INTRODUCTION

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This issue of the UMKC Law Review consists of ten essays on various aspects of hierarchy in legal education. Five of the articles deal with different aspects of the status of legal writing faculty in the legal academy. Taken as a group, they present in satisfying detail, with overwhelming data, a picture of one of the illegitimate hierarchies that organize law schools. That picture contains numerous allusions outward to other law school hierarchies. The other articles in the Symposium take these up, so that the issue presents a sketchy but very valuable larger picture of legal education as a network of hierarchies.

In *Dismantling Hierarchies—Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal*, Jo Anne Durako lays out the many ways in which legal writing faculty receive unequal treatment, covering office space, titles, job security, salaries and academic perks, teaching autonomy, and participation in faculty governance.[1] In *The Hierarchy of Law School Faculty Meetings: Who Votes?*, Susan Liemer presents comprehensive data on voting rights among faculty, including clinicians and librarians in the analysis.[2] Julie Cheslik, in *The Battle over Citation Form Brings Notice to LRW Faculty: Will Power Follow?*, describes the emergence of a "will to power" among LRW teachers as they attempt to replace the (elite) student-authored Bluebook with the ALWD Citation Manual, provoking "casebook" faculty reactions at several schools.[3] Eric Shimamoto, in *To Take Arms Against a* See *of Trouble: Legal Citation and the Reassertion of Hierarchy*, retells this story from the point of view of a (non-elite) student law review editor, urging an alliance between students and LRW teachers.[4] Finally, in *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, Kathryn Stanchi theorizes the relationship between casebook and LRW faculty as a status hierarchy that combines, in a way that is typical throughout the social order, a false meritocratic claim, a self-perpetuating system of rules of unequal treatment, and segregation by sex.[5]

These articles are very different in methodology, in normative orientation (a subject to which I return later in this Introduction) and in tone. They are, however, in more or less complete agreement about the nature of the unequal

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* Professor of Law, Harvard Law School. Kennedy's 1983 pamphlet, *Legal Education and the Reproduction of Hierarchy*, has recently been republished in its entirety in a *Critical Edition*, by the New York University Press, with a new Introduction and Afterword by the author, and commentaries by Paul Carrington, Peter Gabel, Angela Harris and Donna Maeda, and Janet Halley.

[1] Jo Anne Durako, Dismantling Hierarchies—Occupational Segregation of Legal Writing Faculty in Law Schools: Separate and Unequal, 73 UMKC L. REV. 253 (2004).

[2] Susan P. Liemer, *The Hierarchy of Law School Faculty Meetings: Who Votes?*, 73 UMKC L. REV. 351 (2004).

[3] Julie Cheslik, *The Battle over Citation Form Brings Notice to LRW Faculty: Will Power Follow?*, 73 UMKC L. REV. 237 (2004).

[4] Eric Shimamoto, *To Take Arms Against a* See *of Trouble: Legal Citation and the Reassertion of Hierarchy*, 73 UMKC L. REV. 443 (2004).

[5] Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 469 (2004).

treatment meted out to LRW faculty, and in combination they are devastating to the egalitarian self-image of the long-tenured professors who typically dominate the faculty lounge. It is, nonetheless, a felicitous decision to combine these pieces with the remaining articles in the issue, since otherwise one might get the impression that the treatment of LRW faculty was an isolated flaw in an otherwise unproblematic system. These articles present other dimensions of law school hierarchy. They do not provide as full an analysis of any of them as the issue presents of the LRW situation. But they are suggestive, and they put the LRW situation in context as well as gaining themselves from what we've learned in the core set of pieces.

There is some dispute, as is often case, as to who can claim to be at the bottom of the law school prestige hierarchy. Eric Shimamoto (a student) thinks LRW faculty are viewed as above students, but Jo Anne Durako (faculty) thinks they are viewed as below students. Neither mentions academic support faculty, who, as described by Ellen Suni, in *Academic Support at the Crossroads: From Minority Retention to Bar Prep and Beyond*, began with the mission of assisting the wave of minority admits of the 1980s, broadened their clientele to include all students "at the bottom," and then moved on to bar prep.[6] Liemer gathers voting data on clinicians and librarians, treating them as part of the same general category as LRW faculty, but neither academic support nor senior administrators are included, probably simply because they don't vote anywhere.

The reference to academic support is important not just because it identifies yet another category of differentially treated faculty, but also because it draws attention to the brutal internal hierarchies of the student body. Law students are ranked according to the school they attend and also according to their class rank, even when the school has no formal ranking system.[7] Law school resources and law school teaching practices are skewed overwhelmingly to the students at the top and in the middle, at the expense of those at the bottom, even in this age of anxiety about bar passage rates.[8]

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[6] Ellen Yankiver Suni, *Academic Support at the Crossroads: From Minority Retention to Bar Prep and Beyond—Will Academic Support Change Legal Education or Itself Be Fundamentally Changed?* 73 UMKC L. REV. 499 (2004).

[7] *See, e.g.*, Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Rankings of ABA Law Schools*, available at http://www.aals.org/validity.html (last visited Nov. 8, 2004); Abiel Wong, Note, *"Boalt-ing" Opportunity?: Deconstructing Elite Norms in Law School Admissions*, 6 GEO. J. ON POVERTY L. & POL'Y 199 (1999). *See also* Autumn Mesa, Student Essay, 9 CARDOZO WOMEN'S L.J. 379, 390 (2003) ("A simple number demonstrates one's success and perceived value in law school.").

[8] William Prewitt Kralovec, *Contemporary Legal Education: A Critique and Proposal for Reform*, 32 WILLAMETTE L. REV. 577, 579 (1996) ("For most students, law school continually conveys the message that they are "failures" because they are not located in the "top ten percent" of their class and have not otherwise managed to achieve a high institutional status.").

Brigette Willauer, in *The Law School Honor Code and Collaborative Learning: Can We Have One with the Other?*, shows convincingly that deep conflict endures over law school pedagogy.[9] The kinds of collaborative learning that undermine hierarchy are partially blocked by honor codes that reflect at least a residual commitment to the individualistic meritocratic model of what law school is about. Collaborative learning is part of the same package that includes the hands on, feedback-intensive, supportive pedagogy that has characterized both LRW practice and academic support practice.[10] The various hierarchies keep conveniently out of sight the challenge to the mainstream that these methodologies represent.

But what of the "doctrinal" faculty itself? According to Stephen Griffin, in *The Last Hierarchy: Confronting the Tenure Process as Vice Dean*, assistant professors typically have to deal with the "buyer's remorse" of their senior colleagues, preoccupied with whether they will "measure up."[11] The concerns about academic freedom of LRW faculty should surface here as well. Five years of "being good" on probation, subject to the notorious arbitrariness of the promotion process, chills all kinds of divergent thinking, too often forever (the face becomes the mask).

Something like half of these untenured professors, according to Richard Neumann's *Women in Legal Education: A Statistical Update*, are women, but it is likely to be many years before until they reach 40 percent of full professors, from their current 25 percent level.[12] This means that the simple picture of gender segregation between "doctrinal" and LRW faculty is misleading. It is a matter of quite large disproportions (women are about two thirds of the non-tenure track cohort). Furthermore, the numerical disproportions between "doctrinal" and LRW faculty don't tell the whole story of gender hierarchy. Within the "doctrinal" category, women are typically junior, so the doctrinal faculty as a whole has a gender skew that mirrors the gender skew between doctrinal and LRW faculty.

Marjorie Kornhauser's *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, shows empirically that law school courses have a complex, shifting gender coding, and that male and female teachers choose (or are tracked into) courses so that the teachers fit the codings.[13] The "male" courses are more prestigious as well as more "male," and it stands to reason that the same will be true of those who teach them. The

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[9] Brigette LuAnn Willauer, *The Law School Honor Code and Collaborative Learning: Can We Have One Without the Other?*, 73 UMKC L. REV. 515 (2004).

[10] *See generally* KENNETH A. BRUFFEE, COLLABORATIVE LEARNING: HIGHER EDUCATION, INTERDEPENDENCE, AND THE AUTHORITY OF KNOWLEDGE (1999).

[11] Stephen M. Griffin, *The Last Hierarchy: Confronting the Tenure Process as Vice Dean*, 73 UMKC L. REV. 289 (2004).

[12] Richard K. Neumann, Jr., *Women in Legal Education: A Statistical Update*, 73 UMKC L. REV. 419 (2004).

[13] Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 UMKC L. REV. 293 (2004).

trend for men to teach "male" courses and women "female" courses is accelerating rather than dying out as more professors are women. Again, the internal hierarchical organization of the doctrinal faculty mirrors the hierarchical organization of doctrinal vis-a-vis non-doctrinal faculty.

To summarize, my partial and doubtless biased reading of the Symposium is that the legal academy presents a complex network of interlocking, multi-dimensional hierarchies. The Symposium presents an admirably detailed analysis of that involving LRW faculty, but contains as well plenty of material for the fleshing out of the larger picture.

Hierarchy is one thing, "illegitimate" hierarchy quite another. With regard to the question of what is wrong with these particular hierarchies and what to do about them, the striking coherence of the various analyses breaks down. There is nothing wrong with that. In the legal academy, there are diverse normative orientations, in the sense of diverse ideas about what the standard of legitimacy should be, and these stances are well represented here. Moreover, while it is clear what it means to equalize salaries and perks, or job security, or voting rights, it is by no means clear what it would mean to abolish the gender hierarchies that would survive formal equality, or the academic hierarchy between different kinds of faculty that would also survive formal equality.

My own view is that framing the issue as one of illegitimate status hierarchy, in the manner of Kathryn Stanchi, produces an argument that is more convincing, and more disturbing, than the frame of discrimination or segregation. The virtue of the segregation framing is that it leads directly to concrete and obviously perfectly doable reforms, such as equalizing titles, offices, salaries, perks, and voting rights. The down side is that supporters of the existing system do not see what they are doing as discrimination based on immutable characteristics or suspect categories, such as race or gender, but rather as organizing the division of labor, and rewards within it, according to a rational, non-discriminatory plan.[14]

When we see the system as a status hierarchy, we are in a position to attack the supposedly meritocratic selection procedures and supposedly functional compulsory job specialization in the system. We are also pushed to go beyond the argument that those excluded from the rewards of high status should be included "as if" they were doctrinal faculty (or as Catharine MacKinnon might put it, "according to the doctrinal model"). The problem is deeper than discrimination because it has to do with the initial set up of job categories—that is, with the existence of "doctrinal" and LRW faculty as distinct job categories within the academy.

The categories are self-perpetuating: working in one of the categories disables you from working in the other, and, just as important, most likely makes you prefer working in your category. How many LRW teachers would choose, if

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[14] The segregation and subordination models may not be completely discrete. *See* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*?, 58 U. MIAMI L. REV. 9, 10 (2003) (arguing that "antisubordination values have shaped the historical development of anticlassification understandings").

offered the chance, to go onto the assistant professor "doctrinal" track, assuming that it was constituted exactly as it is today (great pay, the vote, and five years to tenure under the faculty's existing promotion standard)? Many, probably, but, likely nothing close to all. And with equal pay, etc., how many doctrinal faculty would switch into LRW? Probably not many.

The problem is closely analogous to that of the segregation of faculty into male and female courses. It isn't solved for doctrinal faculty by the practice of granting faculty a lot of choice as to what they teach. How would the female doctrinal faculty react to a proposal to reallocate responsibility for courses so as to eliminate "gender disparity" in courses taught? I doubt the family law faculty would unanimously cheer their reallocation to securities regulation.

That said, formal equality for LRW faculty would be a gigantic step forward. And it might create the conditions for faculty collectives to work at the deep problem of how to abolish the illegitimate status hierarchies built into the division of labor, with all their credentialist bootstrapping (Stanchi's phrase).[15] The edge, the undertone of pissed off impatience with the silly self-justifications of doctrinal faculty, that runs all through the Symposium is to my mind what is most exciting about it. If it survived some serious reformist successes, it might push us, the exploiting classes, a little closer to the moment of recognition that precedes commitment to real change.