *available at* http://www.aaup.org/NR/rdonlyres/63396944-44BE-4ABA-9815-5792D93856F1/0/AAUPGenderEquityIndicators2006.pdf).

130. *See* McGinley, *supra* note 9, at 101-02 & nn.2-3 (citing Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997); Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293 (2004)).

131. *See id.*

132. Henderson, *supra* note 21, at 4.